

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

**THE HON'BLE JUSTICE SOUMEN SEN
&
THE HON'BLE JUSTICE RABINDRANATH SAMANTA**

**CRA 524 of 2008
*Gurai Bhakta***

-vs.-

The State of West Bengal

For the Appellant	:	Mr. Moinak Bakshi, Adv.
For the State of West Bengal	:	Mr. N.P. Agarwal, Adv., Mr. Subhashree Patel, Adv.
Hearing Concluded on	:	27 th September, 2021
Judgment on	:	30 th September, 2021

Soumen Sen, J. This is an appeal against an order of conviction for the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as 'I.P.C.') passed by the learned Additional Sessions Judge, Fast Track, 3rd Court, Pachim Midnapur on 26.06.2008 in connection with S.T. Case no. XXXV/May/2007 arising out of Narayangarh P. S. Case no. 3/2007 and G.R. Case No. 67/2007.

1. The appellant-accused has been sentenced under S. 302 of I.P.C. to rigorous imprisonment for life and to pay a Rs fine. 5000/- in default to suffer rigorous imprisonment for one year and another term of 3 years of rigorous imprisonment and a fine of Rs. 1000 in default to rigorous

imprisonment for five months for the offence under S. 498A of I.P.C. It had been instructed that both the sentences shall run concurrently.

2. Pithily summarized the facts of the case are as under;

3. Gurai Bhakta was married to Ahalya Bhakta, the victim. Their marriage took place twenty-five years ago from the date of alleged incident of murder.

4. On the fateful day of Makar Sankranti dated 15th January, 2007 it is alleged that the appellant/accused had a quarrel with the victim in the morning. He left the house at around 10 a.m. and returned at around 12 a.m. and again a quarrel broke out between the husband and the wife which aggravated into an assault on the victim resulting in the death of the victim.

5. The case was initiated on the basis of F.I.R. of Sanatan Mallick PW-02, who happens to be the brother-in-law of the present appellant. The F.I.R., amongst others, had stated that the appellant had assaulted the victim with fist and blows at the courtyard of the house and prevented her from fleeing by catching hold of her hair. This resulted in her death. Upon hearing the hue and cry, the locals came to the area of incident and apprehended the appellant/accused.

6. On the basis of the aforesaid complaint Narayangarh Police Station lodged a case no. 3/2007 dated 15.01.2007 against the appellant-accused, Gurai Bhakta under section 498A/302 I.P.C.

7. Chargesheet was filed u/s. 498A/302 IPC against the appellant-accused person before the Court of Learned Chief Judicial Magistrate of Paschim Medinipur. The case got transferred to the Court of Learned

Sessions Judge and thereafter on 21.07.2007 the same got transferred to Additional Fast Track Court, the trial court. The appellant-accused pleaded not guilty.

8. The defense case and cross-examination of the appellant-accused u/s. 313 CrPC presented a complete denial of prosecution case, and according to the defence on the date of the 'Makar Sankranti' festival, his wife took heavy liquor, and as a result, she fell down on the earth and sustained injury, and ultimately died. This was substantiated with the argument that the accused and the appellant belonged to the backward community.

9. The points for determination for the Learned Trial Judge were as under

- a. Had the appellant-accused inflicted cruelty upon the victim – Ahilya Bhakta both physically and mentally?
- b. Had the appellant-accused murdered Ahilya Bhakta intentionally and knowingly?
- c. Has the Prosecution brought home the charge of offence u/s. 498A/302 IPC?
- d. Is the appellant-accused person guilty of offence u/s. 498A/302 IPC as alleged against him?

10. The Prosecution, in order to establish the charge, had examined 16 witnesses. The primary witnesses were their two daughters-in-law who had witnessed the alleged assault and the doctor, namely, Sushila Bhakta and Minati Bhakta, Sushila, and Dr. Arabinda Karak. PW-3, in her evidence,

had stated that her father-in-law- Gurai used to inflict torture upon her mother-in-law- Ahalya Bhakta, and used to assault her and used to snatch away the income of her mother-in-law. It is also her evidence that on the date of 'Makar Sankranti' in the early morning, her father-in-law initiated a quarrel with the deceased and left their house and at about 12-00/1-00 p.m he again came back to their house and started to assault her mother-in-law, and while they tried to save her mother-in-law, they were also assaulted by the appellant-accused, Gurai Bhakta. Thereafter, the appellant-accused committed murder to her mother-in-law.

