Shankar Narayan Bhadolkar vs State Of Maharashtra on 9 March, 2004

Equivalent citations: AIR 2004 SUPREME COURT 1966, 2004 AIR SCW 1511, 2004 AIR - JHAR. H. C. R. 1428, 2004 (2) UJ (SC) 861, 2004 (3) SCALE 78, 2004 (3) ACE 19, 2004 CRI(AP)PR(SC) 510, 2004 ALL MR(CRI) 1144, (2004) 16 ALLINDCAS 78 (SC), (2004) 2 PAT LJR 691, 2004 (2) SLT 498, 2005 (9) SCC 71, 2005 SCC(CRI) 22, 2004 (1) LRI 890, (2004) 3 JT 211 (SC), (2004) 2 BLJ 185, 2004 UJ(SC) 2 861, (2004) 1 CURCRIR 412, (2004) 3 SUPREME 652, (2005) 2 ALLCRIR 1695, (2004) 3 SCALE 78, (2004) 2 BOMCR(CRI) 590, (2004) 3 KCCR 1403, (2004) 49 ALLCRIC 13, (2004) 1 CHANDCRIC 365, (2004) 3 ALLCRILR 327, (2004) 28 OCR 455, (2004) 2 RECCRIR 508, (2004) 3 GCD 1766 (SC), (2004) 2 EASTCRIC 187, (2004) SC CR R 800, 2004 CHANDLR(CIV&CRI) 330, (2004) 18 INDLD 541, 2004 (1) ALD(CRL) 1020, 2004 (2) BOM LR 337, 2004 BOM LR 2 337

Author: Arijit Pasayat

Bench: Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  309 of 1997

PETITIONER:
Shankar Narayan Bhadolkar

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 09/03/2004

BENCH:
Y.K. SABHARWAL & ARIJIT PASAYAT

JUDGMENT:
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J U D G M E N T ARIJIT PASAYAT, J.

Pandurang Varambale (hereinafter referred to as the 'deceased') would not have in his wildest dreams on 8.5.1982 dreamt when he left home to attend the invitation extended by the appellant Shankar Narayan Bhadolkar (hereinafter referred to as accused A-1), that he would never return alive. The appellant allegedly shot him dead by a gun when the deceased was in his house in response to his invitation to attend a marriage celebration. The appellant along with his wife

Laxmibai (A-4), son Dinkar (A-3) and one Sambhaji Mahadeo Patil (A-2) faced trial. They were charged for commission of offences punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). Appellant was alternatively charged for commission of offence punishable under Section 302, 201 and Section 25(1A) of the Arms Act, 1959 (in short the 'Arms Act').

The trial Court found the appellant guilty of the offences punishable under Sections 302, 201 IPC and 25 of the Arms Act. The other three co-accused persons were acquitted. Appellant was sentenced to undergo life imprisonment, two years and six months respectively, with fines and default stipulations.

Prosecution version as unfolded during trial is as follows:

> Complainant Dilip Shripati Dalavi (PW-2) had a laundry in the Shivaji Chowk, Kohlapur. There was also a hair cutting shop adjoining his laundry, which was run by Shantaram Mane (PW-4) and Ramchandra Mane. They are friends. The deceased was coming to the said hair cutting saloon and hence he had become their friend. Accused no.1- appellant was also visiting the said saloon and he had also become their friend. On 2.5.1982, accused no.1 had come to the shop of Dilip Dalavi (PW-2) and gave him invitation for dinner arranged in his house at Vadanage, near the limits of Nigave Dumala Village. The said invitation was for the dinner arranged on 8.5.1982. Besides the complainant, accused no.1 also invited Rajendra the brother of the complainant, Shantaram Mane (PW-4) and his brother Rama and another friend Dattu Kurane. Accused no.1 told him that in case they did not attend the dinner, then they will have to pay a penalty of Rs.100/-. At that time, deceased had come to the saloon where this talk was going on. The deceased was also invited by accused no.1 for the said dinner.
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> On 8.5.1982 about 5.30 p.m. the complainant and others left for Vadanage to the village of accused no.1. After reaching the Mace, they moved around and thereafter took meals. A bus was to leave at about 8.00 p.m. for their return journey to Kolhapur. They finished their meals at about 7.30 p.m. Thereafter all the invitees came out of the house and they wanted to catch the bus.
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> One Sambhaji Patil (A-2) and one unknown person entered the house of accused no.1. Deceased also followed them and went inside. As there was some time for catching the bus, the complainant also entered the house of accused no.1 for chewing betal leaves. The bus stop was just in front of the house of accused no.1. The complainant sat on the cot. The deceased was standing on the threshold of the house. The unknown person was standing close to them. Accused no.2 was sitting on the chair in front of him.
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> Accused no.1 lifted the gun, loaded it with cartridge and pointed it towards the deceased and then fired it. The said shot hit on the left side chest of the deceased,

