Paul vs The State Of Kerala on 21 January, 2020

Equivalent citations: AIR 2020 SUPREME COURT 966, AIRONLINE 2020 SC 50, (2020) 1 ALLCRILR 358, (2020) 1 CRIMES 186, (2020) 2 SCALE 273

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Bench: K.M. Joseph, Sanjay Kishan Kaul

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.38 of 2020

PAUL ... APPELLANT

VERSUS

STATE OF KERALA ... RESPONDENT

J U D G M E N T

K.M. JOSEPH, J.

1. By the impugned judgment the High court has affirmed the Judgment of the learned Principal Sessions Judge, Ernakulam convicting the appellant under section 302 of the Indian Penal Code (for short "IPC") and sentencing him to rigorous imprisonment for life and a fine of Rs.10,000/-.

2. The deceased was the wife of the appellant.

3. The appellant and his mother were charge-sheeted under Sections 498-A and 302 read with Section 34 of the IPC alleging cruelty and for causing the death of 16:40:55 IST Reason:

> the appellant's wife. By order dated 18.2.2005, the accused were acquitted. Thereafter, the mother of the appellant expired. A Division Bench of the Kerala High Court vide judgment dated 29/03/2012 however, allowed the criminal appeal filed by the State against acquittal and set aside the acquittal insofar as it related to the appellant and the matter was remanded back with a direction to dispose of the case by continuing proceedings from the stage of examination under Section 313 Cr.PC. It is after the remand that the Principal Sessions Judge, Ernakulam, convicted the appellant under Section 302 of the IPC as we have already noted. The High Court by the impugned judgment has concurred with the view taken by the trial Court.

4. We heard Mr. Renjith B. Marar, learned counsel for the appellant and learned counsel appearing on behalf of the respondent. Notice was issued in the SLP noticing that the counsel for the appellant has confined the submission to the plea of alteration of the conviction under Section 302 of the IPC to under Section 304 Part-II of the IPC. Learned counsel for the appellant would point out that this is a case where the deceased though conceived a child there was an abortion. She had depression. The appellant was given to drink on the fateful night. According to the prosecution case there was a quarrel. He would point out that though it is true that the appellant may have set up a case that his wife has committed suicide that should not detract the court from considering the case as per law. Expatiating he contended that appellant must be extended the benefit of exception 4 to Section 300 of the IPC which declares that culpable homicide is not murder if it is committed in a sudden fight without their being pre-meditation and in the heat of passion upon a sudden quarrel without the offender taking undue advantage and acting in a cruel and unusual manner. The explanation to Exception 4 to Section 300 undoubtedly provides that it is immaterial in such a case which party offers the provocation or commits the first assault. Learned counsel would point out that according to the prosecution version, appellant in fact, on that evening went to the house of PW 7 to PW9 with whom he had drinks. The deceased went there on account of his drinks. He had to be supported back home by the wife. He relied on the following judgments:

> (1) 1976(2) SCC 798 Par tap v. State of Uttar Pradesh (2) 1996 (6) SCC 457 Periasami and Another v. State of Tamil Nadu (3) 1998(4) SCC 336 State of U.P. v. Lakhmi He would also submit that the Court has found that the appellant has suffered injuries. This strengthened the appellant's case based on their being a quarrel and therefore this is a fit case where the conviction must be altered from Section 302 of the IPC to Section 304 Part II of the IPC. He points out that the court has acquitted him of the charge under Section 498A which means there was no matrimonial cruelty practised by the appellant on his late wife.

5. Per contra, the learned counsel for the respondent-State strenuously supported the order of the High Court. He would point out that this is a clear case of murder by throttling.

PROSECUTION CASE

6. The appellant married Jessy on 31.8.1997. Ever since marriage, it is the case of the prosecution that Jessy was being subjected to physical and mental cruelty in the hands of appellant and his mother. On 11.10.1998, the fateful day, the mother of the appellant created scene at their home. Being depressed, the deceased due to unbearable harassment, left the home in search of her husband and found him consuming liquor with his friends. The appellant assaulted his wife in front of them. Thereafter, on the same night at about 11.00 p.m., the appellant throttled her to death.