11. Minati Bhakta, PW-4 corroborated the evidence of Sushila Bhakta and further stated the appellant-accused committed murder to her mother-in-law and throttling her at pukur par (edge of the pond). Minati Bhakta further deposed that her father-in-law murdered her mother-in-law, and she had seen this incident personally. According to her, on the date of Makar Sankranti, her father-in-law picked up a quarrel with her mother-in-law and left their house, and at about 10.00/11.00 am, he again came to their house and started to assault her mother-in-law. Thereafter, the appellant-accused murdered her mother-in-law by throttling her at pukur par (edge of the pond).

12. Kalipada Das P.W.-7 a neighbour of the appellant in his deposition, stated that on 15th January 2007 on the date of Pous Sankranti at 12 noon on hearing a hue and cry in the house of Gurai, he went to the house of Gurai and found Gurai's wife was lying dead. Consequently, the two daughters-in-law of appellant-accused Gurai reported to him that their

father-in-law, Gurai, had murdered his wife by assaulting her with fists and slaps. On that day of the incident, he also found Gurai was almost in drunken condition.

13. The son of the deceased, namely, Khagen (P.W-11), in his deposition had stated that after returning from work he found the dead body of his mother lying on the pukur par (edge of the pond) and it was also evidence that his father quarreled with his mother regularly.

14. Meghnath Ojha, P.W.-08, and the co-villager of the accused in this evidence had stated that the appellant-accused Gurai Bhakta used to inflict torture upon Ahalya after consuming liquor.

15. Mr. A. Nanda, P.W.-15 is the I.O. of this case. It is his evidence that on 15.01.2007, he was posted at Narayangarh P.S. as S.I. of police, and S. Das was the O.C. of Narayangarh P.S. It was he who, after receiving a written complaint from one Sanatan Mallick, endorsed the case to him for investigation. It is also his evidence that he visited the P.O. and conducted an inquest of the dead body of Ahalya in the presence of witnesses and prepared an inquest report, and sent the dead body of the victim through witness Dibakar Jana. He prepared the seizure list of the wearing apparels of the deceased, and he sent two witnesses Minati Bhakta and Sushila Bhakta for recording their statements u/s. 164 Cr.P.C.. Thereafter he arrested the appellant-accused, and he prepared a rough sketch map of the P.O. with index, he examined the available witnesses and recorded their statements u/s. 161 Cr.P.C., he collected the post mortem examination

report of the deceased Ahalya, and after completion of investigation, he submitted a charge-sheet against the appellant-accused person.

16. Dr. Arabinda Karak, P.W.1, was the doctor who held the post mortem examination of the dead body of the deceased. PW-1 stated in his evidence that on examination of post mortem of the victim, he had found bleeding under the surface of the scalp, her abdomen was full of blood, her liver was ruptured, there were abrasion marks over the right and left side of the neck two inches by one and a half inch in size (2"×1/2"). Both her kidneys were injured, the same upper three ribs of her right side were broken, and her lungs were also ruptured on the right side. It was also deduced that the right ventricle of her heart was ruptured. It was PW-1's opinion that the death was due to shock and hemorrhage in the injuries due to antemortem and blunt trauma. He also, in his evidence had stated that this type of injury might have been expected if the deceased was hit with a hard substance, and the abrasion reflected in the neck of the deceased may be expected due to pulling her neck with gamccha (cotton towel) or any other cloth substance. PW-1's evidence supported his post-mortem report, which was marked as Exhibit-1.

17. The statement of Minati and Sushila was recorded by the learned Judicial Magistrate, 6th Court, Midnapur under Section 164 of the Criminal Procedure Code, and recording of such evidence on 12th February 2007 was proved by the learned Judicial Magistrate, P.W.16 in this case.

