# MICKELSON GERALD WAYNE

**v.**

# PP

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Mohd Zawawi Salleh, Harmindar Singh Dhaliwal FCJJ
[Criminal Appeal No: 05(M)-312-12-2019(W)]
8 October 2021

***Criminal Law:*** *Penal Code — Section 302 — Murder — Appeal against conviction and death sentence — Right of private defence — Legal principles applicable – Lower level of culpability — Whether offence could not amount to murder under s 302 as mens rea element could not come within s 300(c) — Whether conviction could only be justified for lesser offence of culpable homicide not amounting to murder under s 304(b)*

This appeal revolved around a tragic event which culminated in the separation by death of a couple who had been together for 35 years. A 61-year old American woman, Guilda Mickelson ("deceased"), was found dead in a hotel room in Kuala Lumpur. Her death was reported by her ex-husband, 61-year old American, Mickelson Gerald Wayne ("appellant"). The appellant was in the same hotel room at the time of her death. He claimed that he had killed the deceased in self-defence by hitting her on the head with a table lamp and then strangling her. The appellant was, however, arrested and charged with her murder under s 302 Penal Code ("PC"). The High Court Judge found the appellant guilty of the offence of murder under s 302 PC, and convicted and sentenced him to death. The appellant's subsequent appeal to the Court of Appeal was dismissed, resulting in the present appeal in which the following two core issues required consideration: (i) whether the courts below had correctly or properly appreciated the legal principles pertaining to the right of private defence as set out in ss 96, 97, 99, 100 and 102 PC; and (ii) whether the courts below had failed to appreciate that if private defence did not apply, the lower level of culpability applied. The offence could not amount to murder under s 302 PC as the mens rea element in the present case could not come within s 300(c) PC.

**Held** (allowing the appeal; conviction under s 302 PC substituted with one under s 304(b) PC):

**(1)** The right of private defence was available to any person who was suddenly confronted with the immediate necessity of an impending danger or peril, not of his own creation, as long as the harm that was inflicted in the exercise of the right was not more than was necessary for his defence. That right commenced the moment there was reasonable apprehension of danger to the body and

continued as long as such apprehension of danger remained. Whether the apprehension was reasonable or not was a question of fact depending upon the facts and circumstances of each case but should be judged primarily by the unexpected anguish the accused faced at the time and not solely by objective standards, microscopic analysis or pedantic scrutiny by the judge many years later at the trial. It was therefore essential to consider the peculiar circumstances faced by the accused and then put ourselves in his shoes before forming an opinion as to whether he had reasonable apprehension of danger to his person as would entitle him to the right of private defence. In such an analysis, due emphasis must be given to what could happen in the crisis of the moment bearing in mind the normal and instinctive reaction of human conduct in the interest of self-preservation. (paras 24-25)

**(2)** After careful consideration, this court found no reason to interfere with the findings of the courts below. The facts as revealed by the evidence did not justify any finding in favour of the right of private defence as contended by the appellant. The deceased, on the facts, did not attack the appellant with any weapon. Her main motivation of attacking the appellant, as conceded by the appellant, was to prevent him from leaving her. She was obviously desperate as throughout most of her life, she had relied on the appellant almost completely. It did not make sense for her to kill the appellant with whom she had spent about 35 years of her life and who, by all accounts, was the only person she could depend on for her subsistence. It also appeared that when the appellant was on top of her during the struggle, he would have had every opportunity to escape from the room. As confirmed by the pathologist, the deceased was at the time somewhat incapacitated by the injury to her head. That injury would have been sustained by the deceased during the struggle in the hotel room. The danger to the appellant, at some point, had diminished considerably with the injury to the deceased's head. There was no reason left for the appellant to cause more harm than was necessary. He could have left when he was on top of her but he did not. In the result, his contention of private defence became implausible. (paras 35, 36, 37 & 41)

**(3)** Under s 300(c) PC, the decisive factor was the intentional injury which must be sufficient in the ordinary course of nature to cause death. It must be proved that the accused intended to inflict the injury that was in fact caused. This was a matter of subjective assessment. The next step of ascertaining whether or not the injury was sufficient in the ordinary course to cause death was a matter for objective assessment. This was usually a matter of medical evidence unless it could be shown that ordinary reasonable people would know the injury caused would be fatal. To fashion it in plainer terms, if it was established that not only was there an absence of the intention to cause death but also an absence of intention to cause such bodily injury that in the ordinary course of things was likely to cause death, the offence committed was not murder under s 302 PC. (para 59)

**(4)** There was not the slightest doubt that the appellant had no intention to

cause her death. There was certainly no premeditated plan to kill her and no such motive was ever suggested at the trial. It was also plain from the evidence that it was the deceased who had started the struggle as she did not want the appellant to leave her. In the struggle between them, it would appear that he had applied too much force on the neck area which eventually led to her death. There was certainly no intention to cause this injury as his only purpose was to get away from her and leave for the airport. Considering the totality of the evidence, the courts below were plainly wrong in convicting the appellant for murder under s 300(c) PC. Not only was the finding of guilt against the weight of evidence but the error of the courts below was exacerbated by relying almost completely on the pathologist's evidence to ascertain the intention to cause the bodily injury. From the mere medical fact that the injury caused was sufficient in the ordinary course of nature to cause death, it did not necessarily follow that the appellant intended to cause that particular injury. The other relevant evidence was also not given due consideration or completely ignored. There was also no consideration to the principles of law pertaining to s 300(c) PC. In short, the courts below adopted a rather facile approach to the legal niceties implicit within s 300(c) PC. In the circumstances, the conviction of murder under s 302 PC could not be sustained in law and on the facts. On the facts and evidence adduced, a conviction could only be justified for a lesser offence of culpable homicide not amounting to murder under s 304(b) PC. (paras 70-73)

