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PP v. MUSDAR RUSLI

COURT OF APPEAL, KOTA KINABALU
MOHD ZAWAWI SALLEH JCA
ABANG ISKANDAR JCA
AHMADI ASNAWI JCA
B [CRIMINAL APPEAL NO: S-05-372-12-2014]
13 APRIL 2017

CRIMINAL LAW: *Murder – Penal Code, ss. 300 & 302 – Accused person charged with murder – Whether elements of murder proved – Whether death of deceased proved – Whether deceased's death caused by injury or injuries inflicted on her – Whether accused caused injury or injuries which resulted in deceased's death – Whether act of causing death committed with mens rea*

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CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Appeal against reduced charge – Accused person charged with murder and attempt to commit suicide – Trial judge found that prosecution only succeeded in proving culpable homicide not amounting to murder – Whether trial judge correct – Whether prosecution proved elements of murder – Whether death of deceased proved – Whether deceased's death caused by injury or injuries inflicted on her – Whether accused caused injury or injuries which resulted in deceased's death – Whether act of causing death committed with mens rea – Penal Code, ss. 300, 302 & 309*

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The respondent and his wife ('the deceased') were Indonesian nationals working and living in a plantation. One evening, the respondent's neighbour witnessed the respondent gripping the deceased's neck while holding a knife. Terrified, she called out for the respondent's son and when the latter rushed home, he saw them standing facing each other with the respondent's hand placed on the deceased's chest. The deceased collapsed and the respondent stabbed himself. A post mortem conducted revealed that the deceased's death was caused by a stab wound. A knife and a sheath were recovered near the deceased's body and the blood found on the sheath matched the respondent's DNA profile. The respondent was charged under the Penal Code ('the Code') at the High Court with (i) murder under s. 300 and punishable under s. 302; and (ii) an attempt to commit suicide, an offence under s. 309 ('the second charge'). Satisfied that the prosecution successfully established a *prima facie* case, the respondent was called to enter his defence. The respondent submitted that on the fateful day, the deceased's nagging got to him, causing him to pull the deceased's hair and push her to the floor. However, he denied stabbing the deceased but admitted that he took a knife and stabbed himself. The High Court Judge ('the HCJ') rejected the respondent's defence that he did not stab the deceased on the ground that based on the nature of injuries inflicted upon the deceased, there was evidence of the respondent's intention to cause bodily injuries on the deceased which was likely to cause death. However, the HCJ found that the prosecution only succeeded in proving a case of culpable homicide not amounting to murder under s. 304(a) of the

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Code ('the reduced charge'). The respondent was convicted of the reduced charge and the second charge and sentenced to 25 years and one year imprisonment, respectively. The sentences were to run concurrently and upon completion of his sentences, the respondent was ordered to be deported to his country of origin. Hence, the appeal by the prosecution which orbited around the issue of whether the respondent was rightly convicted for the reduced charge.

Held (allowing appeal)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) To establish a case of murder under s. 302 of the Code, these elements must be proved: (i) the death of the deceased; (ii) the deceased's death was caused by injury or injuries inflicted on the deceased; (iii) the accused had caused the injury or injuries which resulted in the deceased's death; and (iv) the act of causing the death was committed with *mens rea* under s. 300(a), (b), (c) or (d). (para 27)

(2) Element (i) was a non-contentious issue as the investigating officer had seen the deceased's body and the respondent's son positively identified the deceased at the mortuary for the purpose of post mortem. As regards element (ii), the post mortem report concluded that the cause of death was the stab wound on the chest which was inflicted by a sharp object akin to the knife. As regards element (iii), there were sufficient circumstantial evidence that proved the nexus between the appellant and the deceased's death. For element (iv), the injury sustained by the deceased was fatal when the main artery was severed. This clearly showed the respondent's intention to cause bodily injury to the deceased. In absence of any evidence to the contrary, the respondent who had inflicted these injuries must have intended to kill the deceased. (paras 27, 29, 36 & 44)