18. The evidence of P.W.-7 was corroborated by P.W.-9, who also happened to be a co-villager of the appellant-accused. In his evidence, he

had stated that when he rushed to the spot after hearing hue and cry originating from the appellant's house, the daughters-in-law of Gurai reported to him that Gurai had murdered his wife Ahalya in a drunken condition.

19. Almost all the witnesses who had deposed in support of the prosecution case had stated that Gurai was a habitual drunkard and used to pick up quarrels with Ahalya and tried to snatch money from her to buy alcohol or misuse funds.

20. In his evidence, the witness – Meghnath Ojha P.W.– 8, another co-villager of the accused, had stated this case.

21. Before the learned trial Judge, the Prosecution contended that it is a case of cruelty and murder committed by a husband on his wife, and the intention has also been proved from the evidence of the prosecution witnesses, and the appellant-accused can be convicted as it is a full proof case.

22. The appellant-accused has been charged u/s. 498A/302 I.P.C. Admittedly, marriage took place between the appellant-accused Gurai Bhakta and Ahalya Bhakta, and they live together as husband and wife. It was the prosecution case that the appellant-accused used to inflict torture upon Ahalya Bhakta both physically and mentally after marriage. The learned Trial Judge's observation was that the Prosecution proved that the appellant-accused made cruelty upon the victim, Ahalya Bhakta, supported by P.W.– 3, Sushila Bhakta's and P.W.– 4, Minati Bhakta's evidence. They were both the daughters-in-law of the appellant-accused Gurai Bhakta and

the victim Ahalya Bhakta. It was the specific evidence of Sushila Bhakta that her father-in-law, who was the appellant-accused person, in this case, used to exercise torture upon her mother-in-law (victim) while her mother-in-law asked him not to take liquor. It was also her evidence that her mother-in-law used to assault her and snatched away the income of her mother-in-law.

23. From the evidence of P.W.-2 and P.W.-3, it was well established that the appellant-accused used to inflict torture upon the victim, Ahalya Bhakta, and used to snatch her money and consume liquor despite her objection. He did not do any work and used to live on the earnings of his wife. He was a habitual drunkard. Thus, the learned Trial Judge was satisfied to find and hold that Prosecution had proved beyond doubt that the appellant-accused had inflicted cruelty upon the victim, Ahalya. So, the appellant-accused was held guilty of offence u/s. 498/I.P.C..

24. Another charge against the appellant-accused is under Section 302 of the Indian Penal Code.

25. The Trial Judge further observed that in the instant case, the Prosecution was under obligation to show with evidence that the appellant-accused intentionally caused the death of the victim or intending to cause such bodily injury as the appellant-accused knew that the said act likely to cause the death of the victim to whom the harm was caused, or with the intention of causing bodily injury to the victim which is sufficient in the ordinary course of nature to cause death. In order to prove the charge

leveled against the appellant-accused the Prosecution has examined as many as sixteen witnesses.

26. The statement of the P.W.-3 Sushila Bhakta and P.W.-4, Minati Bhakta had been duly recorded by the Judicial Magistrate u/s.164 Cr.P.C. and the said statements were marked Ext.6, 6/1. The Learned Trial Judge had perused both the statements of the P.W.-3, and 4 (Ext. 6, 6/1) wherefrom it also appeared that in their earlier statements, it was specifically stated before the Magistrate that the appellant-accused throttled the neck of their mother-in-law. It thus appears from Ext. 6 and 6/1 that both the P.W.-3 and 4 corroborated their earlier statements recorded before the Judicial Magistrate.

27. The Learned Trial Judge found nothing to disbelieve the substantive evidence of P.W.-3 and PW-4 duly corroborated by their earlier statements made before Ld. Judicial Magistrate and found that their evidence inspired the confidence of the Court.

28. Mr. Bakshi, the Learned Counsel for the appellant, submitted that the intention of the appellant-accused to commit murder has not been proved. The incident took place during quarrel between the appellant, and the accused deceased was intoxicated the case can at best be prosecuted u/s. 304, Part – II of the Indian Penal Code.