**Case(s) referred to:**

*Darshan Singh v. State of Punjab, [2010] 2 SCC 333; AIR [2010] SC 1212 (refd)*

*Govindan Neelambaran v. State of Kerala AIR Ker 1960 258 (refd)*

*Jai Dev State of Punjab AIR [1963] SC 612 (folld)*

*Lee Thian Beng v. PP [1971] 1 MLRA 717 (refd)*

*Mohamed Yasin Bin Hussin v. PP [1976] 1 MLRA 603 (folld)*

*Palmer v. R [1971] 1 All ER 1077 (folld)*

*PP v. Dato' Balwant Singh (No 2) [2003] 2 MLRH 665 (refd)*

*PP v. Ngoi Ming Sean [1980] 1 MLRH 12 (folld)*

*Tham Kai Yau & Ors v. PP [1976] 1 MLRA 279 (folld)*

*Virsa Singh v. State of Punjab [1958] AIR 46; [1958] SCR 1495 (folld)*

*Ya Daud v. PP [1996] 2 MLRH 307 (refd)*

**Legislation referred to:**

Penal Code, ss 96, 97(a), (4), 99(3), 100, 102, 106, 299, 300(c), 302, 304A, 304(a), (b)

**Other(s) referred to:**

Ratanlal & Dhirajlal's *Law of Crimes*, 27th edn, Vol 2 p 1415

**Counsel:**

*For the appellant: N Sivananthan (Grace S Nathan with him); M/s Sivananthan*

*For the respondent: Mohd Fairuz Johari (Mohd Zain Ibrahim with him); AG's Chambers*

**JUDGMENT**

**Harmindar Singh Dhaliwal FCJ:**

**[1]** This appeal revolves around a tragic event which culminated in the separation by death of a couple who had been together for 35 years. That fateful day was 26 November 2016. A 61 year old American woman, Guilda Mickelson ("the deceased"), was found dead in a hotel room in Kuala Lumpur. Her death was reported by her ex-husband, 61 year old American, Mickelson Gerald Wayne ("the appellant"). The appellant was in the same hotel room at the time of her death. He claimed that he had killed the deceased in self-defence. The appellant was, however, arrested and charged with her murder under s 302 ("s 302") of the Penal Code ("PC").

**[2]** The appellant claimed trial at the High Court, Kuala Lumpur. At the end of the trial, the learned trial Judge found the appellant guilty of the offence of murder under s 302 PC. He was convicted and sentenced to death. He was unsuccessful in his appeal to the Court of Appeal. The Court dismissed his appeal and affirmed the conviction and sentence passed by the High Court.

**[3]** The appellant then filed this appeal. The appeal was heard on 14 July 2021. At the conclusion of submissions, we unanimously allowed the appeal. We set aside the conviction and sentence under s 302 PC and substituted it with a conviction under s 304(b) PC. After considering the plea in mitigation, we sentenced the appellant to seven years' imprisonment with effect from the date of arrest. Our reasons for doing so now follow. This will form the judgment of the Court.

**The Salient Facts**

**[4]** The salient facts leading to the conviction of the appellant can be gathered from the judgments of the Courts below and the record of proceedings. The appellant and the deceased were American citizens. They were formerly husband and wife. The appellant was working for Ericson Malaysia.

**[5]** On 26 November 2016, the deceased was checked into a hotel suite (Room No 1528) at St Giles, Gardens Hotel & Residences, Kuala Lumpur. At about 11.45 am on that day, the operator on duty, PW1 (Nursiyah binti Amsun) received a call through the hotel intercom from Room No 1528. The male caller asked for the police to be sent to his suite because there was some "trouble". PW1 notified the duty manager, PW 2 (Prusothmanan a/I Tamil Arasu). PW2 told her to call the Security Officer, PW6 (Jeganathan a/I Subramaniam). Both PW2 and PW6 went to Room 1528. Upon opening the door, the guest, later identified as the appellant, told him that his "wife" had died and she was on the bed inside the bedroom. PW2 entered the bedroom and saw a bloodied body

on the bed. PW2 then asked the appellant how she died. The appellant replied that he had killed her. When asked how, the appellant replied that he had hit her on the head with a table lamp and then "cekik" (strangled) her.

**[6]** PW2 ordered PW6 to guard the appellant and immediately notified his superiors. The police had also been informed. PW2 then waited for the police to arrive. ASP Arikrishnan a/I Apparau (PW7) arrived at the scene around 2.45 pm. He found the appellant, the deceased and the security escort in the room. He said the deceased had died by that time. He arrested the appellant and brought him to the police station. PW7 also recorded the cautioned statement of the appellant. The investigating officer of the case, PW9 (ASP Nor Azuha binti Zakerya) ordered evidence to be collected from the said room and arranged for the post-mortem examination of the deceased. The pathologist who conducted the autopsy was Dr Prashant Naresh Samberkar (PW3). In summary, PW3 noted a fracture of the hyoid bone with surrounding soft tissue contusions. He concluded that the deceased had sustained minimal head trauma followed by injury to neck structures which was consistent with manual strangulation. In his opinion, the death of the deceased was due to "fatal compression of the neck".

**[7]** The evidence adduced by the prosecution as outlined above was sufficient to persuade the trial Judge that a *prima facie* case against the appellant was established. The learned trial Judge was satisfied that the ingredients of the offence of murder under s 302 PC read with s 300(c) PC had been proved. The learned Judge also held that none of the exceptions to s 300 PC applied. The appellant was then ordered to enter his defence.