(3) The respondent had not taken the plea that his case fell under any of the exceptions to s. 300 of the Code. On the contrary, he took the plea that he did not stab the deceased which resulted in her death. The HCJ erred in reducing the charge under s. 300 to one under s. 304(a) of the Code. Where such injuries which were intentionally inflicted by the respondent on the deceased were sufficient in the ordinary course of nature to cause death, it would indeed be a travesty of justice to hold that the respondent was guilty only of the lesser offence of culpable homicide not amounting to murder and punishable under s. 304 of the Code. The decision of the HCJ was set aside and substituted with a conviction for murder, punishable under s. 302 of the Code. The respondent was sentenced to death. (paras 47, 48 & 50)

A ***Bahasa Malaysia*** *Headnotes*

Responden dan isterinya ('si mati') adalah warganegara Indonesia yang bekerja dan tinggal di sebuah ladang. Suatu petang, jiran responden menyaksikan responden mencengkam leher si mati sambil memegang sebilah pisau. Ketakutan, dia memanggil anak lelaki responden dan apabila anak
B lelaki responden bergegas pulang ke rumah, dia melihat mereka berdua berdiri setentang satu sama lain dengan tangan responden pada dada si mati. Si mati rebah dan responden menikam dirinya. Satu bedah siasat yang dijalankan mendedahkan kematian si mati berpunca daripada luka tikaman. Sebilah pisau dan sarung dijumpai berdekatan badan si mati dan darah pada
C sarung tersebut padan dengan profil DNA responden. Responden dipertuduh bawah Kanun Keseksaan ('Kanun') di Mahkamah Tinggi bagi kesalahan (i) membunuh bawah s. 300 yang boleh dijatuhkan hukuman bawah s. 302; dan (ii) percubaan membunuh diri bawah s. 309 ('pertuduhan kedua'). Berpuas hati pihak pendakwaan berjaya membuktikan kes *prima facie*,
D responden dipanggil membela diri. Responden menghujahkan bahawa pada hari kejadian, leteran si mati membangkitkan kemarahannya, menyebabkan responden menarik rambut si mati dan menolaknya ke lantai. Walau bagaimanapun, responden menafikan menikam si mati tetapi mengaku mengambil pisau dan menikam dirinya sendiri. Hakim Mahkamah Tinggi
E ('HMT') menolak pembelaan responden bahawa dia tidak menikam si mati atas alasan berdasarkan sifat kecederaan yang dialami si mati, responden terbukti berniat menyebabkan kecederaan pada badan si mati yang berkemungkinan menyebabkan kematian. Walau bagaimanapun, HMT memutuskan pihak pendakwaan hanya berjaya membuktikan kes homisid salah tidak terjumlah kepada membunuh bawah s. 304(a) Kanun
F ('pertuduhan yang dikurangkan'). Responden disabitkan bagi pertuduhan yang dikurangkan dan pertuduhan kedua dan dijatuhkan hukuman 25 tahun dan satu tahun, masing-masing. Hukuman-hukuman ini diperintahkan berjalan serentak dan selepas menjalani kedua-duanya, responden diperintahkan dihantar pulang ke negara asalnya. Maka timbul rayuan ini
G oleh pihak pendakwaan yang berkisar sekitar isu sama ada responden dengan betul disabitkan bagi pertuduhan yang dikurangkan.

Diputuskan (membenarkan rayuan)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

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(1) Untuk membuktikan satu kes bunuh bawah s. 302 Kanun, elemen-elemen ini harus dibuktikan: (i) kematian si mati; (ii) kematian si mati disebabkan oleh kecederaan atau kecederaan-kecederaan yang dikenakan pada si mati; (iii) tertuduh menyebabkan kecederaan atau kecederaan-
I kecederaan yang menyebabkan kematian si mati; dan (iv) tindakan menyebabkan kematian dilakukan dengan *mens rea* bawah s. 300(a), (b), (c) atau (d).

(2) Elemen (i) tidak dipertikaikan kerana pegawai penyiasat telah melihat mayat si mati dan anak lelaki responden telah mengenal pasti dengan positif di bilik mayat bagi tujuan bedah siasat. Bagi elemen (ii), laporan bedah siasat menyimpulkan bahawa punca kematian adalah luka tikaman pada dada yang disebabkan oleh objek tajam seakan-akan pisau. Bagi elemen (iii), terdapat cukup keterangan ikut keadaan untuk membuktikan hubungan antara perayu dan kematian si mati. Bagi elemen (iv) pula, kecederaan yang dialami si mati membawa maut apabila arteri utamanya putus. Ini jelas menunjukkan niat responden untuk menyebabkan kecederaan pada badan si mati. Tanpa keterangan sebaliknya, responden yang menyebabkan kecederaan-kecederaan ini pastinya berniat membunuh si mati.