29. The Ld. Counsel has also submitted that the accused has allegedly murdered his wife following an altercation, and admittedly, he was heavily drunk. Furtherance to the same, he submitted that the eyewitnesses, PW3 and PW4, the daughters-in-law, had witnessed the

assault by kicking and throttling, hence, according to him, the evidence is admissible only to the extent of assault and not of murder.

30. He also has submitted that the autopsy surgeon, PW-01, did not categorize the death as a homicide and did not give evidence of throttling but noted the injuries were all internal. It is also submitted that PW7, an independent witness, had corroborated that the accused was still in an inebriated state post the accident.

31. The learned Counsel attributes the appellant-accused's mental state to be under the influence of alcohol, which could be equivalent to a degree of madness and ought to absolve him of criminal liability. He prays for leniency to be shown to the appellant/accused and setting him free.

32. The Learned Counsel has relied upon the following authorities to support his arguments in aid of the submissions above. They are:

a. **Nanakaunoo v. State of Uttar Pradesh** reported in **2016 (3) SCC 317**.

b. **K. Ravi Kumar v. State of Karnataka**, reported in **2015 (2) SCC 638**.

c. **Subhash Gangadhar Jadhav v. State of Maharashtra**, reported in **2019 (16) SCC 728**.

33. **State of Andhra Pradesh v. Rayavarapu Punnayya and anr.**, reported in **1976 (4) SCC 382**.

34. In addition to the authorities mentioned above to substantiate his submission, the learned Counsel has referred to a co-ordinate bench decision of this Court, **Sadhan Roy v. State of West Bengal**, reported in

CRA 421 of 2009 decided on 24th January 2017. In this case, a similar prayer was sought in light of the facts, that is, the act complained should fall within the fourth exception to Section 300 of the Penal Code, and he should have been given a lesser sentence under Section 304 Part II of the Code. The factual matrix of the case was that the son-in-law of the complainant had killed the complainant's daughter after an altercation. The Court in this matter noted the absence of premeditation and had also noted the absence of any attempt to take undue advantage. The Court had held that the trial court should have given the appellant the benefit under the fourth exception to Section 300 of the Penal Code and consequently ought to have awarded a lesser sentence under the second part of Section 304. Observing that the accused had served more than the required period covered by the maximum sentence ought to have been imposed on him and the order convicting the accused under Section 302 of the Code was modified and accused was regarded to have served out the maximum sentence and was entitled to be set at liberty at an immediate basis.

35. Per Contra, the learned Counsel for the State submitted before us that it transpired from the deposition of the PW1, the Medical Officer who conducted the autopsy that the death was due to shock and hemorrhage in the injuries due to ante mortem and blunt trauma. He further confirmed that such injuries are expected if the deceased was hit with a hard substance. The abrasion on the neck of the deceased may be due to pulling her neck with gamchha or other cloth. It was also submitted that from the depositions of the P.W.s 3 and 4, who are the daughters-in-law of the

appellant and eyewitnesses to the incident, the appellant assaulted, kicked, and throttled the deceased to death. The learned Counsel draws our attention at this juncture to the question of whether the intoxication of the appellant at the relevant point of time curbs the possibility of the appellant having the *men rea* to cause death to the deceased and if the conviction should shift from the offence punishable under section 302 of the Indian Penal Code, 1860 to section 304 (II) of the Indian Penal Code, 1860 and drew our attention to the decision by the Hon'ble Supreme Court in **Bhagwan Tukaram Dange vs. State of Maharashtra**, reported in **2014 (4) SCC 270**, wherein it was held that *"Intoxication, as such, is not a defence to a criminal charge. Intoxication is a mitigating circumstance if accused is not a habitual drunker, otherwise, it has to be considered as an aggravating circumstance."*

36. For the purpose of assessing the character of the offence, it is critical to determine whether the culpable murder was committed with intent or knowledge. It has come on record that PW-1, Dr. Arabinda Karak had held the post mortem of the deceased Ahalya Bhakta and had found the following on the body of the deceased;

- a. Bleeding under the surface of the scalp.
- b. Abdomen being full of blood.
- c. Liver being ruptured.
- d. Abrasion marks over right and left side of the neck.
- e. Both kidneys injured.
- f. Fractured upper three ribs of the rights side.
- g. Lungs ruptured on the side.
- h. Ruptured right ventricle of heart.