21 witnesses were examined on the side of the prosecution. P-1 to P-18 were the documents which were marked. C-1 is the chemical analysis report. In the judgment rendered by the High Court in the first round of litigation where the trial court had acquitted the appellant and his mother, the Division Bench of the High Court noticed that all the occupants of the matrimonial home of the deceased turned hostile. PW2 to PW6, PW12 and PW14 are the brothers and sisters-in- law of the

appellant. PW7 to PW9 were the neighbours. These witnesses turned hostile. PW1, the brother of the deceased and PW 10, the mother of the deceased undoubtedly abided by the prosecution version. The appellate Court noted that the appellant did not deny the fact that he and his wife were available in the bed room in the night. He did not take up any definite stand as to how the injuries were sustained by the deceased. At this point of time, it is apposite to refer to the injuries. The following are the ante- mortem injuries which are noted in Exh.P9 post-mortem certificate which stood proved by PW16, Dr. Siva Sudan:

> "1. Contusion 3x3x0.5 cm on the forehead in midline, 4 cm above the root of nose.
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> 2. Abrasion 1x0.2cm vertical on left side of face, 3cm on front of lobule of left ear.
>
> 3. Abrasion 0.8 cm x 0.3 cm almost horizontal on right side of neck, 2.5 cm to right of midline and 2.5 cm below the jaw bone. Underneath the sterno thyroid muscle was found bruised over on area 2x1.5 cm. The right superior horn of thyroid cartilage was found fractured with infiltration of blood around.
>
> 4. Abrasion 1.5x0.2 cm almost vertical on front of right lower chest, 24 cm below the right collar bone and 8 cm to right of midline.
>
> 5. Contusion 2.5x2x0.5 cm on outer aspect of left arm, 8cm below the tip of shoulder.
>
> 6. Abrasion 1x0.2 cm on the back of inner aspect of left elbow.
>
> 7. Contusion 1.5x1.5x2cm on the back of right forearm 15 cm above the elbow.
>
> 8. Arc like healing abrasion 3x0.1 cm on front of chest with its convexity towards right side, 10 cm below the right collar bone and 1 cm to right of midline (coveted with easily removable black scab)"

7. Resuming the narrative, the High Court in the earlier round found that appellant toed the line taken in the convenient statements of PW2 and PW 3 which were contrary to their case diary statements that the deceased has committed suicide by hanging. It was noted further by the High court that when the evidence of the PW2 and PW3 was put to him he agreed with the statement that the deceased has committed suicide. The judgment further reveals that the High Court found that a proper examination under Section 313 Cr.PC had not been conducted by the Sessions Judge. It is accordingly that the judgment setting aside the acquittal was made. The High Court also directed that the trial Judge must pointedly consider the play of Section 106 of the Evidence Act. The Sessions Judge was directed to dispose of the matter by continuing proceeding afresh from the stage of 313 Cr.PC.

examination of the accused.