**[8]** The appellant's defence was essentially that he acted in self-defence or private defence under the Penal Code. To this end, he gave evidence on oath. He also called his wife from the Philippines as his only witness. His version of the events that took place was well summarized by the Courts below and can be restated as follows. He testified that he was married to the deceased since 1982 until their divorce in 2011. However, he said that the deceased remained with him after the divorce as she depended on him for all her needs. She followed him to Malaysia on a dependent visa in 2013. She stayed for months at various places in Malaysia. The last place she stayed was at the said hotel suite. The appellant's work required him to travel frequently outside the country. He only stayed with the deceased in the said suite when he was in town. The appellant married his Filipino wife about six months prior to the incident in question. His Filipino wife did not follow him to Malaysia. She continued to remain in the Philippines.

**[9]** The day prior to the incident was the appellant's last day with Ericson Malaysia, his employer. He was in the room with the deceased that morning. He left for office to settle work matters later. After that, he went to the airport in the evening to fly to the Philippines for a job interview. As for the deceased, she had earlier refused to fly back to the United States although her visa had

expired. Instead, she wanted to go to Singapore. However, as he was about to check in to fly to Manila, the appellant received a message from the deceased to call her. She told him that she would not go to Singapore and threatened to create a scene. She insisted that he accompany her to the United States. The appellant then returned to the said hotel suite instead of taking his scheduled flight to Manila. He talked to the deceased between 7.30 pm to 8 pm that night. After that, he went outside the room and spoke to his wife in Manila for three hours until 11.30 pm. He then re-entered the hotel suite to pick up his suitcase but the deceased engaged him in conversation.

**[10]** The appellant also told the Court that the deceased had earlier taken USD150,000.00 from him as "ransom". She did not want him to leave her. They argued but also prayed in the room together until 4 am. At 5.00 am, the appellant tried to leave the hotel suite as he wanted to go to the airport to meet his Filipino wife who was arriving later in the morning. He was, however, prevented by the deceased and a violent physical struggle ensued. He said the deceased was much bigger than him. She weighed 93 kilograms whereas he only weighed 60 kilograms He claimed that she threw him across the living room. She pulled him to the bedroom and threw him on the bed. She bit his hand and put her hand inside his mouth and attempted to push back his tongue. He managed to pry open her mouth and pull his hand out. In respect of the fatal neck compression that the deceased suffered, the appellant said he did not intend to kill but that he was defending himself.

**[11]** After the appellant managed to release himself, he fell on the floor. He heard the deceased coughing deeply and saw her falling to the bedroom floor. The appellant crawled to the living room and remained there for half an hour. When he returned to the bedroom, he realized that the deceased was motionless. He noticed blood on her head. However, he said he wanted to rest and he went back to the living room again. He only called the hotel staff late in the morning around 11.45 am to alert them about the incident.

**Proceedings In The Courts Below**

**[12]** The High Court dismissed the appellant's defence of private defence on the ground that there was no evidence of injuries found on his body and that it was a pure concoction. The learned trial Judge also found that the element of intention was proved. The "intention" in s 300(c) PC is the intention to cause the injury that would have been sufficient in the ordinary course of nature to cause death. Hence, the offence of murder under s 302 PC was established beyond reasonable doubt.

**[13]** On appeal, the decision of the High Court was assailed on a number of grounds. In essence, the Court of Appeal upheld the findings of the trial court on the issues raised as follows. Firstly, the confession by the appellant to the duty manager (PW2) was properly admitted and considered by the trial Judge given that PW2 was a disinterested witness and there was no requirement in law for the confession to be reproduced verbatim. Secondly, given that the

appellant never complained to the investigating officer nor did the investigating officer notice that the appellant was injured, there was no requirement for the investigating officer to refer the appellant for any medical examination. Thirdly, the finding by the trial Judge that the injury caused by the appellant was sufficient in the ordinary cause of nature to cause death ought not to be interfered with because from the evidence of the pathologist (PW3) it was the only inference that could be drawn; and fourthly, the trial Judge was correct in disbelieving the appellant's version of events about being attacked and did not misapply the law on the right of private defence.

**[14]** Separately, the Court of Appeal also found that neither the prosecution nor the defence led any evidence to bring the case within the exceptions to s 300 PC and that the appellant never said he acted under grave or sudden provocation or that he killed the deceased in a sudden fight. The sole line of defence was self-defence.

**The Instant Appeal**

**[15]** Before us, although the appellant purported to raise five issues, in substance the core issues which merited consideration were essentially two. The first core issue was whether the Courts below had correctly or properly appreciated the legal principles pertaining to the right of private defence as set out in ss 96, 97, 99, 100 and 102 PC. The second core issue was whether the Courts below had failed to appreciate that if private defence did not apply, the lower level of culpability applied. The offence could not amount to murder under s 302 PC as the *mens rea* element in the present case could not come within s 300(c) PC. In any event, Exception 4 to s 300 PC also applied with the result that the offence committed could not amount to murder.

**The Right To Private Defence**

**[16]** Historically speaking, from the existence of mankind, the right to protect one's person, one's family and property was accepted as an inherent right of every human being. This right was closely tied to one's honour, dignity and the right to life. Protecting oneself or others from harm is a basic human instinct propelled by a primary impulse in the law of nature for the right to self-preservation. Seen in this way, many see self-preservation as the most basic and fundamental natural right that any individual may possess far eclipsing other basic rights.