(3) Responden tidak menyatakan kesnya terangkum dalam pengecualian bawah s. 300 Kanun. Sebaliknya, dia menyatakan dia tidak menikam si mati hingga mati. Hakim Mahkamah Tinggi terkhilaf apabila beliau mengurangkan pertuduhan bawah s. 300 menjadi s. 304(a) Kanun. Apabila kecederaan-kecederaan yang dikenakan dengan sengaja oleh responden terhadap si mati cukup secara semulajadinya untuk menyebabkan kematian, menjadi satu persendaan keadilan untuk memutuskan responden hanya bersalah bagi pertuduhan yang dikurangkan iaitu homisid salah yang tidak terjumlah kepada membunuh dan boleh dihukum bahawa s. 304 Kanun. Keputusan HMT diketepikan dan diganti dengan sabitan membunuh yang boleh dijatuhkan hukuman bawah s. 302 Kanun. Responden dijatuhkan hukuman mati.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***
Dato' Mohtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Joseph v. State of Kerala [2005] 5 SCC 197 ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mazlan Othman v. PP [2013] 1 CLJ 750 CA ***(refd)***
Phulis Tudu and Anr v. State of Bihar (now Jharkhand) AIR 2007 SC 3215 ***(refd)***
Poh Weng Nam v. PP & Another Appeal [2013] 4 CLJ 1096 CA ***(refd)***
PP v. Megat Shahrizat Megat Shahrur [2011] 8 CLJ 893 FC ***(refd)***
PP v. Thenegaran Murugan & Another Appeal [2013] 4 CLJ 364 CA ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
State of AP v. Rayavarapu Punnayya [1967] 4 SCC 382 ***(refd)***
Tham Kai Yau v. PP [1976] 1 LNS 159 FC ***(refd)***
Virsa Singh v. State of Punjab AIR 1958 SC 465 ***(refd)***

Legislation referred to:
Penal Code, ss. 299, 300, 302, 304(a)

Other source(s) referred to:
Ratanlal and Dhirajlal Law of Crimes, 25th edn, p 1304

For the appellant - Adam Mohamed; DPP
For the respondent - Abdul Ghani Zelika; M/s Abdul Gani Zelika & Amin

Reported by Najib Tamby

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JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

B **[1]** The respondent was charged before the Sandakan High Court for murder and attempt to commit suicide. The charges read as follows:

> First charge:
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> That you on 2.5.2012 at about 6.30 p.m., at an unnumbered house at the Perumahan Pekerja Kampung Arau, Ladang Genting Tanjung in the
C District of Kinabatangan, in the State of Sabah, did commit a murder by causing a death to one, Intan Bago (Passport No. AM 282072) and thereby committed an offence punishable under section 302 of the Penal Code.
>
> Second charge:
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D That you on 2.5.2012 at about 6.35 p.m., at an unnumbered house at the Perumahan Pekerja Kampung Arau, Ladang Genting Tanjung in the District of Kinabatangan, in the State of Sabah, had attempted to commit suicide by stabbing yourself with a knife, and thereby, committed an offence punishable under section 309 of the Penal Code.

E **[2]** The respondent had pleaded guilty to the second charge and he was accordingly convicted. The learned High Court Judge postponed sentencing for the second charge until the conclusion of the trial in respect of the first charge.

[3] At the end of the trial of the first charge, the respondent was convicted
F for an offence of culpable homicide not amounting to murder punishable under s. 304(a) of the Penal Code ("PC"). He was sentenced to 25 years imprisonment commencing from the date of his arrest. The respondent was also sentenced to one year imprisonment in respect of the second charge. The learned High Court Judge ordered both sentences to run concurrently and
G upon completion of his sentences, the respondent be deported to his country of origin. Aggrieved by the impugned conviction and sentence in respect of the reduced charge, the Public Prosecutor ("PP") has now appealed to this court.

[4] We have heard learned Deputy Public Prosecutor ("DPP") and
H learned counsel for the respondent at some length. We have also perused the written submissions carefully and gone through the record of appeal in its entirety. For the reasons that follow, we found there was merit in this appeal and accordingly we allowed the appeal by the PP. We set aside the conviction and sentence of the learned trial judge and substituted it with an
I order of conviction for murder as originally charged. The respondent was sentenced to death as prescribed under s. 302 of the PC.