He concluded that the death was due to,

- a. Shock.

- b. Hemorrhage in the injuries due to antimortem.
- c. Deceased was hit with a hard substance.

37. Abrasion on the neck reflected her neck was pulled by a gamcha (cotton towel).

38. **The relevant provisions from I.P.C.** are reproduced as under:

Section 299 in The Indian Penal Code

299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented.

Explanation 3.—The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been

brought forth, though the child may not have breathed or been completely born.

Section 300 in The Indian Penal Code

300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

(Secondly) —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

(Thirdly) —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

(Fourthly) —If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular

individual. Exception 1.—When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:—

(First) —That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

(Secondly) —That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

(Thirdly) —That the provocation is not given by anything done in the lawful exercise of the right of private defence. Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills. Y, Z's child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, in as much as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as witness before Z, a Magistrate, Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose, Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is

murder, in as much as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration: Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent. Illustration A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

Section 304 in The Indian Penal Code

304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

39. From the evidence of prosecution witnesses, it is established that the appellant-accused used to quarrel with the deceased Ahalya regularly in a drunken state. He used to inflict cruelty on her regularly and snatch her earnings. The evidence of the victim's brother, PW-1, was corroborated with PW-3's evidence, who reiterated the same. The eyewitnesses PW3 and PW4 submitted that on the day of 'Makar Sankranti,' the accused initiated a fight with the victim early in the morning, left the house, and then returned at 12/1 pm and assaulted the victim again. The appellant-accused had also assaulted his daughters-in-law when they tried to save Ahalya.

40. Introspecting into the question of murder and culpable homicide, it had been found that manslaughter, as defined in the English Law, is when a person may be convicted of the offence, notwithstanding that he has the malice aforethought of murder, if he kills under provocation, suffering from diminished responsibility, or in pursuance of a suicide pact. (**Halsbury's Laws of England**, Volume 25, Fifth Edition).

41. S. 304 of I.P.C would apply only in a case where culpable homicide is not murder. If the act results in culpable homicide, which does not amount to murder, then and then alone, the question arises of applying Section 304 Part I or Part II as the case may be. In cases where the accused can establish he is entitled to the benefit of any of the Exceptions under Section 300, then his case may be considered under Part I and Part II of Section 304 of I.P.C. depending on whether the act which caused the culpable homicide was done with the intention of causing death or with the knowledge that it is likely to cause death. If the act amounting to culpable homicide satisfies any of the four criterias to bring it under the offence of murder, being mutually exclusive, there shall be no scope for applying Section 304 of I.P.C. If the act which caused the death and which is culpable homicide is done with the intention of causing death, then it would be murder. (See ***Paul v. State of Kerala*** reported in **(2020) 3 SCC 115**)

42. In case the Court comes to the conclusion that there was no intention of any kind mentioned above, but there was the knowledge that the act was likely to cause death, the offence will fall under Part II of Section 304 only if the Court finds that the offender did not know that the act was so imminently dangerous that it must, in all probability, cause death or such bodily injury as was likely to cause death and the offender had not committed the act without any excuse for incurring the risk of causing death or the bodily injury. If such bodily injury as is likely to cause death is intentionally caused and results in the victim's death, the case will fall under Part I, not Part II. In the case of ***Behari v State*** reported in **A.I.R.**

1953 All. 203, Sections 299, 300, and 304 were analyzed, and it was held that Section 304 will inter alia apply to the case when the act is caused with the knowledge that death is likely to ensue, but there was no intention to cause death or an injury likely to cause death.