**[17]** It is therefore not surprising that the right of self-preservation has been given due recognition by law in almost all civilized jurisdictions. This right of self-preservation, or self-defence, or, as characterized in our Penal Code, the right of private defence, arises when the State apparatus, whose duty it is to protect all and maintain law and order, is unable or unavailable to protect an individual who is faced with imminent danger of himself or his property. The utilitarian philosophy of "kill or be killed" may come leaping to mind and is perhaps not out of place. There are, of course, limits to the exercise of such

a right to prevent its abuse especially when it could become a pretext for a disproportionately vicious response.

**[18]** Our Penal Code covers this right of private defence quite extensively with ten provisions from ss 96 to 106. Whilst it may be useful to look at all these provisions to get an understanding of the motivations and rationale behind this defence, for the purposes of the instant appeal, it is necessary to consider only the following provisions:

> 96. Nothing is an offence which is done in the exercise of the right of private defence.
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> 97. Every person has a right, subject to the restrictions contained in s 99, to defend:
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> (a) his own body, and the body of any other person, against any offence affecting the human body;
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> (b) the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.
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> 99. (1) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.
>
> (2) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.
>
> (3) There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.
>
> (4) The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.
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> 100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the following descriptions:
>
> (a) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
>
> (b) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
>
> (c) an assault with the intention of committing rape;

(d) an assault with the intention of gratifying unnatural lust;

(e) an assault with the intention of kidnapping or abducting;

(f) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

**[19]** These provisions clearly provide that the right of private defence, or self-defence in ordinary parlance, is a complete defence. However, in order for this defence to bite, there must exist certain circumstances which are again subject to certain limitations. The first of these circumstances is that the right only arises when an offence against the human body is being committed against the person's own body or the body of another person (s 97(a) PC). We are not here concerned with the right to protect property. The second circumstance for the right to apply is that there must have been no time to have recourse to the protection of the public authorities (s 99(3) PC).

**[20]** Now, of course, the presence of these circumstances is further circumscribed by two limitations. The first is that the right of private defence will not extend to the case where more harm than necessary is inflicted for the purpose of the defence (s 97(4) PC). The second limitation is that the right of private defence only commences when there is reasonable apprehension of danger to the body (s 102 PC). The right dissipates when there is no longer any such apprehension of danger.

**[21]** The application of these provisions was considered in *PP v. Ngoi Ming Sean* [1980] 1 MLRH 12 where Ajaib Singh J (later SCJ) summarized the defence in these succinct terms:

"The Penal Code provides that nothing is an offence which is done in the exercise of the right of private defence of a person's body. But there is no such right where the person has time to seek the protection of the public authorities. Nor will this right of private defence extend to the inflicting of more harm than is necessary for the purpose of defence. Subject to these limitations the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant if the person who exercises his right of private defence is under a reasonable apprehension that death or grievous hurt would be caused to him by the assailant. The right of private defence commences as soon as there is reasonable apprehension of danger to the body and this right continues so long as such apprehension of danger continues. (See ss 96 to 102 of the Penal Code). And it goes without saying that the right of private defence ceases and is not available when there is no more

apprehension of danger to the body."

**[22]** On the scope and applicability of the right of private defence, the High Court was very much influenced by the observations of the Supreme Court of India in *Jai Dev State of Punjab* AIR [1963] SC 612 as follows:

> "In judging the conduct of a person who proves that he had a right of private defence allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself or his property, and so, he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. **But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a court room, for instance Iona after the incident has taken which he uses should not be weighed in golden scales**. To begin with the person exercising a right of private defence must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right, he must use force necessary for the purpose and he must stop using the force as soon as the threat had disappeared. So long as the threat lasts and the right of private defence can be legitimately exercised, it would not be fair to require that 'he should modulate his defence step by step, according to the attack before there is reason to believe the attack is over'. The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. As soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is continuing, the right is there; if the danger or the apprehension about it has ceased to exist, there is no longer the right of private defence."
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> [Emphasis Added]

**[23]** Another oft-cited precedent which has been followed in this Court (see, for example, *Lee Thian Beng v. PP* [1971] 1 MLRA 717 is the Privy Council decision, in an appeal from Jamaica, in *Palmer v. R* [1971] 1 All ER 1077 where Lord Morris had occasion to comment on the law of self-defence as follows:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take

some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action, if a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

**[24]** So, it is apposite that the right of private defence is available to any person who is suddenly confronted with the immediate necessity of an impending danger or peril, not of his own creation, as long as the harm that is inflicted in the exercise of the right is not more than is necessary for his defence. That right commences the moment there is reasonable apprehension of danger to the body and continues as long as such apprehension of danger remains. Whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case but should be judged primarily by the unexpected anguish the accused faced at the time and not solely by objective standards, microscopic analysis or pedantic scrutiny by the judge many years later at the trial.

**[25]** It is therefore essential to consider the peculiar circumstances faced by the accused and then put ourselves in his shoes before forming an opinion as to whether he had reasonable apprehension of danger to his person as would entitle him to the right of private defence (see *Govindan Neelambaran v. State of Kerala* AIR Ker 1960 258). In such an analysis, due emphasis must be given to what can happen in the crisis of the moment bearing in mind the normal and instinctive reaction of human conduct in the interest of self-preservation.