The Factual Background

The Prosecution's Case

[5] The antecedent facts giving rise to this appeal may be stated in brief as follows. The respondent and one Intan Bago (the deceased), both Indonesians, were husband and wife for 20 years and blessed with nine children. The respondent was a palm fruit harvester at Ladang Genting Tanjung (the plantation) and the deceased was a general worker involved in the ablation process. Their child, Sabri bin Musdar (PW8), was also a palm fruit harvester.

[6] The respondent and the deceased were allotted quarters within the said plantation. The respondent and the deceased occupied one house whilst another was occupied by other plantation workers, Ansyalmi Nadus (PW9) and her husband, Martin. Ratang Erna Ardi (PW7) occupied a house behind the deceased's residence.

[7] On 2 May 2012, at about 6.30pm, PW7 was at the kitchen and she saw the respondent gripping the deceased's neck while holding a knife. She was terrified and ran to Martin's house looking for PW8. At the material time, PW8 was watching a television programme at Martin's house. PW8 heard PW7 call out his name and PW8 went back to his house to check on his parents. He saw his parents stood facing each other and the respondent had his hand placed on the deceased's chest. The deceased then collapsed and PW8 saw the respondent stabbing himself.

[8] On 7 May 2012, Dr Jessie Hiu (PW1), conducted a post mortem on the deceased and prepared a post mortem report (exh. P6). She found three stab wounds on the deceased's front chest and another three stab wounds on the back of the chest. There were two lacerations on the deceased's face with multiple abrasions on the forehead and bruises on the upper lip, with dislocation of the upper tooth. She opined that it was the stab wound under the mid front of the chest (injury no. 7 in the post mortem report) that caused the deceased's death. The wound was directed backward.

[9] Inspector Razlan Abdul Razak (PW12) from the police forensic team, recovered a knife (exh. P16a) and a knife sheath (exh. P20a) near the deceased's body. PW12 collected blood sample swab (exh. P21a) on the knife sheath for forensic DNA analysis.

[10] The items were analysed by Zaliha Saudi (PW6), a science officer at the Chemistry Department. She found that the DNA profile on exh. P16a matched that of the respondent. She also found that the respondent and the deceased were the contributors of the mixed DNA profile found on the cotton swab P21a.

A **Findings Of The High Court At The Close Of The Prosecution's Case**

[11] After conducting a maximum evaluation of the evidence, both oral and documentary, the learned trial judge held that the prosecution had succeeded in establishing a *prima facie* case against the respondent for murder. The respondent was called to enter his defence.

B **The Defence Case**

[12] The respondent gave evidence on oath. He testified that he had been unwell for days and returned home from work early on that fateful day. Their son was crying and the deceased was cooking in the kitchen. The respondent C held his son and tried to sooth the baby by rocking him back and forth. However, the baby continued to cry. Unable to withstand the crying, the respondent took the baby to the deceased. Once he got to the kitchen the deceased started nagging at him for his failure to assist her in doing the household chores. The nagging finally got to the respondent causing him to D pull the deceased's hair and push her to the floor. The respondent then took a knife and stabbed himself. The respondent denied stabbing the deceased as he loved his wife.

Findings Of The High Court At The End Of Trial

E **[13]** At the conclusion of the trial, the learned trial judge rejected the respondent's defence that he did not stab the deceased. His Lordship found that based on the circumstances of the case and the nature of injuries inflicted upon the deceased, there was evidence of an intention on the part of the respondent to cause bodily injuries on the deceased which is likely to cause death. However, the trial judge found that the prosecution had only F succeeded in proving a case of culpable homicide not amounting to murder, and he proceeded to convict and sentence the respondent on the reduced charge of culpable homicide not amounting to murder. Thus, this appeal by the learned DPP before us.

G **The Appeal**

[14] Before us, the main thrust of the learned DPP's argument is that the trial judge had erred in amending the charge to one under s. 304(a) of the PC on the ground that the respondent had no intention to kill the deceased. This is contrary to the evidence brought on record. Learned DPP submitted that in view of the injury caused on the vital part of the body ie, the chest, a H conviction under s. 302 of the PC, should have been recorded against the respondent. Learned DPP posited that the view taken by the learned trial judge is patently erroneous in law as the offence of murder was clearly made out. He urged this court to allow the appeal.