who collapsed and blood started oozing. As soon as deceased fell down, he died instantaneously. As the complainant was afraid, he came out of the house. Rajendra, Shantaram, Ramchandra and Dattu Kurane were outside the house. As soon as he came out of the house, those persons enquired from him about the sound. He disclosed to them that accused no.1 had fired a gun hitting Pandurang. Thereafter they all started towards Vadanage. They went to the house of Sadashiv Khadaka to whom they narrated the incident, because he was their friend. The distance between his house and the house of accused no.1 is about 2 to 3 kms. The brother-in-law of the deceased resides in the same village. Khadake had taken them in his house. Then they went to village Kerli in the bus belonging to the society of Vadanage, because the deceased was from Kerli. Then they went to Mahadeo Varsmble who is the cousin brother of the deceased. They woke him up and told him about the incident. Thereafter they all went to Shripati Chougule and disclosed to him the incident. Then he himself alongwith five others who were present for the dinner came to Karvir Police Station in jeep. Shripati Chougule came to the police station by motorcycle. Complaint was lodged in the Karvir Police Station. It was reduced into writing. On the basis of the said first information report, the Police Inspector Shirawekar registered the offence u/s 302 IPC and also under Section 25 of the Arms Act.

Thereafter Police Inspector visited the spot along with the complainant and his staff in the jeep. The complainant pointed out the house of accused no.1. Police Inspector called out accused no.1 by standing near door. Accused no.1 who came out by opening the latch of the door was arrested. A green lungi which was on the person of accused no.1 was attached under panchanama (Ex.12). On interrogation accused no.1 expressed his willingness to show the well where the corpse of the deceased was thrown. The said well is situate at village Kerli. Accordingly a memorandum was prepared vide Ex.23 in presence of the panchas. Accused no.1 then led them to the well and the dead body of deceased was taken out from the well. It was wrapped in a gunny bag. After opening the gunny bag, the dead body was taken out. It was identified by Sadashiv and others. Accordingly panchanama (Ex.24) was prepared. Under the panchanama muddemal articles nos. 2 and 3 were also attached. Then inquest on the dead body was drawn (Ex.30). The dead body was sent to the doctor for autopsy. Then the Police Inspector arrested accused no.2. He also attached a white Dhoti and Nehru shirt (Art. 4 & 5) of deceased no.2 under panchanama (Ex.14). Then he visited the scene of offence in the morning and drew panchanama (Ex.15). He found some blood stains on the threshold and also on the bench. The floor was cleaned with cow dung. Soiled cow dung was found at the backyard of the house of accused no.1. It was also attached. Statements of witnesses were recorded.

On 30.5.1982 he sent the muddemal articles nos. 1 to 30 and also the viscera and plastic like material forwarded by the Medical Officer, along with his forwarding letter to the Chemical Analyser Pune so also, muddemal article, no.10 the gun was sent to the Ballistic Expert for examination and his opinion. On enquiry it was revealed that the gun (Art.10) was in the name of accused no.3 having a valid licence. The same was attached by him. He obtained a permission from the District Magistrate, Kolhapur (Ex.21) against accused no.1 for having used the gun without valid licence. for his prosecution under the Arms Act. After conclusion of the investigation, charge sheet was

submitted in the Court of Chief Judicial Magistrate, Kolhapur.