**[26]** Coming now to the facts of the present case, it was submitted by the appellant that the Courts below had failed to properly consider the appellant's basis for reasonable apprehension by having overlooked important evidence as follows. The prosecution witnesses had already testified that the deceased had never been seen outside the hotel room which was also confirmed by the investigating officer (PW9). As such, it was reasonable to draw the inference that a person who never leaves the hotel room might have some form of

abnormal behaviour or emotional breakdown when suddenly confronted with the fact that the appellant, whom she had been dependent on for the past 35 years, was moving away permanently. She had been injured in the head when she was young and she could not control herself when upset. It was therefore not outside the realm of possibility that the deceased, who quite clearly had behavioural problems, could turn volatile as she had in the past.

**[27]** It was also reasonable for the appellant to be apprehensive when the deceased became volatile as she was much bigger and heavier than him. It was also urged upon the Court to take into account that the deceased was the aggressor and she suddenly attacked the appellant when he tried to leave and at the time when the fatal compression occurred, the appellant was trying to push himself away from the deceased.

**[28]** It was further submitted that considering the evidence adduced, the appellant could not be said to have exceeded the right to private defence. The appellant did not inflict more harm than was necessary against the deceased. The harm inflicted was accidental and necessary to prevent her from strangling him. It was also suggested that this was a case where the deceased only suffered one major injury which was the fatal compression to the neck as opposed to, for example, multiple stab wounds in other cases.

**[29]** It was never established by the prosecution that the injuries to the deceased's head were caused by the appellant. In this regard, the appellant asked the Court to consider that the prosecution also failed to suggest that it was possible the injury to the deceased's head was caused by a table lamp. Further, it was submitted that the appellant was far smaller than the deceased, was elderly himself and did not have any physical advantage nor did he use any weapon or object to give himself any additional advantage over the deceased.

**[30]** Based on all the foregoing reasons, it was submitted that the appellant had shown on a balance of probabilities that he was rightfully and lawfully exercising his right of private defence and accordingly should be entitled to a full acquittal.

**[31]** Now, the High Court, being the trier of facts, and after considering all the evidence, came to the conclusion that the appellant did not exercise the right to private defence as provided under the law. The following is how the learned trial Judge assessed the evidence:

> "[65] It is perhaps pertinent to bear in mind that first, it was the accused own testimony that he was on the deceased's body during the struggle. He was on the top of the deceased's body. Secondly, there was no injury seen on him. Hence, by no stretch of the imagination could these constitute evidence in relation to private defence. There was no threat of injuring his life.
>
> [71] The defence of private defence, in my considered view, was a pure concoction on the part of the accused. It was contrary to the injuries sustained by the deceased. The accused must have used considerable strength and force

to the extent that it caused the deceased to die."

**[32]** Although it was unfortunate that the learned trial Judge did not consider in detail the provisions in the Penal Code with regard to the right of private defence, we considered that going by the passages reproduced above in the judgment, the learned Judge was alive as to the elements of the defence. Whilst it is true that there was no requirement under the law for the accused to have sustained an injury before exercising the right to private defence (see *Ya Daud v. PP* [1996] 2 MLRH 307; *PP v. Dato' Balwant Singh (No 2)* [2003] 2 MLRH 665), the learned Judge was nevertheless right to take into account the absence of injuries on the appellant. In order to determine whether the right of private defence is available or not, "the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered" (see *Darshan Singh v. State of Punjab and Another [2010] 2 SCC 333; AIR [2010] SC 1212*). In any case, the trial Judge was also right to look into the injuries sustained by the appellant to assess the credibility of his version of events.

**[33]** This finding by the High Court was affirmed by the Court of Appeal. The Court found nothing in the judgment of the trial Judge which indicated that he had misapplied the principles that are applicable to the defence of private defence. It was noted that the investigating officer or the arresting officer did not notice any injuries on the appellant. The Court was also mindful that the appellant's blood was found in the fingernail clippings taken from the deceased. Nonetheless, that evidence was not indicative of serious injury inflicted on the appellant. Notably, the Court observed that the appellant could have extricated himself and moved away and he would not have been in any danger.

**[34]** In rejecting the defence of private defence, the Court of Appeal observed:

> "[39] We also note that the deceased did not use any weapon when she allegedly attacked the appellant. In fact, it was the deceased who had been injured in the head by a hard object before she was strangled to death. The learned trial judge who is the primary trier of fact had considered the lengthy testimony of the appellant who at one point gave a very detailed account of the struggle between him and the deceased from the living room of the hotel suite to the bedroom. However, he disbelieved the appellant and found that his defence did not raise reasonable doubt on the case for the prosecution. We find no reason to interfere with this finding of fact as it is consistent with the medical evidence and the circumstantial evidence that we adverted to earlier."

**[35]** After careful consideration, we found no reason to interfere with the findings of the Courts below. We did not think that the facts as revealed by the evidence justified any finding in favour of the right of private defence as contended by the appellant. What impressed us most was that the deceased did not attack the appellant with any weapon. Her main motivation of attacking the appellant, as conceded by the appellant, was to prevent him from leaving her. She was obviously desperate as throughout most of her life, she had relied

on the appellant almost completely.

**[36]** She had some injury to her head during her childhood which was confirmed by the pathologist. The pathologist had reported that a small portion of her brain matter had been removed probably due to an earlier surgical intervention. The appellant claimed that this injury had affected her behaviour. Nevertheless, it did not make sense for her to kill the appellant with whom she had spent about 35 years of her life and who, by all accounts, was the only person she could depend on for her subsistence.