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[15] In reply, learned counsel for the respondent contended that taking the prosecution's case on its face value, it was not a case of murder but it was a case appropriately falling under s. 304(a) of the PC. Learned counsel pointed out that there was no intention on the part of the respondent to commit the murder of his own wife. The relationship between the respondent and the deceased was amicable and the same has been clearly borne out in the testimony of PW7.

[16] Learned counsel submitted further that the respondent was rightly convicted under s. 304(a) of the PC and no interference by the court was called for.

Issue

[17] The issue that arose for our determination in this instant appeal is whether the respondent has been rightly convicted for an offence of culpable homicide not amounting to murder, punishable under s. 304(a) of the PC or he should have been convicted for an offence of murder, punishable under s. 302 of the same code.

Our Findings

[18] In our view, the discussion on the legal principles governing the distinction between murder and culpable homicide not amounting to murder would be necessary to answer the issue raised.

[19] There are a plethora of cases which discuss the difference between murder and culpable homicide (see *PP v. Megat Shahrizat Megat Shahrur* [2011] 8 CLJ 893; *Tham Kai Yau v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174; *Poh Weng Nam v. PP & Another Appeal* [2013] 4 CLJ 1096; *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364).

[20] The safest way to approach the interpretation and application of ss. 299 and 300 of the PC, ie, "culpable homicide" and "murder" seems to be to keep in focus the keywords used in the various clauses of these sections. In the case of *Phulis Tudu and Anr. v. State of Bihar (now Jharkhand)* AIR 2007 SC 3215, the court provided the following comparative tables to help in appreciating the points of discussion between these 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 which the death 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.

(emphasis added).

[21] The plain reading of the section makes it clear that the first clause of s. 300 reproduces the first part of s. 299. Therefore, ordinarily if the case comes within cl. (a) of s. 299, it would amount to murder.

[22] Clause (b) of s. 299 corresponds with cls. (2) and (3) of s. 300. Clause (b) of s. 299 does not postulate any such knowledge on the part of the offender. Thus, if the assailant had no knowledge about the disease suffered by 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.

[23] A comparison of cl. (b) of s. 299 with cl. (3) of s. 300 would show that the offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine but appreciable. The word "likely" means "probably". When the chances of a thing happening are greater than it not happening, we say the thing will "probably" happen. When the chances of it happening are very high, we say that it will 'most probably' happen. An injury sufficient in the ordinary course of nature to cause death only means that "death will be the most probable result of the injury having regard to the ordinary course of nature".

The expression does not mean that death must result. Thus, the distinction between cl. (b) of s. 299 and cl. (3) of s. 300 would depend very much upon the degree of probability or likelihood of death in consequence of the injury.

[24] Clause (c) of s. 299 and cl. (4) of s. 300 appear to apply to cases in which there is no intention to cause death or bodily injury but knowledge that the act is dangerous and therefore likely to cause death. Both clauses require knowledge of the probability of the act causing death. Clause (4) requires knowledge of a very high degree of probability. The following factors are necessary:

(i) That the act is imminently dangerous,

(ii) That in all probability it will cause death or such bodily injury as is likely to cause death; and

(iii) That the act is done without any excuse for incurring the risk. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide, if it is the most probable result, it is murder. Furious driving and firing at a mark near a public road are cases of these description.

[25] The academic distinction between "murder" and "culpable homicide not amounting to murder" was made clear in the case of *State of AP v. Rayavarapu Punnayya* [1967] 4 SCC 382, where the Supreme Court of India observed as follows:

> ... that the safest way of approach to the interpretation and application of Section 299 and 300 of the Code is to keep in focus the key words used in various clauses of the said sections. Minutely comparing each of the clauses of section 299 and 300 of the Code and the drawing support from the decisions of the court in *Virsa Singh v. State of Punjab and Rajwant Singh v. State of Kerala*, speaking for the court, Justice RS Sarkaria, neatly brought out the points of distinction between the offences, which have been time and again reiterated. Having done so, the court said that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused death of another. Proof of such casual connection between the act of the accused and the death, leads to the, second stage for, considering whether that act of the accused amounts to culpable homicide as defined in s. 299. If the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of s. 300, Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in s. 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of s. 304, depending, respectively, on whether the second or the third clause

A of s. 299 is applicable. If this question is found in the positives, but the case comes within any of the Exceptions enumerated in s. 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of s. 304, Penal Code.

