DAYA NAND

v.

STATE OF HARYANA

(Criminal Appeal No. 595 of 2005)

APRIL 3, 2008

(DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.)

Penal Code, 1860; Ss. 299, 300, 302, 304 Part I and II/ Arms Act, 1959; S.27:

Culpable homicide/murder – Appellant, at the instance of his father, allegedly fired a shot at the deceased resulting in his death – F.I.R. – Investigation – Charge-sheet – Trial Court found appellant guilty of committing the offence of murder punishable u/s.302 IPC and s. 27 of the Arms Act but found evidence against accused father of the appellant insufficient to convict him – Appeal dismissed by High Court – Correctness of – Held: According to the law laid down in the case of Virsa Singh vs. State of Punjab even if the intention of the accused was limited to the infliction of bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would not be murder – Considering the evidence on record in the background of the principles of law, the inevitable conclusion is that the appropriate conviction would be u/s.304 Part II IPC – Conviction altered accordingly – Sentence restricted to the period already undergone – Sentencing.

'Culpable homicide' and 'murder' – Distinction between – Discussed.

According to the prosecution, on the fateful day, an altercation took place between PW5 and his brothers including the deceased on the one side and accused persons including the appellant on the other. Accused 'A' allegedly exhorted his son, appellant, to fire a shot at the

A deceased. Appellant fired a shot, which hit the deceased resulting in bleeding injury. PW5 and PW6, brothers of the deceased, had taken the victim to a hospital, where he was declared dead. On the basis of an information received from the hospital, an FIR was recorded by the B Police and after investigation of the case, charge sheet was filed against the accused appellant u/s.302 IPC and s. 27 of the Arms Act and against his father u/s.302 r/w s.34 IPC. Trial Court found the prosecution evidence cogent and credible as against the appellant and C accordingly convicted him for committing the offence of murder punishable u/s. 302 IPC and sentenced him accordingly but found the evidence as against father of the appellant insufficient, and acquitted him. Appeal filed thereagainst by the appellant was dismissed by the D Division Bench of the High Court. Hence the present appeal.

Appellant contended that s.302 IPC has no application in the facts and circumstances of the case.

Partly allowing the appeal, the Court

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HELD: 1.1 '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 the generic F offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in s.300 IPC as 'murder'. The second may be termed as 'culpable G homicide of the second degree'. This is punishable under the first part of s.304 IPC. 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 H

under the second part of s.304 IPC. (Para – 10) [1050-E, F & G]

1.2 The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. 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 Ss. 299 and 300 IPC. (Para – 11) [1050-H; 1051-A & B]

1.3 For cases to fall within clause (3) of s.300 IPC, it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. (Para – 14) [1053-D & E]

Rajwant and Anr. vs. State of Kerala, AIR (1966) SC 1874 – relied on.

1.4 Under clause thirdly of s.300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted. According to the rule laid down by this Court in *Virsa Singh's* case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would not be murder.

A Illustration (c) appended to S. 300 clearly brings out this point. (Paras – 18 & 19) [1055-C, D, E & F]

Virsa Singh vs. State of Punjab AIR (1958) SC 465 – relied on.

B 1.5 Clause (c) of s.299 and clause (4) of s.300 IPC both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that C clause (4) of s.300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons – being caused from his imminently dangerous act, approximates to a practical D certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury. (Para – 20) [1055-G & H; 1056-A & B]

E *State of Andhra Pradesh vs. Rayavarapu Punnayya and Anr.* (1976) 4 SCC 382; *Abdul Waheed Khan @ Waheed and Ors. vs. State of Andhra Pradesh* (2002) 7 SCC 175; *Augustine Saldanha vs. State of Karnataka* (2003) 10 SCC 472; *Thangiya vs. State of T.N.* (2005) 9 SCC 650 and *Rajinder vs. State of* F *Haryana* (2006) 5 SCC 425 – relied on.

2. Considering the evidence on record in the background of the principles of law, the inevitable conclusion is that the appropriate conviction would be under s.304 Part II IPC. The conviction is accordingly G altered. The accused has suffered custody of nearly 8½ years. The sentence is restricted to the period already undergone. (Paras – 23 & 24) [1056-E & F]

CRIMINAL APPELLATE JURISDICTION : Criminal H Appeal No. 595 of 2008.

From the Judgment/ final Order dated 27.2.2007 of the High Court of Punjab and Haryana at Chandigarh in Crl. A. No. 789-DB/1997. A

Naresh Kaushik, Satish Dayanandan, Parag Goyal and Lalita Kaushik for the Appellant.

