PHULIA TUDU AND ANR.

v.

THE STATE OF BIHAR (NOW JHARKHAND)

SEPTEMBER 14, 2007

[DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

Penal Code, 1860—s. 304 (Part I) r/w s. 34—Prosecution for murder-Deceased attacked with lathi blow resulting in her death—Conviction under s. 302 r/w s. 34 and sentenced to life imprisonment—Justification of—Held: On facts, one blow was given with a small stick, and place where assault took place was dimly lit—In light of the facts of the case and legal principles laid down in s. 299 and s. 300, conviction altered to one under s. 304 (Part I) r/w s. 34 and custodial sentence of ten years awarded.

According to the prosecution case, appellants were nurturing grievance against BM. On the fateful day, appellants chased BM and BM took refuge in the house of BS. Appellant-first accused assaulted BM with lathi which resulted in her death. When BS tried to intervene she was threatened with her life. Thereafter, accused fled away. FIR was lodged. Investigation was carried out. Trial court convicted the appellants under section 302 r/w section 34 and imposed life imprisonment. Appellants filed appeal. It was contended that second accused held hands of the deceased while first accused inflicted only one lathi blow which could not have caused fatal injuries thus, section 302 was not applicable. High Court upheld the order of trial court. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1.1. 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 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, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second is 'culpable homicide of the second degree'. This is punishable under the first part of

A Section 304. Then 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. It is punishable under the second part of Section 304. [Para 7] [1001-F, G; 1002-A]

1.2. Clause (b) of Section 299 corresponds with clauses (2) and (3) of B 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 C in normal health or condition. 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. [Para 9] [1003-A-C]

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1.3. 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 E 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 F 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" 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 G 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 H 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. [Para 10] [1003-D-G; 1004-A]

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1.4. 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. [Para 11] [1004-A-B]

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

1.5. The test laid down by **Virsa Singh's* case for the applicability of clause 'thirdly is now ingrained in Indian 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. [Para 15] [1005-E, F, G]

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Virsa Singh v. *State of Punjab,* AIR (1958) SC 465, relied on.

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1.6. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. Clause (4) of Section 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 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 17] [1006-A, B, C]

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State of Andhra Pradesh v. *Rayavarapu Punnayya and Anr.,* [1976] 4 SCC 382; *Abdul Waheed Khan @ Waheed and Ors.* v. *State of Andhra Pradesh,* JT (2002) 6 SC 274 and *Augustine Saldanha* v. *State of Karnataka,* [2003] 10 SCC 472, referred to.

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2. In view of the legal principles, the factual position is to be examined.

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A **It cannot be said as a rule of universal application that whenever one blow is given Section 302 IPC is ruled out. It would depend upon the facts of each case. The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given are some of the factors to be considered. In the instant case admittedly one blow was given with a small stick, and the place where the assault took** B **place was dimly lit. The case is covered by section 304 Part I and not section 302. Therefore, each of the appellants is convicted under section 304 Part I read with section 34 and not section 302 read with section 34 IPC. Custodial sentence of ten years would meet the ends of justice.**

[Paras 20 and 21] [1006-E, F, G]

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1221 of 2007.

From the Judgment and Order dated 7.2.2006 of the High Court of Jharkhand at Ranchi in Criminal Appeal No. 130 of 1989.

D Arup Banerjee and Aparna Jha for the Appellants.

Manish Kumar Saran for the Respondent.

The Judgment of the Court was delivered by

E **DR. ARIJIT PASAYAT, J.** 1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Jharkhand High Court upholding conviction of the appellants for offence punishable under Section 302 IPC read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC').