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

C **[26]** Keeping in view the above principles, we proceed to consider whether in this instant appeal a case of murder against the respondent is made out or otherwise the offence said to have been committed would only be culpable homicide not amounting to murder punishable under s. 304(a) of the PC.

[27] For convenience of discussion, we restate the proposition of law that
D in order to establish a case of murder punishable under s. 302 of the PC, it is incumbent upon the prosecution to prove:

(i) the death of the deceased;

(ii) the deceased's death was caused by injury or injuries inflicted on the deceased;

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(iii) the accused had caused the injury or injuries which resulted in the deceased's death; and

(iv) the act causing the death was committed with the *mens rea* under s. 300(a), (b), (c) or (d) ie, if:

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a) the act is done with the intention of causing death;

b) 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;

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c) 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

d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily
H injury as is like to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[28] Element (i) is a non-contentious issue. It is a common ground that the
I investigating officer (PW13) had seen the body of the deceased at the scene and had together with the deceased's son (PW8), positively identified the deceased at the mortuary for the purpose of post mortem.

[29] As regards element (ii), the learned trial judge had appraised the evidence of the pathologist (PW1), as well as her post mortem report (exh. P6). PW1 concluded that the cause of death was the stab wound on the chest which was inflicted by a sharp object with one sharp edge and blunt edge akin to exh. P16a. A

[30] As regards element (iii), the prosecution relied heavily on the evidence of PW7. Therefore, it is incumbent upon us to scrutinise her evidence carefully. PW7 testified that she had witnessed the tussle between the deceased and the respondent. PW7 deposed that she was sitting beside the house and overseeing her children before the brawl started. She went on to describe that the respondent had attempted to sooth the crying baby by rocking the swing but failed miserably. The deceased then came out from the kitchen and rocked/carried (digendong) the baby to sleep. After the deceased had managed to put the baby to sleep, she went back to the kitchen and continued her chores. When asked whether the deceased was angry, PW7 replied: 'bisinglah dia punya mulut sambil bersihkan ikan.' B C D

[31] According to PW7, she then entered her kitchen and heard the deceased cry out faintly but PW7 paid her no mind thinking that the deceased must have suffered a hot water burn. PW7 was shocked when she heard the deceased cry out again in pain (loudly). PW7 then saw the respondent standing at the kitchen door with one hand gripping the deceased's neck and the other holding a knife. The deceased struggled against him and fought to get away from the respondent. PW7 ran to the neighbour's house and shouted for assistance. PW7 was certain that there was no one else present at the vicinity at the material time. PW7 had stood firm and remained unshaken in the cross-examination and nothing has been elicited to dislodge her testimony. E F

[32] In his judgment, the trial judge found that there was no material before him to disbelieve the evidence of these two witnesses. His Lordship, after having considered the totality of PW7's testimony, coupled with PW8's evidence, held that it was the respondent who had inflicted the injuries which caused the deceased's demise. The respondent's conduct of putting his hand on the deceased's neck was also found to be consistent with the fatal injury which was directed backward. G

[33] It was contended by learned counsel for the respondent at trial that the deceased was assaulted by an unknown female because an unidentified DNA profile was found at the scene. With respect, the contention was misconceived. Out of all the human bloodstains taken and analysed, all proved to belong to either the deceased or the respondent, except a swab marked 'E3' or exh. P19. We noted that the learned trial judge had specifically addressed this issue at p. 274 of the appeal record as follows: H I

> The defence submitted that there is a possibility that someone else, other female who is still at large, inflicted those injuries on the deceased. However, as I have ruled earlier, the prosecution had established through

A its witnesses that there was no other person at the crime scene at that material time except the accused and the deceased. If indeed it was true that there was other female who inflicted the injuries on the deceased, the accused should have given assistance to his wife but instead he stabbed himself to commit suicide.