B

Rajeev Gaur 'Naseem', Rajesh Ranjan and Naresh Bakshi for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted. C

2. Challenge in this appeal is to the judgment rendered by a Division Bench of the Punjab and Haryana High Court upholding the conviction of the appellant for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short 'IPC') in terms of the judgment dated 9/10.10.1997 passed by the Additional Sessions Judge, Hissar. D

3. A synoptical resume of the prosecution case is as under:

The prosecution machinery was set into motion at the instance of Shankar - PW 5 who had four brothers. Chhajju Ram (hereinafter referred to as the 'Deceased') was younger to PW 5- Shankar and they had a joint khewat in the revenue estate of village Sirdhan. On 9.9.1993 the said Shankar and his brother Nain Sukh and deceased Chhajju Ram went to their fields known as Theriwala for irrigating the land. Amar Singh (who faced trial and was acquitted) and Daya Nand (appellant herein) were already irrigating their fields. Shankar and others were to take turn of irrigation at 8.00 A.M. from the accused. At 8.00 A.M. deceased Chhajju Ram diverted the irrigation water to his field. Accused Daya Nand objected that his turn of water had not yet started. Chhajju Ram retorted that their turn started from 8.00 A.M. onwards. An altercation took place between Shankar and the deceased on one side and the accused on the other. Accused threatened that they will see them and both of them left towards the village. Shankar and others also went to supervise the flow of irrigation water through the water courses. E F G H

A In the meantime, both the accused came from the side of village Sirdhan. Accused Daya Nand was armed with a gun. Accused Amar Singh exhorted his son accused -Daya Nand to fire a shot. Accused Daya Nand then fired a shot from his gun towards Chhajju Ram who took a turn but was hit on the right side of the B waist and fell down. Blood started oozing out from the fire shot injury. Nain Sukh (PW-6) also reached there at the Naka and witnessed the occurrence apart from Shankar. Thereafter, accused fled away towards the village along with the gun. Chhajju Ram was admitted to Civil Hospital, Fatehabad by his C brother Shanker and Nain Sukh, where he was declared dead by the doctor. Ruqa Ex. PG was sent by Dr. Jagdish Chaudhry to the Station House Officer, Police Station Fatehabad. A wireless message Ex. PK was sent by the said Police Station to Police Station Bhattu. Ram Kumar, Assistant Sub inspector D along with some constables reached Civil Hospital Fatehabad and recorded the statement of Shanker in Civil Hospital, Fatehabad. That statement Ex. PG/1 was sent to the Police Station and on its basis, FIR was recorded by Satbir Singh MHC, copy of which is Ex. PG/3. Inquest proceedings were conducted and report Ex. PF/1 was prepared by Ram Kumar Assistant E Sub Inspector in the presence of Devi Lal and Shanker Lal PWs. He moved an application Ex. PF and post mortem examination was conducted vide report Ex. PF/2 by Dr. S.P. Mimani. Multiple wounds of small sizes were found and eleven pellets were recovered from the abdomen of the deceased. The pellets were F sealed in a vial. The clothes of the deceased were removed and sealed into a parcel. The cause of death was due to shock and haemorrhage as a result of fire arm injuries which were ante mortem in nature and sufficient to cause death in the ordinary course of nature vide post mortem report Ex. PF/2. G Ram Kumar, Assistant Sub Inspector along with Ram Kumar Constable then went to village Sirdhan. He inspected the spot in the presence of Nain Sukh, Ram Sarup, Sarpanch and Brij Lal, Chowkidar. Blood stained earth was lifted, made into a sealed parcel and taken into possession vide recovery memo H Ex. PH. One empty cartridge of 12 bore was found lying which

was also lifted, made into a sealed parcel and taken into possession vide memo Ex. PJ. Rough site plan, Ex. PL, was prepared and statements of other witnesses were recorded. Accused Daya Nand produced a double barrel gun, Ex. P-8, licence, Ex. P-9, and two live cartridges. Sketch map, Ex. PP of the gun was prepared. The gun was placed in a sealed parcel. The licence and the two live cartridges were also sealed in parcel and taken into possession vide memo Ex. PP/1. The case property was sent for Chemical Examination and for report of the Ballistic expert of Forensic Science Laboratory, Haryana, Madhuban. Vide report, Ex. PO, the double barrel gun, Ex. P8, was found in working order, the empty cartridge hereinafter referred to as the crime cartridge, which was lifted from the spot, Ex. P6, was opined to have been fired from the said gun. The pellets recovered from the dead body were opined to be pellets as are usually loaded in shot gun cartridges, including 12 bore cartridge. As per reports, Ex. PO/1 and Ex. P0/2, human blood was found in blood stained earth and on shirt, Ex. P-1, Banian, Ex. P-2 and underwear Ex. P-3 of the accused. After completion of investigation, accused was sent up for trial.