8. We may further notice that when the Principal Sessions Judge took up the matter after remand, he has entered the following findings inter alia. It was found that the death was an immediate result of the blunt force applied on the neck of the deceased. The learned Judge went on to find that a case under Section 498A was not made out. The appellant and the deceased-wife were living in a separate bed room. PW1 noted marks of physical violence on the body of the deceased. PW1, in his chief examination deposed that the brother of the appellant and two others informed that his sister was hospitalised due to sore throat. Later he was informed that she died due to hanging. He has testified that he saw swelling on the forehead, contused abrasion on the left cheek of his sister apart from marks of throttling on the neck and nail marks on those regions. It was found by the learned Judge that there was no cross examination of these aspects by PW1. The court proceeded to question the appellant under Section 313 Cr.PC. He made a written statement. He maintained that he was innocent. He and his wife were living a happy marital life. His wife had dejection and objection about his drinking habit. She was desperate for not having a child. The Court finds an admission by the appellant that on 11.10.1998 PW7 to PW9 and himself consumed liquor at the house of PW7. At about 7.00 pm his wife came there in search of him and he went with her. His version that he was heavily drunk and it was his wife who fully supported him and he was finding it difficult to walk under the influence of alcohol. He admitted to having a separate bed room. An altercation between his mother and his wife is noticed. Since he was under intoxication he could not separate the two. His mother beat him and he sustained injuries on lips. He fell fast asleep. In the early morning he got up for urinating and at that time only he saw the deceased hanging by a shawl tied to the railings in the window and on his crying PW 2 and 3 came to his room. They untied the shawl and the body of Jessy was laid on the bed. This version was noted by the learned Principal Sessions Judge to be a new version and not made at the time of the original questioning under Section 313 Cr.PC or in the cross examination of the prosecution witnesses. The learned Judge went on to notice the swelling on the middle of the forehead, abrasion on the left cheek given in the inquest report. Nail clippings and blood samples was taken from the dead body. Nail clippings was also collected from the appellant. According to the appellant blood in nail clippings was on account of an attempt by the deceased and the appellant to untie the noose around her neck. However the court noted that PW14 doctor has mentioned that the once ligature has fastened firmly around her neck, the victim would become unconscious and he or she would not be able to lift his/her upper limbs to loosen the ligature. The Court further noted that in the written statement under 313 Cr.PC given after remand, it was stated that PW1 and PW3, brothers of appellant, untied the shawl alleged to have been used by the deceased for committing suicide. PW15 also testifies that if the victim scratches the assaultor, blood and part of skin would be present underneath his nail clippings. The version sought to be introduced in the written statement after remand by the appellant that there was a fight between his mother and his wife on the date of occurrence when he was also assaulted by his mother, was found to be an embellished version and unacceptable. The Court also noticed that the incident happened in the bed room of the appellant and that too during night and there was no other person in the room. Therefore, the appellant had a responsibility under Section 106 of the Evidence Act. The appellant was found as having committed murder by throttling and the theory of suicide was found unacceptable. The High Court also noted the case of the appellant that his wife committed suicide at 1.30 a.m. by hanging on the window grill of their room. The High Court agreed that only hypothesis possible was homicide by the appellant. ANALYSIS

9. We can safely conclude on the basis of the material and findings which has been rendered by the courts concurrently that the case of suicide set up by the appellant was a completely false plea. It is clear as day light that the appellant caused the death of his wife by throttling. We have already noticed the injuries. Apart from injuries to the neck, we noticed contusion on the forehead in the midline, upon the mid of the nose, an abrasion on the left side of the face (the cheek). There is contusion on the outer aspect of the left arm and there is an abrasion on the back of the inner aspect of left elbow, contusion on the back of the right forearm. This is apart from injuries 2 and 3 which clearly has been appreciated as indicating death by throttling.

10. In Partap v. State of Uttar Pradesh 1976 (2) SCC 798, there was an exchange of hot words between two persons in regard to water. The dispute escalated and a state of acrimony was attained. A gun was fired. The victim of the gun shot injury lost his life. The plea of the appellant was that deceased was about to strike him with the balla and he fired a shot in self defence. Justice M.H. Beg wrote a concurring judgment agreeing with Justice R.S. Sarkaria that the appellant had established a case that he has acted in his self defence and held as follows:

> "30. The question which arises in this case is: Even if the defence version is not held to be fully established by a balance of probabilities, were there not sufficient pointers in evidence of what was probably the truth which leaked out from some statements of the prosecution witnesses themselves? They had indicated the bellicose and threatening attitude of Ram Nath while he was advancing. Did this not tend to corroborate the defence version that he was actually advancing menacingly armed with a bhala poised for an attack with it when he was shot at?
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> 31. It was held in the case of Rishi Kesh Singh by a majority of a Full Bench of nine Judges of the Allahabad High Court explaining and relying upon the decisions of this Court discussed there (at p. 51):
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> "The accused person who pleads an exception is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused." In that case, the result of a consideration of the decision of this Court in relation to the provisions of Section 105 of the Evidence Act was summed up by me as follows (at pages 97-98):
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> "... an accused's plea of an exception may reach one of three not sharply demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of a prudent man weighing or balancing probabilities carefully. These stages are: firstly, a lifting of the initial obligatory presumption given at the end of Section 105 of the Act; secondly, the creation of a reasonable doubt about the existence of an ingredient of the offence; and thirdly a complete proof of the exception by 'a preponderance of probability', which covers even a slight tilt of the balance of probability in favour of the accused's plea. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he