The charge was framed against accused nos. 1 to 4 and they pleaded not guilty.

Accused appellant took the plea that on the date of occurrence he had invited 30/40 persons to attend the dinner and the deceased was one of them. He was heavily drunk and was not in a position to walk and also unable to control himself. Apprehending that the deceased might create problems and fall on the road, the appellant dissuaded him from returning to his place and advised him to go on the next day. But the deceased paid little heed. To scarce him, the appellant picked up a gun lying there, loaded the same with blank cartridges which only create noise. But the deceased tried to snatch it from him. In the scuffle when the deceased pulled the barrel of the gun accidentally it got fired and deceased sustained injuries on his chest. After seeing the injury, the appellant was totally shocked and fled away. The other accused persons denied their involvement in the occurrence. The trial Court as noted above, found the co-accused not guilty but recorded the conviction so far as the appellant is concerned under Sections 302, 201 IPC and Section 25(1A) of the Arms Act, and imposed sentences.

The plea before the High Court which, did not find acceptance, was that there was no offence involved as the act was covered by Section 80 IPC. In any event, there was no element of culpability to bring home accusations of Section 302. At the most it was covered by Section 304A. Finally, it was submitted that even if the prosecution version is accepted in its toto, the case would be covered under Section 304 Part II. The trial Court held that though intention may not be attributed for causing death, it cannot be said that the accused did not have the requisite knowledge and the case was covered under clause fourthly of Section 300. In appeal by the impugned judgment, the High Court upheld the conviction and sentence. It, however, held that the case was really covered by clauses Firstly and Thirdly of Section 300.

In support of the appeal, learned counsel for the accused appellant reiterated the stand taken before the trial court. It is relevant to note at this juncture that before the High Court the plea that the case was covered under Section 304A was not specifically pressed into service. However, the other two pleas raised before the trial Court i.e. applicability of Section 80 IPC or in the alternative Section 304 Part II IPC were urged. According to him, the first plea was available to be urged. He further submitted that the scenario clearly rules out any culpability and the act was merely accidental. The accepted position being that there was no motive to kill the deceased, both the accused and the deceased were friendly, there was large number of people invited for the dinner and the invitees included the deceased, the pleas of the accused appellant, should have been accepted. It was urged that the case at hand bears great resemblance to factual position in Sadhu Singh Harnam Singh v. The State of Pepsu (AIR 1954 SC

271). In that case it was held that the case was covered by Section 304A and the custodial sentence was restricted to the period of custodial sentence already undergone.

Residually it was submitted that even if as projected by the prosecution, its case is accepted offence under Section 302 IPC is not made out and it would be a case under Section 304 Part II. With

reference to the age of the accused it was pointed out that he is now nearly 80 years and the sentence should be restricted to the period already undergone.

In response, learned counsel for the respondent-State submitted that the two courts have analysed the factual position in great detail and have rejected the pleas presently being urged. The case is one where Section 302 IPC is clearly applicable. The conduct of the accused after the occurrence shows the deliberateness in his action. If it was accidental as pleaded, the normal reaction after the gun shot would have been to save the deceased and not to cause disappearance of his dead body by carrying it in gunny bag and throwing it into a well. These factors clearly establish that the gun was fired deliberately with clear intention to kill the deceased.

Section 80 IPC is a part of Chapter IV IPC dealing with "General Exceptions". The "general exceptions" contained in Sections 76 to 106 make an offence a non-offence. The "general exceptions" enacted by IPC are of universal application and for the sake of brevity of expression, instead of repeating in every section that the definition is to be taken subject to the exceptions, the Legislature by Section 6 IPC enacted that all the definitions must be regarded as subject to the general exceptions. Therefore, general exceptions are part of definition of every offence contained in IPC, but the burden to prove their existence lies on the accused.