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3. Background facts according to the prosecution in a nutshell are as follows:

Bitia Soren (PW-8) is the sister-in-law of Biti Murmu (hereinafter referred to as 'the deceased'). The first appellant's son fell ill and the appellants/ G accused were under the impression that since the deceased, Biti Murmu, is a witch, she has caused a spell on the son of the accused and, therefore, they were nurturing a grievance against the deceased. On the date of incident, when the villagers had gone to the cremation ground to cremate the dead body of a villager, Jhora Hansda, appellants Phulia Tudu and Malgo Soren, H chased the deceased, Biti Murmu, and she took asylum in the house of Bitia

Soren (PW-8). The appellants entered the house and caught hold of the deceased, Biti Murmu. Bitia Soren (PW-8) at that time, was engaged in dehusking paddy. The first accused caught the hands of the deceased and pulled her out and the deceased fell down. The first accused, Phulia Tudu, assaulted her with lathi and when PW-8 attempted to intervene, she was threatened with her life. The other accused was present there at that time and after the occurrence, they ran away from the place. After the return of the villagers including the husband of PW-8, information was passed on to them. Thereafter, fardbeyan, Ext.3, was given by PW-8 at Raneshwar police station at 2.30 p.m., which was registered as a crime and Ext.5 is the first information report and investigation was taken up by Bijendra Narain Singh (PW-9). PW-9, on taking up the investigation, reached the scene of occurrence, prepared the inquest report, Ext.5, and sent the dead body to the hospital with a requisition to the Doctor to conduct autopsy. On completion of investigation, charge-sheet was filed. As accused persons pleaded innocence trial was held.

4. The trial Court believed the evidence of PW-8 and recorded conviction under Section 302 read with Section 34 IPC and sentenced each to undergo imprisonment for life. However, the accused Kisto Kisku was acquitted.

5. Matter was carried in appeal before the High Court. Before the High Court it was submitted that only accusation was that A2 held the hands of the deceased while A1 inflicted a lathi blow. It is submitted that lathi blow attributed to A1 could not have caused fatal injuries. In any event, only one blow was given and, therefore, Section 302 has no application.

6. Learned counsel for the State on the other hand supported the judgment of the High Court, which as noted above, dismissed the appeal filed before it.

7. 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 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, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable

A 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.

B 8. 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 C 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
D A person commits culpable homicide if the act by which the death is caused is done -	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done -
INTENTION	
E (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
F	(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
G 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

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bodily injury as is likely to cause death, and without any excuse or incurring the risk of causing death or such injury as is mentioned above.

9. 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.

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10. 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" 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

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A 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.

11. For cases to fall within clause (3), it is not necessary that the B 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.

12. In *Virsa Singh* v. *State of Punjab*, AIR (1958) SC 465, Vivian Bose, C 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 D 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 above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is E purely objective and inferential and has nothing to do with the intention of the offender.

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

F "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 is present.

Secondly, the nature of the injury must be proved. These are purely G objective investigations.

Thirdly, it must be proved that there was an intention to 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.

H 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 above is 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." A

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

"The question is not whether the prisoner intended to inflict 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 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." C D

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15. 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. F G

16. 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 be murder. Illustration H

A (c) appended to Section 300 clearly brings out this point.

17. 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 B 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 certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been C committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

18. 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 and the second and the third stages D 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.

19. The position was illuminatingly highlighted by this Court in *State of Andhra Pradesh* v. *Rayavarapu Punnayya and Anr.*, [1976] 4 SCC 382, *Abdul Waheed Khan @ Waheed and Ors.* v. *State of Andhra Pradesh,* JT E (2002) 6 SC 274, and *Augustine Saldanha* v. *State of Karnataka,* [2003] 10 SCC 472.

20. Keeping the aforesaid legal principles in view, the factual position is to be examined. It cannot be said as a rule of universal application that whenever one blow is given Section 302 IPC is ruled out. It would depend F upon the facts of each case. The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given are some of the factors to be considered. In the instant case admittedly one blow was given with a small stick, and the place where the assault took place was dimly lit. Inevitable conclusion is that G the case is covered by Section 304 Part I IPC and not Section 302 IPC.

21. Therefore, each of the appellants is convicted under Section 304 Part I read with Section 34 IPC and not Section 302 IPC read with Section 34 IPC. Custodial sentence of ten years would meet the ends of justice.

H 22. The appeal is allowed to the aforesaid extent.