becomes entitled to acquittal by obtaining a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This, in my opinion, is the effect of the majority view in Parbhoo's case which directly relates to first two stages only. The Supreme Court decisions have considered the last two stages so far, but first stage has not yet been dealt with directly or separately there in any case brought to our notice."

32. Provisions of Section 105 of the Evidence Act, which are applicable in such cases, contain what are really two kinds of burden of the accused who sets up an exception: "firstly, there is the onus laid down of proving the existence of circumstances bringing the case within any of the General Exceptions in the Penal Code, 1860, or, within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence," and, secondly, there is the burden of introducing or showing evidence which results from the last part of the provision which says that "the Court shall presume the absence of such circumstances". The effect of this obligatory presumption at the end of Section 105 of the Evidence Act is that the Court must start by assuming that no facts exist which could be taken into consideration for considering the plea of self-defence as an exception to the criminal liability which would otherwise be there. But, when both sides have led evidence of their respective versions, the accused can show, from any evidence on the record, whether tendered by the prosecution or the defence, that the mandatory presumption is removed. The last mentioned burden is not really a burden of establishing the plea fully but of either introducing or of showing the existence of some evidence to justify the taking up of the plea. The burden resulting from the obligatory presumption is not difficult to discharge and its removal may not be enough for an acquittal."

11. In Periasami and Another v. State of T.N.; 1996 (6) SCC 457, accused, two in number, were alleged to have attacked the deceased. Though the Sessions Judge acquitted the accused, the High Court convicted the two appellants under Section 302 read with Section 34 IPC and another accused under Section 324 IPC. This Court found that the injuries were caused by the appellant with lethal weapons. Dealing with the contention that offence would not be above 304 Part I, the Court noted that though the right of private defence was not set up under Section 313 Cr.PC., absence of such a plea would not stand in the way of the defence based on the exception being set up was the contention taken by the appellant. The Court noted as follows:

"17. While dealing with the said alternative contention we have to bear in mind Section 105 of the Evidence Act, 1872. A rule of burden of proof is prescribed therein that the burden is on the accused to prove the existence of circumstances bringing the case within any of the exceptions "and the Court shall presume the absence of such circumstances". The said rule does not whittle down the axiomatic rule of burden (indicated in Section 101) that the prosecution must prove that the accused has committed the offence charged against. The traditional rule that it is for prosecution to prove the offence beyond reasonable doubt applies in all criminal cases except where any particular statute prescribes otherwise. The legal presumption created in Section 105 with the words "the Court shall presume the absence of such circumstances" is not intended to displace the aforesaid traditional burden of the prosecution. It is only where the prosecution has proved its case with reasonable

certainty that the court can rest on the presumption regarding absence of circumstances bringing the case within any of the exceptions. This presumption helps the court to determine on whom is the burden to prove facts necessary to attract the exception and an accused can discharge the burden by "preponderance of probabilities" unlike the prosecution. But there is no presumption that an accused is the aggressor in every case of homicide. If there is any reasonable doubt, even from the prosecution evidence, that the aggressor in the occurrence was not the accused but would have been the deceased party, then benefit of that reasonable doubt has to be extended to the accused, no matter he did not adduce any evidence in that direction.