B **[34]** The prosecution's case is based upon circumstantial evidence. The law relating to circumstantial evidence is well settled. Circumstantial evidence can be the sole basis for a conviction provided that the condition precedents before conviction on circumstantial evidence are fully established. The conditions are:

C (i) The circumstances from which the conclusion of guilt is to be drawn should be fully established;

(ii) The facts so established should be consistent with the hypothesis of the guilt of the accused;

D (iii) Circumstances should be conclusive in nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion to be consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

E (See *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1; *Mazlan Othman v. PP* [2013] 1 CLJ 750; [2013] 1 AMR 615; *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; *Chan Chwen Kong v. PP* [1962] 1 LNS 22.)

[35] In *Joseph v. State of Kerala* [2005] 5 SCC 197 at p. 203, the Supreme F Court of India had explained under what circumstances conviction can be based purely on circumstantial evidence. It is observed, that:

> … it is often said that though witness may lie, circumstances will not, but at the same time it must cautiously be scrutinised to see that the incriminating circumstances are such to lead only to a hypothesis of guilt G and reasonably exclude every possibility of innocence of the accuse. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by peculiar facts and circumstances of each case. The whole effort and endeavour in the case should be to find out whether the crime was H committed by the accused and the circumstances proved from themselves into a complete chain unerringly pointing to the guilty of the accused.

[36] We agreed with the learned trial judge's finding on element (iii) that there are sufficient circumstantial evidence that proved the nexus between the appellant and the deceased's death. The evidence, though circumstantial, I is so cogent and strong such that it allowed the learned trial judge to draw the only irresistible inference that the respondent is the one who caused the deceased's death.

[37] The next element is intention or *mens rea*. As stated in the opening statement, the prosecution relies on limb (c) of s. 300 of the PC. Intention or *mens rea* is not something which is capable of being established by direct evidence; it is a matter of inference. It could be gathered from all the facts and circumstances prevailing in the case. There are an abundance of literature in this area of jurisprudence (See *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215; [1999] 4 MLJ 497, *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174).

[38] It has been observed in *Ratanlal and Dhirajlal Law of Crimes,* 25th edn at p. 1304 that:

> Intention must be inferred not merely from the natural consequences of his act but from the act itself, and as the natural consequences of an act of the kind in question would be death.

[39] Limb (c) under s. 300 of the PC is in *pari materia* with the third limb of the Indian PC. In *Virsa Singh v. State of Punjab* AIR 1958 SC 465, V Bose J, speaking for the court, explained the meaning and scope of cl. 3. It was observed at p. 467 that the prosecution must prove the following facts before it can bring a case under s. 300 third limb:

> Firstly, 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 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, fourthly, it must be proved that the injury of the type just described made up of these 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.

[40] V Bose J explained further the third ingredient in the following words at p. 468 of the judgment:

> 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 nor 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.

[41] These observations of V Bose J have become *locus classicus*. The test laid down in the case of *Virsa Singh* is now ingrained in our legal system and has become part of the rule of law. Thus, to sustain a charge of murder under limb (c) to s. 300 of the PC, the prosecution must prove by evidence, either direct or circumstantial, from prosecution witnesses that the injury sustained by the deceased was intentionally caused by the accused. For the second part of the same limb (c), the prosecution must lead evidence through a medical doctor that such injury was sufficient in the ordinary course of nature to cause the death of the deceased. This part of the enquiry is purely objective and has nothing to do with the intention of the offender. If the offender inflicts injury of that kind, he must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.

[42] In this instant appeal, there was the evidence from the prosecution witnesses ie, PW7 and PW8, who had testified to the effect that the injuries sustained by the deceased was attributable to the respondent. A sharp knife was used in the commission of the crime and the deceased had sustained several stab wounds on the vital part of her body. In the absence of other circumstances which would either totally or partially negate criminal intention, the respondent was deemed to have intended the consequences of his acts ie, he had intended the injuries which were inflicted by him on the deceased's chest which, objectively, is a critical part of a human anatomy.

[43] We now turn to consider the evidence adduced by the prosecution that would evince the nature of the injury sustained by the deceased. We found that the prosecution had established the second part of limb (c) through PW1's testimony. PW1 found that the cause of death was a stab wound (injury No. 7) that was directed backward cutting the intercostal muscle, the pericardium, the ascending aorta, the right atrioventricular and the right atrium. PW1 testified that the said injury was sufficient in the ordinary course of nature to cause death. PW1 also stated in her evidence that the deceased was stabbed repeatedly and it was not accidental.