43. In **Dayal v Union of India** reported in **A.I.R. 1963 H.P. 18**, the appellant had inflicted fist blows and kicks to the deceased. Such blows could not have been inflicted accidentally and must be held to have been inflicted intentionally. The findings recorded by the Judge that the act caused was known by the accused to be likely to cause death involved the following findings:

- a. That the appellant had intentionally inflicted fist blows and kicks, inter alia, in the abdominal region.
- b. That the cause of death was injury to the solar plexus.
- c. That the appellant knew that injury to solar plexus was likely to cause death.

The aforesaid findings brought the case under the first part of Section 304. (See **Dr. Hari Singh Gour's Penal Law in India**, 11th Edition)

44. The question of whether in a given case, a homicide is murder punishable under Section 302 IPC, or culpable homicide, of either description, punishable under Section 304 IPC has engaged the attention of courts in this country for over one and a half-century, since the enactment of the I.P.C.; several case laws, on this aspect, exists, including perhaps several hundred rulings by this Court. The use of the term “likely” in several places in respect of culpable homicide highlights the element of uncertainty

that the act of the accused may or may not have killed the person. However, section 300 IPC, which defines murder, refrains from using the term likely, which reveals the absence of ambiguity left on behalf of the accused. The accused is sure that his act will definitely cause death. It is often difficult to distinguish between culpable homicide and murder as both involve death. Yet, there is a subtle distinction of intention and knowledge involved in both crimes. This difference lies in the degree of the act. There is a very wide variance of the degree of intention and knowledge among both the crimes.

(See **Mohd. Rafiq v. The State of Madhya Pradesh**, Supreme Court, CRIMINAL APPEAL NO. 856 of 2021, decided on 15.09.2021).

45. In **Mohd. Rafiq v. The State of Madhya Pradesh** (supra), the Apex Court had referred to two judgments to illustrate the difference between culpable homicide and murder. The elaboration as laid down in Paragraph 12 and 13 are as follows,

*“12. The decision in **State of Andhra Pradesh v Rayavarapu Punnayya** & Anr reported in **1976 (4) SCC 382**, notes the important distinction between the two provisions, and their differing, but subtle distinction. The Court pertinently pointed out that:*

“12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice- versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the

lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304..

13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300."

13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in **Pulicherla Nagaraju @ Nagaraja Reddy v State of Andhra Pradesh** reported in (2006) **11 SCC 444**. This Court observed that:

"29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body;(iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free

for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.””

46. However, the case put forward by the Prosecution does not establish the intention of the accused to kill the deceased. This point, though delicate, is not without significance because it goes to the root of the nature of the intention. Did the appellant intend to kill Ahalya Bhakta?

47. Both the counsels have agreed that the appellant-accused was drunk during the occurrence of the crime, and that he was a habitual drunkard. However, neither of the Counsels could substantiate when or how it was witnessed the appellant-accused drinking, lest only the evidence of the PW-07 who had noticed the appellant-accused inebriated after the crime when he arrived at the scene of the crime and the submissions of the other witnesses that the appellant-accused was a habitually drunkard.

48. The position of law with regard to the knowledge or intention attributed to an intoxicated individual has been both addressed in the statute and established authorities of the Apex Court. Reference ought to be made to an Apex Court Judgment, **Paul (Supra)**. The factual matrix of the case involved a conviction under section 302 of the I.P.C., whereby on a fateful day, the mother of the appellant created a scene at their home, and

the deceased, who was the appellant's wife, due to unbearable harassment, left the marital home in search of her husband. When she located him, she was consequently assaulted by him, and thereafter the same night, the appellant throttled her to death. Although the appellant and his mother were charge-sheeted under Sections 498A and 302 read with Section 34 of I.P.C. alleging cruelty and for causing the death of the appellant's wife. The trial judge had convicted the appellant under Section 302 of I.P.C, and this view was concurred with by the High Court and the Apex Court. The Apex Court herein made the following observation with regard to the intoxication of the appellant;

"We may no doubt notice Section 86 of the IPC. Section 86 reads as follows:

"86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.—In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