18. The above legal position has been succinctly stated by Subbarao, J. (as he then was) in a case where an accused pleaded the exception under Section 84 IPC (Dahyabhai Chhaganbhai Thakkar v. State of Gujarat [AIR 1964 SC 1563 : (1964) 2 Cri LJ 472]):

> "The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code, 1860. This general burden never shifts and it always rests on the prosecution. ... If the material placed before the court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of 'prudent man' the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself."

> 20. Keeping the above legal position in mind, we scrutinised the evidence to ascertain whether the deceased could have been the aggressor. Neither PW 1 nor PW 2 could say how the occurrence started. The possibility that before they reached the place, some events would have already taken place cannot be ruled out. PW 1 and PW 2 overheard the squeal of a pig. They also overheard the sound of a quarrel.

When they reached the scene they saw the carcass of a slain pig lying nearby. The motive suggested by the prosecution was sufficient for the deceased as well to entertain animus towards the second appellant. Further, both sides would have confronted with each other on that morning abruptly without any prior knowledge or inkling that the deceased might go to the plantain grove at the crucial time for answering the call of nature." (emphasis supplied)

12. The Court found that the circumstances were more than enough to install a reasonable doubt that the accused would have picked up a quarrel with the second appellant and other events followed and on this basis they were held liable for culpable homicide not amounting to murder.

13. In State of U.P. v. Lakhmi; 1998(4) SCC 336 the case involved death of the respondent's wife. Respondent and the deceased had two children. The prosecution case was that there were intermittent skirmishes between the couple. The wife accused the appellant of dissipating his money on account of having drinks. During the early hours of the fateful day, it is further alleged that the respondent inflicted blows on the head of the deceased, smashed her skull leading to instant death.

The trial Court convicted the respondent but High Court acquitted him. We may notice paragraph 8. It reads as under:

> "8. As a legal proposition we cannot agree with the High Court that statement of an accused recorded under Section 313 of the Code does not deserve any value or utility if it contains inculpatory admissions. The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality. It has a salutary purpose. It enables the court to be apprised of what the indicted person has to say about the circumstances pitted against him by the prosecution. Answers to the questions may sometimes be flat denial or outright repudiation of those circumstances. In certain cases the accused would offer some explanations to incriminative circumstances. In very rare instances the accused may even admit or own incriminating circumstances adduced against him, perhaps for the purpose of adopting legally recognised defences. In all such cases the court gets the advantage of knowing his version about those aspects and it helps the court to effectively appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstance appearing in evidence against him there is no warrant that those admissions should altogether be ignored merely on the ground that such admissions were advanced as a defence strategy." (emphasis supplied)

14. We, therefore, have no hesitation in holding that a statement made by the accused under Section 313 Cr.PC even it contains inculpatory admissions cannot be ignored and the Court may where there is evidence available proceed to enter a verdict of guilt. In the aforesaid case he specifically stated that he murdered his wife with a Kunda and not with Phali. The Court noted further that there was no merit in the defence sought to be set up under Section 84 of the penal code. However, the Court noted as follows:

> 16. .....However, we have noticed that the accused had adopted another alternative defence which has been suggested during cross-examination of prosecution witnesses i.e. his wife and PW 2 (Ramey) were together on the bed during the early hours of the date of occurrence. If that suggestion deserves consideration we have to turn to the question whether the benefit of Exception I to Section 300 of the IPC should be extended to him?
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> 17. The law is that burden of proving such an exception is on the accused. But the mere fact that the accused adopted another alternative defence during his examination under Section 313 of the IPC without referring to Exception I of Section 300 of IPC is not enough to deny him of the benefit of the exception, if the Court can cull out materials from evidence pointing to the existence of circumstances leading to that exception.

It is not the law that failure to set up such a defence would foreclose the right to rely on the exception once and for all. It is axiomatic that burden on the accused to prove any fact can be

discharged either through defence evidence or even through prosecution evidence by showing a preponderance of probability.