[44] In our view, the injury sustained by the deceased was fatal when the main artery was severed. This clearly evinced the intention on the part of the respondent to cause bodily injury to the deceased. As the evidence of the prosecution stood at the end of its case at the High Court trial, we were of the considered view that the instant appeal case would fall squarely within the ambit of s. 300 of the PC. In the absence of any evidence to the contrary, the respondent who had inflicted these injuries must have intended to kill the deceased. We found that the learned trial judge was right to hold that the prosecution had proved a *prima facie* case of murder and to call the respondent to enter defence upon the same. This in turn meant that the evidence adduced by the prosecution must be such that it can be overthrown only by evidence in rebuttal (See *Balachandran v. PP* [2005] 1 CLJ 85).

[45] The defence raised by the respondent in the instant appeal was a mere denial and that part of the evidence has been summarised and alluded to in para. 13 of our judgment. The learned trial judge had stated in unequivocal terms at p. 277 of the record of appeal that:

> I do not believe the evidence of the accused that he did not stab the accused. The prosecution had adduced overwhelming evidence to show that it was the accused that inflicted the injuries on the deceased.

[46] However, the learned trial judge in reliance of the case of *Tham Kai Yau & Ors v. PP* [1977] 1 MLJ 174, went on to amend the charge under s. 302 of the PC to one under s. 304(a) of the same Code on the following grounds:

> I am in doubt that the accused had the intention to kill the deceased. I find that the prosecution did not establish that the accused had the intention to kill the deceased …
>
> In the instant case, based on the nature of injuries sustained by the deceased, there was evidence of an intention on the part of the accused to cause bodily injury to the deceased. However, having made a fine distinction between section 299 and section 300 I am of the view that based on the nature and number of injuries inflicted on the deceased, the accused had no intention to cause death to the deceased.
>
> I believe being sick for about 10 days, the deceased must have not been able to bear the mumbling and nagging by the deceased and this had triggered him to stab the deceased … I believe there was a physical fight between the accused and the deceased where the accused punched the deceased in the mouth before a knife was used to inflict the fatal injury …
>
> I am of the opinion that in view of the injuries sustained by the deceased and given the circumstances the accused was then in, there was evidence of an intention on the part of the accused to cause bodily injuries on the deceased (which is likely to cause death).

[47] With respect, the learned High Court Judge fell into a serious error. In *Tham Kai Yau (supra)*, having regard to the weapon (chopper) used to cause the multiple injuries leading to shock and haemorrhage, it would be a case under limb (c) of s. 300 PC under normal circumstances. However, the pathologist's evidence was silent in respect of the nature of the injuries and its likely and natural effects. The Federal Court found that the absence of such positive statement of opinion emanating from the medical expert was fatal to the charge of murder that was premised upon limb (c) to s. 300 of the PC. Since there was a doubt created, such doubt must be resolved in favour of the accused. However, in the instant appeal, there was clear testimony by the medical expert that the injury intentionally inflicted was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, the instant appeal was not a case which could be brought within the lesser offence of culpable homicide not amounting to murder in view of the nature of the medical evidence which we have alluded to earlier.

[48] It is useful to note here that the respondent had not taken the plea that his case fell in any of the exceptions to s. 300 of the PC. On the contrary, he has taken the plea that he did not stab his wife which resulted in the death of the deceased. Therefore, the learned trial judge was in error in reducing the charge under s. 300 to one under s. 304(a) on the ground that the respondent stabbed the deceased because she had subjected him to constant nagging.

[49] Where such injuries which are intentionally inflicted by the respondent on the deceased, which were established by the pathologist (SP1) as being sufficient in the ordinary course of nature to cause death, it will indeed be a travesty of justice to hold that the respondent was guilty only of the lesser offence of culpable homicide not amounting to murder and punishable under s. 304(a) of the PC.

Conclusion

[50] In the premises, we found that the learned High Court Judge had erred in finding the respondent guilty for the offence punishable under s. 304(a) of the PC. The resultant effect of our finding is the allowance of the appeal by Public Prosecutor. The decision of the learned trial judge was set aside and substituted with a conviction for murder, punishable under s. 302 of the PC. The respondent was sentenced to death as mandatorily prescribed by law. So ordered.