A BALKAR SINGH

v.

STATE OF UTTARAKHAND

(Criminal Appeal No. 206 of 2007)

B MARCH 31, 2009

[DR. ARIJIT PASAYAT AND ASOK KUMAR GANGULY, JJ.]

Penal Code, 1860:

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s. 304 (Part I) – Conviction u/ss. 302 and 307 – By Courts below – Relying on evidence of injured witness and eye-witnesses – On appeal, held: In view of the circumstances in which offence was committed, case not covered u/s. 302 – D *Conviction altered to one u/s. 304 (Part I).*

ss. 299 (b) and 300 (c) – Distinction between – Discussed.

Appellant-accused was prosecuted for having E **caused death of two persons and for attempt of murder one person . Trial court convicted him u/ss. 302 and 307 IPC, placing reliance on evidence of one injured eye-witness and two other eye-witnesses. The conviction was confirmed by High Court discarding the contention** F **of the accused that the case was not covered by s. 302 IPC. Hence, the present appeal.**

Partly allowing the appeal, the Court

HELD: 1.1. In the scheme of the IPC culpable G **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**

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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 IPC as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 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 under the second part of Section 304 IPC. [Para 7] [248-G-H; 249-A-B]

1.2. The distinction between ss. 299 and 300 IPC 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. 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. [Paras 10 and 11] [251-B-G; 252-A-B]

1.3. 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

A **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,**
B **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] [254-A-B]**

C *Rajwant and Anr. v. State of Kerala* **AIR 1966 SC 1874 and** *Virsa Singh v. State of Punjab* **AIR 1958 SC 465, relied on.**

State of Andhra Pradesh v. Rayavarapu Punnayya and Anr. **1976 (4) SCC 382;** *Abdul Waheed Khan @ Waheed and*
D *Ors. v. State of Andhra Pradesh* **JT 2002 (6) SC 274;** *Augustine Saldanha v. State of Karnataka* **2003 (10) SCC 472;** *Thangaiya v. State of Tamil Nadu* **2005 (9) SCC 650 and** *Laxmannath v. State of Chhatisgarh* **2009 (1) SCR 348, referred to.**

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2. The background as projected by the prosecution is that the accused requested the deceased to have some wine with him as weather was very cold. Deceased-1 replied that he did not like to have wine with a person like the accused. On this the accused pleaded that the
F **family members of Deceased-1 and Deceased-2 had got him punished and if he did not take wine with him the enmity would be continued. On this Deceased-2 told him that they did not have wine with people like the accused and he can do whatever he wanted to do. On this the**
G **appellant went inside the house and came back with a gun. The deceased and the witnesses were travelling in a tractor which was moving at a high speed. The appellant did not direct first shot towards the deceased, he fired in the air and thereafter indiscriminately fired**
H **shots. In this background and in view of the principles**

of law as regards s. 299 (b) and s. 300 (3) IPC, the offence is not covered by Section 302 IPC. The proper conviction would be under Section 304 (Part I) IPC. Custodial sentence of 8 years would meet the ends of justice in the peculiar facts of the case. [Paras 5 and 20] [248-C-E; 255-C-D]

Case Law Reference:

AIR 1966 SC 1874	**Relied on**	**Para 11**
AIR 1958 SC 465	**Relied on**	**Para 12**
1976 (4) SCC 382	**Referred to**	**Para 19**
JT 2002 (6) SC 274	**Referred to**	**Para 19**
2003 (10) SCC 472	**Referred to**	**Para 19**
2005 (9) SCC 650	**Referred to**	**Para 19**
2009 (1) SCR 348	**Referred to**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 206 of 2007.

From the Judgment & Order dated 10.07.2006 of the High Court of Uttaranchal at Nainital in Criminal Appeal No. 1387 of 2001 (Old No. 2174 of 1985).

S.K. Dubey, P.K. Jain, P.K. Goswami, K.K. Mishra, R.P. S. Bhaduria and Sumita Hazarika for the Appellant.

S.S. Sham Shery and Rachana Srivastava for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. In this appeal challenge is to the judgment of a Division Bench of the Uttarakhand High Court upholding the conviction of the appellant as recorded by learned First Additional Sessions Judge, Nainital under Section 302 of

A Indian Penal Code, 1860 (in short the 'IPC'). The allegation was that accused committed murder of Ajeet Singh (hereinafter referred to as 'D-1') and Bajan Singh (hereafter referred to as 'D-2') and attempted to commit murder of Roop Singh for which he was convicted under Section 307 IPC and sentenced to 10 B years RI.

2. Prosecution version in a nutshell is as follows:

On 01.01.1983, at about 5:00 P.M., D-1 along with Roop Singh (P.W. 2) (injured) and Harbhajan Singh (P.W.1) informant, C were going in a tractor to take flour from wheat flour mill of one Ram Prasad in village Paigakhas, situated within the limits of P.S. Kashipur (earlier part of District Nainital. At about 5:15 p.m., when they reached and got down in village *Paigakhas*, accused/appellant Balkar Singh met them and asked D-1 to D have some wine with him, as it was a chilly day. On this, D-1 curtly replied that he would not have wine, bought with the money of the accused/appellant. There was old enmity between Balkar Singh (accused/appellant) and D-1 as earlier on a report lodged against accused/appellant Balkar Singh by the family members of D-1, he had been convicted but later on, acquitted E by the appellate court. When Balkar Singh reiterated his request to have drinks with him and not to develop further enmity between them, D-1 again firmly told that he would not have liquor with Balkar Singh and he may do whatever he likes. This made Balkar Singh feel insulted and he threatened D-1 F that he will have to face the consequence of this refusal. Then Balkar Singh went to his house to bring his gun and in the meantime D-1 after taking flour from the wheat flour mill, proceeded for his further journey. When D-1 and others, in their tractor, reached near temple of goddess in village Paigakhas, G accused Balkar Singh armed with a gun, fired a shot at D-1. It was around 5:30 p.m. D-1 on seeing Balkar Singh, firing at him, drove the tractor a bit faster. Balkar Singh, kept on firing shots, one after another and injured D-1, Bhajan Singh and Roop Singh. D-2 along with Roop Singh (P.W. 2) and Harbhajan H Singh (P.W.1), in an attempt to save their lives, jumped from