18. In the above context, we deem it useful to ascertain what possibly would have prompted the accused to kill his wife. The prosecution case as noted above, is that the accused was not well-disposed to his wife as she was always speaking against his drinking habits. We are inclined to think that, while considering the manner in which he had suddenly pounced upon his young wife who bore two children to him and smashed her head during the early hours, he would have had some other strong cause which probably would have taken place within a short time prior to the murder. Certain broad features looming large in evidence help us in that line of thinking."

15. The Court went on to hold on analysing the evidence that the features show that the appellant had seen something lascivious between his wife and PW2. This led the Court to find that the respondent was entitled to benefit of Exception I to Section 300 IPC and the respondent was convicted under Section 304 Part I of IPC.

16. There can be no quarrel with the principles which have been laid down. Principles of law however cannot be appreciated or applied irrespective of the facts obtaining in a particular case. There can be no doubt that the burden to prove that the case is made out in a particular case is on the prosecution unless the law declares otherwise. To be murder within the meaning of Section 302 undoubtedly, the offence must be culpable homicide. In order that it is culpable homicide it must fall under Section 299 of the IPC but all acts which amount to culpable homicide do not constitute murder.

17. There can be no doubt that the burden of proving that the case fall within the four corners of any of the exceptions under Section 300 of the IPC is on the accused. It is equally true that even without adducing any defence evidence it may be possible for the accused to discharge the said burden with reference to material appearing by virtue of the prosecution evidence which includes the cross examination of prosecution witnesses. The test is one of preponderance of probability.

18. The fact that a false case is set up by itself may not deprive an accused of the right to establish the fact that the case against him would still be embraced within any of the exceptions under Section 300 IPC. The law does not taboo adopting of the alternate pleas. Ultimately, the question would fall to be decided, no doubt, on the basis of appreciation of evidence and the requirements of law flowing from the particular provision of law. The accused may also be entitled to the benefit of reasonable doubt.

19. Applying the principles, let us examine the facts of this case. It is true, no doubt, evidence was tendered by PW2 and PW3, who it may be noted are the brothers of the appellant, that the wife of the appellant committed suicide. In the original 313 questioning the appellant also took the stand that it is a case of suicide. After the matter was remanded, in the 313 statement the appellant continued to persevere with the stand and set up the case that he was beaten up by his mother following a quarrel between her and his wife and then he fell fast asleep. When he got up for urination in the early morning he saw the deceased hanging. He has categorically stated that PW2

and PW3 came, untied the shawl used by her for committing suicide. It was accepting the plea of the appellant that the High Court in the earlier round had found that he had not been questioned under Section 313 Cr.PC in regard to circumstances which were addressed by the prosecution as evidence of his complicity. The case which is sought to be set up before us revolves around the applicability of exception 4 to Section 3000 IPC which involves inter alia a sudden fight following a quarrel. What is conspicuous by its absence is a plea despite the opportunity he had of indicating about any such quarrel between him and his wife. The case sought to be set up was though is that he was heavily drunk: He was at the residence of PW7: The quarrel ensued between his mother and his wife: She-(deceased) came to the residence of PW7: She has escorted him back. He was beaten by his mother when they reached home following a quarrel between the mother-in-law and daughter-in-law; He fell fast asleep.

20. The evidence including the medical evidence is clear and has been correctly appreciated by two courts. It leads to the only irresistible inference that it was not a case of suicide but an unambiguous case of homicide. The death was caused by throttling. Appellant and his wife were occupying a separate bed room. There is reference to the nail clippings containing blood. The attempt at explaining the same has been correctly dispelled by the trial court.

21. There is a case for the appellant that there were injuries on the appellant. It is to be noted that when there is throttling unless the victim is asleep or unconscious there would be resistance. Injuries on the aggressor are not uncommon. In this case we have also noted the injuries on other parts of body apart from the neck. They indicate acts of violence by the aggressor. In this case we are not even called upon to pronounce on where there is anybody else who would be the aggressor. It is the appellant and appellant alone who can be attributed with the acts which resulted in the death of his wife.