Section 80 protects an act done by accident or misfortunate and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. The primordial requirement of Section 80 is that the act which killed the other person must have been done "with proper care and caution". In Bhupendrasinh A. Chaudasama v. State of Gujarat (1998 (2) SCC 603) it was held by this Court that where the accused shot his own colleague at close range without knowing the identity of his target, the act smacked of utter dearth of any care and caution.

The amount of care and circumspection taken by an accused must be one taken by a prudent and reasonable man in the circumstances of a particular case. Where the act of the accused is itself criminal in nature the protection under Section 80 is not available. If the accused pleads exception within the meaning of Section 80 there is a presumption against him and the burden to rebut the presumption lies on him. (See K.M. Nanavati v. State of Maharashtra (AIR 1962 SC 605).

Here the evidence on record as substantiated by the testimony of PWs 2 and 3 shows that the accused picked up the gun, unlocked it, loaded it with cartridges and shot the gun from a close range of about 4/5 ft. aimed at his chest. Certainly in view of unimpeachable evidence of PWs 2 and 3, Section 80 has no application.

Coming to the plea of the applicability of Section 304A it is to be noted that the said provision relates to death caused by negligence. Section 304A applies to cases where there is no intention to cause death and no knowledge that the act done in all probabilities will cause death. The provision relating to offences outside the range of Sections 299 and 300 IPC. It applies only to such acts which are rash and negligent and are directly the cause of death of another person. Rashness and negligence are essential elements under Section 304A. It carves out a specific offence where death is

caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder in Section 300 IPC. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a persons' death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, Section 304A IPC has to make room for the graver and more serious charge of culpable homicide.

In order to be encompassed the protection under Section 304A there should be neither intention nor knowledge to cause death. When any of these two elements is found to be present, Section 304A has no application. The accused- appellant not only picked up the gun, unlocked it for user but also put the cartridges and fired from very close range, aiming at a very vital part of the body.

In the background facts as highlighted above the inevitable conclusion is that Section 304A has no application.

The decision in Sadhu Singh's case (supra) has no application because in that case the evidence indicated that the gun was not aimed at the victim and there was evidence of scuffle between the accused and the deceased. In the present case though such plea was taken, it has not been substantiated. On the contrary the evidence of PWs 2 and 3 shows that there was no scuffle as claimed by the accused.

The only other point which needs to be considered is whether Section 302 IPC has been rightly made applicable.

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 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable 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.

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 Subject to certain exceptions if the act by which the death is 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 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	(4) with the knowledge that

is likely to cause death. 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.

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.

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 degrees 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.

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.

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.

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."

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.
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> 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."

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.
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> 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.

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.

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.

The position was illuminatingly highlighted by this Court in State of Andhra Pradesh v. Rayavarapu Punnayya and Anr. (1976 (4) SCC 382) and in Abdul Waheed Khan @ Waheed and Ors. v. State of Andhra Pradesh (JT 2002 (6) SC 274).

Looked at the scenario as described by PWs 2 and 3 and evidence of ballistic report, in our considered view the offence committed by accused is covered by Section 304 Part II.

So far as the other convictions are concerned the conclusions of the trial Court and the High Court do not warrant any interference. For the conviction under Section 201 it has been established beyond even a shadow of doubt that dead bodies were carried in a gunny bag. It was discovered on the basis of the discovery statement in terms of Section 27 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') which is also relevant. The conviction is well merited. So far as offence under Section 25 (1A) of the Arms Act is concerned, the admitted position being that the gun belonged to the son of the appellant, and that he had no license to hold the gun, the evidence has clearly made out the offence. The District Magistrate, Kohlapur had accorded sanction under Section 39 of the Arms Act for the prosecution. Therefore, the conviction under Section 25 (1A) is also well merited. Custodial sentence of 8 years would meet the ends of justice. The appeal is allowed to the extent indicated above.