**[37]** It also appeared to us, as found by the Courts below, that when the appellant was on top of her during the struggle, he would have had every opportunity to escape from the room and go on with his life with his current wife. As confirmed by the pathologist, the deceased was at the time somewhat incapacitated by the injury to her head. That injury would have been sustained by the deceased during the struggle in the hotel room. There was some evidence, as claimed by the learned Deputy Public Prosecutor, of the appellant striking the deceased on the head with the table lamp. However, as the table lamp was never introduced into evidence, there was a serious doubt as to the credibility of such evidence. Even so, although it may not have been the table lamp, the injury to her head cannot be ignored nor disputed as it was confirmed by the pathologist.

**[38]** The appellant also appeared to lay great emphasis on the fact that the deceased was 93 kilograms in weight whereas he weighed only 60 kilograms at the time. He was, in our view, quite disingenuously suggesting that she was significantly stronger than him. It would be quite illogical to base one's strength on weight alone unless it was all muscle built into an athletic frame. Besides, both of them were 61 years of age at the relevant time. She was of large build, as confirmed by the pathologist, and far from having an athletic frame, she was also obese. The appellant, on the other hand, suffered no such handicap. So, common sense and logical reasoning dictated that she could not have been significantly stronger than him going only by the weight differences. We were, therefore, unconvinced as to how this created a situation of imminent grave danger to the appellant especially as she was unarmed at all times as noted earlier.

**[39]** Even if he was not as strong, he would certainly have been more fleet-footed by comparison being of a smaller and lighter frame. In any case, being of large build, the deceased could not have maintained the struggle for long. We did not think, therefore, that the appellant was seriously disadvantaged in the fight as he claimed. His fear and claims of being over-powered by the deceased and therefore put in a situation of grave imminent danger were, in our view, quite fanciful and exaggerated as found by the Courts below.

**[40]** As it turned out, it was not by sheer bad luck or misfortune that it was the deceased who suffered the serious injuries such that it led to her death lending credence to the findings of the Courts below. The Courts below were unconvinced that the appellant had suffered any injuries. The Court of Appeal

noted with skepticism the appellant's claims of being injured:

> "[22] The appellant also said that he suffered a bleeding cut on his lower left leg after he stumbled over the treadmill machine during struggle with the deceased. The fact that the investigating officer did not notice any injury or blood on the appellant meant that he was not injured as found by the learned trial judge. The appellant did not tell the arresting officer (SP7) who came to the hotel suite about having been injured either. When cross-examined why he did not disclose his injuries, his unconvincing answer was that SP7 never asked him about it. But in the same breadth, he said that he told SP7 two days later about the injury on his leg when the latter recorded his statement. If it was true that the appellant had suffered the injuries that he described, it is incredible that he did not seek medical attention through the police officers that he encountered on the same day."

**[41]** In the final analysis, a fact which remained unrefuted and cannot be overlooked, was that the danger to the appellant, at some point, had diminished considerably with the injury to the deceased's head. There was no reason left for the appellant to cause more harm than was necessary. He could have left when he was on top of her but he did not. In the result, his contention of private defence became implausible. For all these reasons as well, we were unable to accept that the appellant was justified in causing the death of the appellant. We were therefore constrained to hold that there was no merit on this ground of appeal.

**The *Mens Rea* Element For Culpable Homicide**

**[42]** We come now to the next ground of appeal which has vexed the courts over the years. It has to do with the *mens rea* element in the commission of the offence. It was contended by the appellant that he did not have the requisite *mens rea* to have been found guilty and convicted for murder under s 302 PC. In particular, it was argued that the offence could not amount to murder under s 302 PC as the *mens rea* element in the present case could not come within s 300(c) PC.

**[43]** It was further argued that, in any event, Exception 4 to s 300 PC also applied such that the offence committed could not amount to murder. To recap, the learned trial Judge had found that the act of the appellant in strangling the injured deceased came within s 300(c) PC and that none of the exceptions in s 300 that precludes the act of homicide from amounting to murder applied. This finding was affirmed by the Court of Appeal.

**[44]** In order to appreciate the arguments in this context, it is necessary to understand the different levels of homicidal culpability when death is caused by a person which is not accidental or justifiable. Under English law, homicide can generally be divided into three main categories which are murder, voluntary manslaughter and involuntary manslaughter with murder being the gravest crime. In the United States, the categories of homicide, at the risk of some oversimplification, can also be divided into murder either in the first, second

or third degree. There is a further distinction of voluntary and involuntary manslaughter. There are differences within the States depending on how each type of offence is defined under the law. In both these jurisdictions, the offences are defined individually or separately.

**[45]** In our Penal Code, and like the Penal Codes of India and Singapore and some common law countries, the classification of the various categories of homicide is rather peculiar. The two broad categories are murder and culpable homicide not amounting to murder. Murder is, of course, the gravest form of culpable homicide. Where the offence committed is without the characteristics of murder, then it may be a lesser offence of culpable homicide not amounting to murder. So, notail culpable homicides amount to murder although all murders are culpable homicides. However, and this is significant, each of the offences are not defined separately but expressed as one being a graver form of the other. Not surprisingly, this approach in the Penal Code has led to much befuddlement and controversy as will become apparent in the following discussion.

**[46]** It may be convenient at the outset to set out the relevant provisions. Section 299 PC defines the offence of culpable homicide and is reproduced as follows:

> 299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> ILLUSTRATIONS
>
> (a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.
>
> (b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence, but A has committed the offence of culpable homicide.
>
> (c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.
>
> Explanation 1 - A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.
>
> Explanation 2 - Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have

been prevented.

Explanation 3 - The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

**[47]** Section 300 PC then defines when an offence of culpable homicide becomes murder. The provision together with the exceptions are reproduced as follows:

300. Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

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

ILLUSTRATIONS

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A, without any excuse, fires a loaded cannon into a crowd of persons and

kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1 - Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

ILLUSTRATIONS

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, in as much as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a

knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2 - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

ILLUSTRATION

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3 - Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill will towards the person whose death is caused.