Charge was framed against accused Daya Nand under Section 302 IPC and 27 of the Arms Act, 1959. Charge was framed against accused Amar Singh under Section 302 read with Section 34 IPC.

4. In order to establish the accusations the prosecution examined 10 witnesses and the report of the Forensic Science Laboratory, Haryana, Madhuban was exhibited.

5. Accused persons during their examination under Section 313 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') pleaded innocence and false implication. The Trial Court relied on the evidence of eye witnesses Shankar (PW5) and Nain Sukh (PW6). It found the prosecution evidence cogent and credible and recorded conviction of the appellant. But so far as accused Amar Singh is concerned, it was held that the evidence was not sufficient to fasten guilt on him.

A 6. In appeal, it was submitted that the evidence of Shankar (PW5) and Nain Sukh (PW6) should not have been relied upon. It was further submitted that a single shot that too on the hip cannot attract application of Section 302 IPC. Prosecution with reference to the evidence of Shankar (PW5) and Nain Sukh B (PW6) submitted that the evidence was clear and cogent and, therefore, the accused persons were to be convicted. The High Court, as noted above, dismissed the appeal.

7. Basic challenge in this appeal is to the conviction under Section 302 IPC.

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8. It was contended, as was done before the Trial Court and the High Court, that Section 302 IPC has no application.

9. Learned counsel for the State, on the other hand supported the impugned judgment.

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10. The crucial question is as to which was the appropriate provision to be applied. In the scheme of the IPC 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 E culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, F 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 G the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

11. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed H

the Courts. 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. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is	Subject to certain exceptions culpable homicide is murder caused is done – if the act by which the death is caused is done -
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) 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
	(3) 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
KNOWLEDGE	
****	
(c) with the knowledge that the act is likely to cause death	(4) with the knowledge that the act is so imminently

	dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

12. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

13. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the

words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature to cause death" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury.....sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

14. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant and Anr. v. State of Kerala,* (AIR 1966 SC 1874) is an apt illustration of this point.

15. In *Virsa Singh v. State of Punjab,* (AIR 1958 SC 465), Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out

A above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

16. The ingredients of clause "Thirdly" of Section 300, IPC were brought out by the illustrious Judge in his terse language B as follows:

> "To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly".
>
> First, it must establish, quite objectively, that a bodily injury C is present.
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to D inflict that particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and, E
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential F and has nothing to do with the intention of the offender."

17. The learned Judge explained the third ingredient in the following words (at page 468):

> "The question is not whether the prisoner intended to inflict G a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only H

possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here or there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

18. These observations of Vivian Bose, J. have become locus classicus. The test laid down by *Virsa Singh's* case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted.

19. Thus, according to the rule laid down in *Virsa Singh's* case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would not be murder. Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the

A probability of death of a person or persons in general as distinguished from a particular person or persons – being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been B committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. The above are only broad guidelines and not cast iron imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes the facts are so intertwined C and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

22. The position was illuminatingly highlighted by this Court in *State of Andhra Pradesh v. Rayavarapu Punnayya and Anr.* D (1976 (4) SCC 382), *Abdul Waheed Khan @ Waheed and Ors. v. State of Andhra Pradesh* (2002 (7) SCC 175), *Augustine Saldanha v. State of Karnataka* (2003 (10) SCC 472), *Thangiya v. State of T.N.* (2005 (9) SCC 650) and in *Rajinder v. State of Haryana* (2006 (5) SCC 425).

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23. Considering the evidence on record in the background of the principles of law, the inevitable conclusion is that the appropriate conviction would be under Section 304 Part II IPC. The conviction is accordingly altered.

F 24. Undisputedly, the accused has suffered custody of nearly 8½ years. The sentence is restricted, therefore, to the period already undergone. The appeal is allowed to that extent. The accused person be set at liberty forthwith unless required in custody in any other case.

G S.K.S. Appeal partly allowed.