22. Valiant attempt is made by Mr. Renjith B. Marar, learned counsel for the appellant to bring the case within the scope of Section 304 Part-I. He emphasised that proceeding that it is culpable homicide and that he had the intention also to cause the death of his wife, it could still be brought under Section 304 Part- I as the Legislature expressly declares that be it a culpable homicide, it is not the inexorable opening of the doors to an offence under Section 302 IPC but it could despite the intention to cause death being present, be culpable homicide not amounting to murder.

23. In this regard, it must be noticed that the prosecution case about there being a quarrel is about the mother of the appellant creating a scene on 11.10.1998 compelling the deceased to leave home and search her husband out. There is also mention about ill treatment given by the appellant to his wife in front of his friends and it is thereafter in the night the act of the appellant throttling her took place. We are unable to see how exception I to Section 300 IPC which is also pressed into service by the learned counsel for the appellant apply. Exception I requires deprivation of power of control by the accused by virtue of grave and sudden provocation. The grave and sudden provocation must be given by the deceased. No doubt, if death is caused of any other person by virtue of the sudden provocation, by mistake or accident, exception I may apply. Nothing is brought out before us in the evidence to even faintly establish the giving of any provocation leave alone a grave and sudden provocation. Equally, there is no such case undoubtedly set up in the written statement under 313

Cr.PC even after the remand.

24. The case of exception 4 is no different in our view in its inapplicability to the facts. There is no material for us to come to the conclusion that there occurred a sudden quarrel leading to a sudden fight going by the version furnished by the appellant in his written statement under 313 Cr.PC which statement also recites that he fell fast asleep. Till such time there is no hint even of any sudden fight or sudden quarrel. It must also be appreciated that under Section 106 of the Evidence Act facts within the exclusive knowledge of the appellant as to what transpired within the privacy of their bed room even must be established by the appellant. The fact that appellant went about setting up of a palpably false case even at the late stage of filing the written statement under 313 after remand trying to attribute death by hanging by his wife falsely.

25. We may no doubt notice Section 86 of the IPC. Section 86 reads as follows:

> "86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.—In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

26. Section 86 of the IPC enunciates presumption that despite intoxication which is not covered by the last limb of the provision, the accused person cannot ward off the consequences of his act. A dimension however about intoxication may be noted. Section 86 begins by referring to an act which is not an offence unless done with a particular knowledge or intent. Thereafter, the law giver refers to a person committing the act in a state of intoxication. It finally attributes to him knowledge as he would have if he were not under the state of intoxication except undoubtedly, in cases where the intoxicant was administered to him either against his will or without his knowledge. What about an act which becomes an offence if it is done with a specific intention by a person who is under the state of intoxication? Section 86 does not attribute intention as such to an intoxicated man committing an act which amounts to an offence when the act is done by a person harbouring a particular intention. This question has engaged the attention of this Court in the decision in Basdev v. State of Pepsu AIR 1956 SC 488. In the said case the appellant, a retired military official went to attend a wedding. The appellant was very drunk. He asked a young boy to step aside a little so that he could occupy a convenient seat. The boy did not budge. The appellant fired from a pistol, he had with him, in the abdomen of the boy which proved fatal. This Court inter alia held as follows:

> "4. It is no doubt true that while the first part of the section speaks of intent or knowledge, the latter part deals only with knowledge and a certain element of doubt in interpretation may possibly be felt by reason of this omission. If in voluntary drunkenness knowledge is to be presumed in the same manner as if there was no drunkenness, what about those cases where mens rea is required.

> Are we at liberty to place intent on the same footing, and if so, why has the section omitted intent in its latter part? This is not the first time that the question comes up for consideration. It has been discussed at length in many decisions and the result may be briefly summarised as follows:-
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> 5. So far as knowledge is concerned, we must attribute to the intoxicated man the same knowledge as if he was quite sober.

But so far as intent or intention is concerned, we must gather it from the attending general circumstances of the case paying due regard to the degree intoxication. Was the man beside his mind altogether for the time being?

If so it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking, and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts.

6. Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things. Even in some English decisions, the three ideas are used interchangeably and this has led to a certain amount of confusion." (emphasis supplied)

27. In this case there is no evidence about how drunk the appellant was or whether the drunkenness in any way stood in the way of the appellant forming the requisite intention. There is also gap between the time when he was allegedly found drinking and the time of the crime. Moreover, in his 313 statement, according to him, he has stated that he fell fast asleep and he got up to see his wife hanging. The principle that would apply therefore is that appellant can be presumed to have intended the natural consequences of his act.

28. As far as the contention that appellant should be handed down conviction under Section 304, Part-I, we are not impressed by the said argument. As to what constitutes murder under Section 300 of the IPC and what constitutes culpable homicide amounting to murder has been a vexed issue and the subject matter of a large body of case law. Section 300 of the IPC declares that except in those cases which are specifically excepted culpable homicide is murder in situations which have been specifically laid down. There are commonly referred to as firstly, secondly, thirdly and fourthly under Section 300 of the IPC. If the intention of the Legislature was that culpable homicide would amount to murder if it did not fall in any of the five exceptions enumerated in Section 300 of the IPC. What was the need for the Legislature to 'waste words' as it were by declaring that culpable homicide is murder if the act fell within any of the 4 clauses in Section 300 of the IPC? In order that an act is to be punished as murder, it must be culpable homicide which is declared to be murder. Murder is homicide of the gravest kind. So is the punishment appropriately of the highest order. Murder requires establishment of the special mens rea while all cases of culpable homicide may not

amount to murder. This Court in the judgment in State of Andhra Pradesh v. Rayavarapu Punnayya and Another 1976(4) SCC 382 inter alia held as follows:

> 21. From the above conspectus, it emerges 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 the death of another. Proof of such causal 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 Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the 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 Section 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 Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code.

(emphasis supplied)

29. As far as this case is concerned, there can be no doubt that the act which led to the death has been committed by the appellant. We can safely proceed on the basis also that it amounts to culpable homicide. Going by the circumstances present in this case and in particular injuries suffered, it is quite clear that the act would fall within the scope of Section 300 of the IPC. If the act results in culpable homicide which does not amount to murder, then and then alone the question arises of applying Section 304 Part-I or Part- II as the case may be. Appellant cannot extricate himself from the consequence of his act attracting the ingredients of murder by pointing out Section 304 Part I which also contains the expression, "the act with the intention to cause death'. The implications are vastly different. Section 304 of the IPC would apply only in a case where culpable homicide is not murder. If the act amounting to culpable homicide satisfies any of the four criteria to bring it under the offence of murder, being mutually exclusive, there can be no scope for applying Section 304 of the IPC. On the other hand, if the act is culpable homicide as falling in any of the five exceptional circumstances mentioned in Section 300 and then it would amount to culpable homicide not amounting to murder. In cases where the accused is able to establish he is entitled to the benefit of any of the exceptions under Section 300 then his case may be considered under Part-I or Part-II of Section 304 of the IPC depending on whether the act which caused the culpable homicide was done with the intention of causing death or with knowledge that it is likely to cause death. That apart cases of culpable homicide which do not attract any of the four situations under Section 300 would still be culpable homicide to be dealt with under Section 304 of the IPC.

However, if the case falls under any of the four limbs of Section 300, there would be no occasion to allow Section 304 to have play. If the act which caused the death and which is culpable homicide is done with the intention of causing death, then it would be murder. This is however subject to the act not being committed in circumstances attracting any of the 5 exceptions. Appellant's contention that it would be culpable homicide not amounting to murder and reliance placed on the words 'done with the intention of causing death' in Section 304 Part-I is wholly meritless.

30. The act of the appellant in the facts of this case clearly show that he has throttled his wife. None of the exceptions in Section 300 are attracted. The act amounts to murder within the meaning of Section 300 of the IPC. The upshot of the above discussion is, we see no reason to interfere with the impugned judgment. The appeal stands dismissed.

.....J. (SANJAY KISHAN KAUL) .....J. (K.M. JOSEPH) New Delhi, January 21, 2020.