the tractor and took shelter behind rubbish heap by the side of pathway in the village. D-1 died on the spot in the tractor. Meanwhile, villagers started assembling near the scene of occurrence and accused-appellant Balkar Singh, by then left the place. Injured Roop Singh and D-2 were taken to Civil Hospital. But D-2 succumbed to the injuries in the hospital. Harbhajan Singh (PW-1) lodged oral First Information Report at police station, Kashipur, at 7:20 p.m. on the very day i.e. 01.01.1983, which was registered as crime No. 2 of 1983 under Section 302/307 I.P.C. against accused Balkar Singh. On the basis of the oral report, chick report (Ext. A-1) was prepared and necessary entry in the general diary was made, extract of which is Ext. A-23. Devendra Kumar Thapliyal (PW-8) Inspector Incharge of the police station- Kashipur, took up the investigation of the case. Meanwhile, the injuries of Roop Singh (P.W. 2) were recorded in the Civil Hospital at 7:45 p.m. on the same day i.e. 01.01.1983. Inquest report (Ext. A-3) was prepared after dead body of D-1 was taken into possession by the police on 02.01.1983, at 7:30 a.m. and police form No. 33 (Ext. A-4), sketch of his dead body (Ext. A-5), police form No. 13 (Ext. A6) and letter (Ext. A-7) to Chief Medical Officer for post mortem examination, were prepared. After the death of D-2, his dead body was also taken into possession by police on 02.01.1983, at about 12:30 p.m. and an inquest report (Ext. A-15), police form No. 33 (Ext. A- 16), sketch of his dead body (Ext. A-17), police form No. 13 (Ext. A-20) and letter (Ex.A-8) to Chief Medical Officer, requesting for post mortem examination, were prepared. The Investigating Officer prepared the site plan and recorded the statements of the witnesses. He also prepared the recovery memo of the turban lying at the place of occurrence. After completion of investigation the Investigating Officer submitted charge sheet. Since the accused persons pleaded innocence, trial was held.

Placing reliance on the evidence of an injured witness PW-2 and the eye witnesses PWs 1 and 3 the trial Court recorded

A the conviction and found the appellant guilty.

3. In appeal the basic stand was that the case at hand is not covered by Section 302 IPC. The High Court did not accept the stand and dismissed the appeal. The stand taken before the High Court was re-iterated in this appeal.

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4. Learned counsel for the State supported the judgment of the trial Court as affirmed by the High Court.

5. It is to be noted that the background as projected by the C prosecution is that the accused requested the deceased to have some wine with him as weather was very cold. D-1 replied that he did not like to have wine with a person like the accused. On this the accused pleaded that the family members of D-1 and D-2 had got him punished and if he did not take wine with D him the enmity would be continued. On this D-2 told him that they did not have wine with people like the accused and he can do whatever he wanted to do. On this the appellant went inside the house and came back with a gun. The deceased and the witnesses were travelling in a tractor which was moving at a high speed. The appellant did not direct first shot towards the E deceased, he fired in the air and thereafter indiscriminately fired shots.

6. The basic question is whether Section 302 IPC has application.

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7. 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 G 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 H

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.

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 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 caused is done-	Subject to certain exceptions culpable homicide is murder 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

	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.

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.

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 injury.....sufficient in the ordinary course of nature to cause death" means that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

A 11. 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 B this point.

12. 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 C 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 D 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 E course of nature. This part of the enquiry is 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 F were brought out by the illustrious Judge in his terse language as follows:

> "To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly".
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> First, it must establish, quite objectively, that a bodily injury is present.
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> Secondly, the nature of the injury must be proved. These are purely objective investigations.
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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. A

Once these three elements are proved to be present, the enquiry proceeds further and, B

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." C

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

"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." D E F G

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. H

A 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 B 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.

C 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 (c) appended to D 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 E 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 probability of death of a person or persons in general as distinguished from a particular person or persons – being F 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 as aforesaid.

G 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 so telescoped into each other that it may not be convenient to give a separate treatment

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to the matters involved in the second and third stages. A

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 2002 (6) SC 274), B *Augustine Saldanha v. State of Karnataka* (2003 (10) SCC 472) and *Thangaiya v. State of Tamil Nadu* (2005 (9) SCC 650) and *Laxmannath v. State of Chhatisgarh* (SLP (Crl.) No. 6403 of 2006)

20. If the background facts are considered keeping in view C the principles of law as noted above, the inevitable conclusion is that the offence is not covered by Section 302 IPC and the proper conviction would be under Section 304 Part I IPC. Custodial sentence of 8 years would meet the ends of justice in the peculiar facts of the case. D

21. The appeal is allowed to the aforesaid extent.

K.K.T. Appeal partly allowed.