Md.Rafique @ Chachu vs State Of West Bengal on 21 November, 2008

Author: Arijit Pasayat

Bench: Mukundakam Sharma, Arijit Pasayat

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 828 OF 2006

Md. Rafique @ Chachu ...Appellant

Versus

State of West Bengal ...Respondent

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of a Division Bench of the Calcutta High Court which by the impugned judgment upheld the conviction of the appellant for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the `IPC') while setting aside the conviction under Section 398 IPC as done by learned Additional Sessions Judge, Alipore, in connection with Sessions trial No.6 (1) of 1997.

2. Prosecution case in a nutshell is as follows:

> On 1st August, 1996, at about 11.40 in the night the present appellant along with others came in a white Ambassador car having fake number plate in front of the grocery shop under the name and style "Prabhat Stores"
>
> situated at 7/1, Bampass Road, Calcutta-29. The persons who came in the Ambassador car were armed with weapons like pistol, nepala etc. and they entered into the grocery shop and demanded key of the cash box from the proprietor of the shop namely Gulab Mehata (hereinafter referred to as the `deceased'). At that

relevant time Gulab Mehata alongwith his sons Mukesh Mehata was about to take their dinner and the FIR maker Shyam Mehata just came inside the shop with drinking water. Since Gulab Mehata refused to hand over the key of the cash box the present appellant shot at the deceased from the front side at his chest and on receiving the injury, he fell down and thereafter the appellant and other accused persons inflicted cut injuries on the person of the deceased. The miscreants also assaulted Mukesh Mehata with the butt of the revolver. Soon after the occurrence, hearing the alarm of the FIR maker, Shyam Mehata and his brother Mukesh Mehata, the neighbours of the locality rushed in the shop and Gulab Mehata and Mukesh Mehata were taken to the nearby hospital where subsequently Gulab Mehata succumbed to his injuries. One of the neighbours informed Tollygunge Police Station immediately about the occurrence and Tollygunge Police Station officials soon thereafter arrived at the spot and started investigation. On completion of the investigation, police submitted the charge sheet against the present appellant along with others under Section 302 read with Section 34, Section 307 read with Section 34 and Section 398 read with Section 34 IPC. Since the accused persons pleaded innocence trial was held.

Before the High Court the learned counsel for the appellant accepted that there was no challenge to the fact relating to the occurrence. It was also conceded that from the evidence of the FIR maker and also from the evidence of the other witnesses examined during the trial it was established that the present appellant was physically present inside the shop room. It was also conceded that there was little scope to deny the prosecution charge that accused had assaulted the deceased Gulab Mehata with the help of fire arm. It was, however, submitted that the circumstances under which firing has been done were not very clear. Brother of the FIR maker who was also injured at the time of occurrence did not identify the appellant as the person who shot at his father and, therefore, there was scope to raise a doubt as to whether the appellant with the intention of causing death to Gulab Mahata shot at him. In other words, it was submitted that a case under Section 302 is not made out. The High court did not accept this plea, though it accepted the stand that there was no scope for the conviction under Section 398 IPC. The stand taken before the High Court was re-iterated by learned counsel for the appellant. In support of the appeal, it was submitted that the High Court has erroneously recorded certain concessions which in fact were not made. It is submitted that in any event, no offence under Section 302 IPC is made out. It is also submitted that there was no identification of the appellant as claimed.

3. Learned counsel for the State on the other hand submitted that the factual scenario clearly established the commission of offence under Section 302 IPC.

4. So far as the aspect of concession is concerned it is to be noted that there is no ground taken even in the memorandum of appeal that there was no concession as recorded by the trial Court.

5. It would be logical to first deal with the plea relating to absence of concession. It is to be noted that the appellant conceded certain aspects before the High Court. After having done so, it is not open to the appellant to turn around or take a plea that no concession was given. This is clearly a case of sitting on the fence, and is not to be encouraged. If really there was no concession, the only course open to the appellant was to move the High Court in line with what has been said in State of Maharashtra v. Ramdas Shrinivas Nayak (1982 (2) SCC 463). In a decision Bhavnagar University v. Palitana Sugar Mill (P) Ltd. (2003 (2) SCC 111) the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary. The above position was highlighted in Roop Kumar v. Mohan Thedani (2003) 6 SCC 595).

6. This brings us to the crucial question 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 `murders' are `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 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.

7. 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	Subject to certain exceptions culpable homicide is murder caused is done -
if the act by which the	death is caused is done -
	INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to likely to caus the person to is caused; or
	(3) With the in causing bodily person and the intended to be is sufficient i ordinary course to cause death;
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 probability ca such bodily in likely to caus without any ex incurring the death or such mentioned abov

8. 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.

9. 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" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

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

11. In Virsa Singh v. State of Punjab, (AIR 1958 SC 465), Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

12. The ingredients of clause "Thirdly" of Section 300, IPC 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".

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 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 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."

13. 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."

14. 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.

15. 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 Section 300 clearly brings out this point.

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

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

18. 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), Augustine Saldanha v. State of Karnataka (2003 (10) SCC 472), Thangaiya v. State of Tamil Nadu (2005 (9) SCC 650) and Sunder Lal v. State of Rajasthan (2007 (10) SCC 371) and Kandaswamy v. State rep. by the Inspector of Police (SLP (Crl.) No.5134/2006 disposed of on 17.7.2008)

19. Coming to the identification aspect the Judicial Magistrate who conducted the Test Identification Parade has clarified the position. It has been stated that on 7.10.1996 there could not be identification of the present appellant because the wrong person was put in the TI Parade. The real suspect, i.e. the present appellant was not put in TI Parade and this aspect has been noted in the report relating to TI Parade. Subsequently, TI Parade was held where the appellant was identified.

20. It is further relevant to note that during trial the present appellant escaped from jail custody at the time of transporting from Alipore Jail to the Court.

21. Coming to the question as to whether the offence committed by the appellant is covered by Section 302 or Section 304 IPC. It is to be noted that the accused appellant shot at the deceased from his fire arm as a result of which he sustained grievous injuries and died in the hospital.

22. There are two eye witnesses to the occurrence i.e. PWs 12 and 24. Shyam Prasad Mehata (PW-12) was the informant while PW-24 was another eye witness of the occurrence. They are sons of the deceased and had sustained injuries in the incident.

23. According to PW-12 on the date of occurrence he had carried food for his father and elder brother as usual around 11.30 p.m. He was talking to his father and his father asked him to fetch drinking water from the tubewell. Shortly thereafter while he was standing in front of the counter of the shop room, one Ambassador car stopped in front of the shop room from which six persons alighted and two persons remained inside the car. All the six persons were armed with various weapons out of which two were armed with revolvers. They trespassed to the shop room and demanded keys of the almirahs and when PW-24 stated that he did not have the same, one of them assaulted his elder brother with the butt of the gun four times, thrice on the head and one near the eye side as a result of which he received blood injuries. He tried to save his elder brother. At that time the present appellant shot at his father. To the similar effect is the evidence of PW-24. The doctor PW-22 had stated that death was due to the effect of the gun shot injury.

24. Above being the position there is no merit in the plea that the offence is not covered by Section 302 IPC.

25. The appeal fails and hence dismissed.

.....J. (Dr. ARIJIT PASAYAT) .....J. (Dr. MUKUNDAKAM SHARMA) New Delhi, November 21, 2008