*26. Section 86 of the IPC enunciates presumption that despite intoxication which is not covered by the last limb of the provision, the accused person cannot ward off the consequences of his act. A dimension however about intoxication may be noted. Section 86 begins by referring to an act which is not an offence unless done with a particular knowledge or intent. Thereafter, the law giver refers to a person committing the act in a state of intoxication. It finally attributes to him knowledge as he would have if he were not under the state of intoxication except undoubtedly, in cases where the intoxicant was administered to him either against his will or without his knowledge. What about an act which becomes an offence if it is done with a specific intention by a person who is under the state of intoxication? Section 86 does not attribute intention as such to an intoxicated man committing an act which amounts to an offence when the act is done by a person harbouring a particular intention. This question has engaged the attention of this Court in the decision in **Basdev v. State of Pepsu** reported in **AIR 1956 SC 488**. In the said case the appellant, a retired*

military official went to attend a wedding. The appellant was very drunk. He asked a young boy to step aside a little so that he could occupy a convenient seat. The boy did not budge. The appellant fired from a pistol, he had with him, in the abdomen of the boy which proved fatal. This Court inter alia held as follows:

“4. It is no doubt true that while the first part of the section speaks of intent or knowledge, the latter part deals only with knowledge and a certain element of doubt in interpretation may possibly be felt by reason of this omission. If in voluntary drunkenness knowledge is to be presumed in the same manner as if there was no drunkenness, what about those cases where mens rea is required.

Are we at liberty to place intent on the same footing, and if so, why has the section omitted intent in its latter part? This is not the first time that the question comes up for consideration. It has been discussed at length in many decisions and the result may be briefly summarised as follows:-

5. So far as knowledge is concerned, we must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, we must gather it from the attending general circumstances of the case paying due regard to the degree intoxication. Was the man beside his mind altogether for the time being?

If so it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking, and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts.

6. Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things. Even in some English decisions, the three ideas are used interchangeably and this has led to a certain amount of confusion.” (emphasis supplied)”

49. Returning to the facts of the instant case, there can be no doubt that the Prosecution has established that the factual allegations have been laid down. The appellant-accused, a habitual drunkard, frequently quarreled and physically inflicted cruelty upon the deceased and forcefully

took away her earnings. On the fateful day of Makar Sankranti, he had been fighting with the deceased since the early morning and was under the influence of alcohol. He had left the house and then had returned back. He consequently started fighting with the accused again, and now the matter took a more violent form. This was witnessed by the two daughters-in-law of the appellant-accused and the deceased. The altercation resulted in the death of the deceased. No motive or animus against the accused is being made out at this point. The matter of crucial importance is the manner in which the physical violence was carried out. The Prosecution could prove the brutality of the violence, supported by the post mortem report; however, the Prosecution was unable to establish the intention of the appellant-accused. We think this juncture of the argument is most crucial. We disagree with the Trial Judge that the appellant-accused had the intention to kill the deceased. His behavior was habitual. He regularly beat up his wife, and thus, the Prosecution could not prove that the accused knew that this time the physical violence would result in the death of the deceased. Therefore, it is held that the appellant's conviction under Section 302 IPC was not appropriate

50. Part I of Section 304 of the Indian Penal Code (I.P.C.) stipulates that culpable homicide is punishable by imprisonment for life, or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death. Part II of Section 304 of the Indian Penal Code

(I.P.C.) stipulates the punishment of imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

51. In this case, he had committed an offence punishable under the second part of Section 304 of the Indian Penal Code, since he had the goal was to do such bodily injury to the dead that it would be likely to end in her death, which it did. In light of these considerations, the conviction is justified. The conviction of the trial court is changed to one under Section 304 Part II, I.P.C.

52. In view of the fact that the accused has spent 14 years in jail, we set him free immediately as he has already completed his sentence of 10 years in jail in terms of our findings.

Accordingly, the appeal is disposed of.

No order as to costs.

Send down the L.C.R. to the learned Court below along with a copy of this Judgment.

The department is directed to immediately communicate this order to the Superintendent, Midnapore Central Correctional Home for due compliance of this order.

Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance with all requisite formalities.

(Soumen Sen, J.)

I agree

(Rabindranath Samanta, J.)