Exception 4-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation-It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5 - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent.

ILLUSTRATION

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death. A has therefore abetted murder.

**[48]** Where the offence is one of culpable homicide not amounting to murder, or if it falls within one of the Exceptions to s 300 PC, two categories of punishment are then provided in s 304 PC as follows:

304. Whoever commits culpable homicide not amounting to murder shall be punished:

(a) with imprisonment for a term which may extend to thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or

(b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

**[49]** Characterised as such, it follows that there are really three degrees of criminality when it comes to culpable homicide. The first is murder which is punishable with death under s 302 PC. The second category is the offence under s 304(a) PC, which for convenience should be referred to as culpable homicide in the second degree, and which is punishable with imprisonment for up to 30 years. The third category is the offence under s 304(b) PC, which for convenience may be labelled culpable homicide in the third degree, and which is punishable with imprisonment for up to 10 years. This distinction commended itself to the authors of Ratanlal & Dhirajlal's *Law of Crimes*, 27th Ed, Vol 2 page 1415 who alluded to several Indian cases and observed that it would be the degree of probability of death which determines whether the culpable homicide falls within the "gravest, medium or the lowest degree".

**[50]** For completeness, and as a means for comparison, we should also add that there are other offences with a lesser degree of criminality or *mens rea* where death of a person is caused but which are not regarded as an offence of culpable homicide. For example, there is s 304A PC which applies to the case where death is caused by a rash or negligent act not amounting to culpable homicide. The penalty for such an offence is imprisonment for up to 2 years or with fine or with both. This provision contemplates a situation where there is neither intention nor knowledge.

**[51]** Now, although it may not be too difficult to separate what is culpable homicide from what is not as set out in s 299 PC, the line between what amounts to murder and what is culpable homicide not amounting to murder is a blurry one as pointed out earlier. It has vexed even judges and lawyers. Even so, it is at least plain that in order for an offence of culpable homicide can be said to have been committed, the elements of "intention" or "knowledge" must exist. In other words, it must be a deliberate act as opposed to a rash or negligent act, which forms the basis of the offence of culpable homicide.

**[52]** So, the question remains - how do we distinguish between an act which is mere culpable homicide under s 299 PC and one that is murder under s 300 PC? In this regard, *Ratanlal & Dhirajlal's Law of Crimes, supra*, provides a useful explanation:

> "The distinction lies between 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. 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. The difference between s 299 and clause (3) of s 300 is one of the degree of probability of

> death resulting from the intended bodily injury. The clause (4) of s 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."

**[53]** The distinction between the two sections was also explained by the then Federal Court in *Tham Kai Yau & Ors v. PP* [1976] 1 MLRA 279 in the following terms (per Raja Azlan Shah FJ (as HRH then was):

> "The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of s 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300, Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300, Penal Code is an example. It is on a comparison of these two limbs of s 299 and section 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability".

**[54]** From the above explanations, we can conclude that where there is an intention to kill and death results, the offence is murder. However, these types of cases are not as common as the cases where the accused alleges that he had no such intention to cause death or the particular bodily injury or that he had no knowledge that the bodily injury was likely to cause death. The instant case is a classic example.

**[55]** In such cases, it is not uncommon for the prosecution to rely on s 300(c) PC to prove an offence of murder. The perception among prosecutors, at least, is that it is the easiest clause to prove since it is not necessary to prove that the offender had 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. To recall, the appellant in the present case was convicted of murder under s 300(c) PC.

**[56]** The meaning and scope of s 300(c) PC can be found in a decision of the Indian Supreme Court which has stood the test of time and accepted as correctly representing the law in our courts. This is the case of *Virsa Singh v. State of Punjab* [1958] AIR 46; [1958] SCR 1495 ("*Virsa Singh*"). The Indian

Supreme Court held that to establish a charge of murder under s 300(c) of the Indian Penal Code (whose provision is identical to ours), four elements have to be proved:

> "To put it shortly, the prosecution must prove the following facts before it can bring a case under s 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"
>
> [Emphasis Added]

**[57]** In our view, the words underlined above for emphasis are particularly significant. The Supreme Court (through the judgment of Bose J) explained the meaning of these words in the following way:

> "The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

**[58]** Deciding in a somewhat similar vein on the same issue was the Privy Council case of *Mohamed Yasin Bin Hussin v. PP* [1976] 1 MLRA 603 ("*Mohamed Yasin*"). As the appeal was from the Singapore Court of Appeal, identical provisions were in issue. The facts were that in the course of a robbery, the appellant had grabbed the deceased, thrown her to the ground and subsequently raped her. Medical evidence showed that the fatal injuries on the deceased consisted of fractures of the ribs in the front portion of the chest which had resulted in congestion of the lungs and cardiac arrest. The

injuries were consistent with someone sitting with force on the chest of the deceased as she was lying on the floor on her back. The injuries were sufficient in the ordinary course of nature to cause death. In overturning the conviction for murder and substituting it with a conviction under s 304A, Lord Diplock, in delivering the judgment of the Board, observed:

> "In their Lordships' view, this fails to give effect to the distinction drawn in ss 299 and 300 of the Penal Code, in cases where the accused did not deliberately intend to kill, between the act by which death is caused and the bodily injury resulting from that act. In the instant case, the act of the appellant which caused the death, viz. sitting forcibly on the victim's chest, was voluntary on his part. He knew what he was doing; he meant to do it; it was not accidental or unintentional. This, however, is only the first step towards proving an offence under s 300(c) of the Penal Code. Not only must the act of the accused which caused the death be voluntary in this sense; the prosecution must also prove that the accused intended, by doing it, to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death.
>
> In the instant case, the bodily injury caused by the appellant's voluntary act was the fracture of the victim's ribs. It was established by the evidence of the pathologist that this injury was of a kind sufficient in the course of nature to cause death by cardiac arrest. The lacuna in the prosecution's case which the trial judges overlooked was the need to show that, when the accused sat forcibly on the victim's chest in order to subdue her struggles, he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being of the victim's apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal.
>
> There was no finding of fact by the trial judges that this was the appellant's intention; nor, in their Lordships' view, was there any evidence upon which an inference that such was his intention could have been based. There was no admission by the accused that he had sat on the victim's chest at ail. The judges' finding that he did so was based upon the evidence of the pathologist, which they were entitled to accept, that this was the most probable way in which the internal injuries to the victim's ribs had been caused. But to fall on someone's chest, even forcibly, is something which occurs frequently in many ordinary sports, such as Rugby Football, and though it may cause temporary pain, it is most unusual for it to result in internal injuries at all, let alone fatal injuries.
>
> To establish that an offence had been committed under s 300(c) or under s 299, it would not have been necessary for the trial judges in the instant case to enter into an enquiry whether the appellant intended to cause the precise injuries which in fact resulted or had sufficient knowledge of anatomy to know that the interna! injury which might result from his act would take the form of fracture of the ribs, followed by cardiac arrest. As was said by the Supreme Court of India when dealing with the identical provisions of the Indian Penal

Code in *Virsa Singh v. State of Punjab* AIR [1958] SC 465 at p 467:

> 'that is not the kind of enquiry. It is broad-based and simple and based on commonsense.'
>
> It was, however, essential for the prosecution to prove, at very least, that the appellant did intend by sitting on the victim's chest to inflict upon her some internal, as distinct from mere superficial, injuries or temporary pain."

**[59]** So, as these cases indicate, under s 300(c) PC, the decisive factor is the intentional injury which must be sufficient in the ordinary course of nature to cause death. It must be proved that the accused intended to inflict the injury that was in fact caused. This is a matter of subjective assessment. The next step of ascertaining whether or not the injury was sufficient in the ordinary course to cause death is a matter for objective assessment. This is usually a matter of medical evidence unless it can be shown that ordinary reasonable people would know the injury caused would be fatal. To fashion it in plainer terms, if it is established that not only was there an absence of the intention to cause death but also an absence of intention to cause such bodily injury that in the ordinary course of things is likely to cause death, the offence committed is not murder under s 302 PC.

**[60]** We would venture to add that this assessment of the law is consistent with the express words found in s 300(c) itself. The words "intention of causing bodily injury to any person" and then the words "the bodily injury intended to be inflicted" quite plainly, in our view, refer to the bodily injury intended to be inflicted and not the bodily injury actually inflicted. It is not uncommon for trial judges to make the mistake of asking the wrong questions, which is - firstly, whether the bodily injury was inflicted by the accused and secondly, whether the bodily injury was sufficient in the ordinary course of nature to cause death. The further inquiry of whether the accused intended to cause the type of injury that was in fact caused is absent leading to a possible miscarriage of justice.

**[61]** This dichotomy between the intended injury and the actual injury sits well with the test in *Virsa Singh* that the injury inflicted was "not accidental or unintentional, orthat some other kind of injury was intended." It may have also inspired Lord Diplock in Mohamed Yasin to conclude that although the accused might have intended the injuries caused by raping her, he did not intend the internal injuries and cardiac arrest that were caused by restraining her, which actually caused her death.

**[62]** Interpreted in this fashion, s 300(c) would not be attracted in a case where the offender did not intend to kill but only intended a minor injury to be caused as opposed to an intention to cause serious injury. So, for example, if a house owner is confronted by an armed burglar and subsequently shoots him in the leg with a firearm having no intention to kill but only to stop the burglar in his tracks, it is not murder even if the medical evidence suggests that the injury in the normal course would lead to death due to excessive bleeding. He would, of

course, have a right to private defence if there was a reasonable apprehension of death or grievous hurt to his person. Another comparable example in this respect can be found in Illustration (b) to s 300 PC. Similarly, s 300(c) would also not apply in the case where an injury is caused with no intention to kill and is such an injury that ordinary reasonable people would not think would be fatal but only a person with knowledge of science and medicine would know that the said injury would in the normal course lead to death.

**[63]** Apart from the case precedents which highlight the distinction, there are perhaps more fundamental reasons why this dichotomy is merited. It is firstly precipitated by an elementary principle in the theory of punishment that the penalty must fit the crime. So, it cannot be right in criminal jurisprudence that a person with a premeditated mind plans to kill and does so receives the same punishment as one who had no intention to kill but death results nevertheless. We do not think the framers of the Penal Code had intended that the death penalty was warranted in the latter case. Secondly, if no distinction is made, the intention to kill, which is the essence of murder, becomes presumed only by the existence of certain facts whereas the reality in most cases is that no such intention ever existed. In other words, the precise mental state or *mens rea* is ignored. Thirdly, in terms of the punishment again, it would be out of proportion to impose the most extreme penalty for a crime where the *mens rea* is presumed.

**[64]** Coming now to the inquiry required, as part of the subjective assessment alluded to earlier, which is to ascertain whether the offender had the requisite intention to cause such bodily injury which in the ordinary course of nature was sufficient to cause death, a whole host of factors must be considered as each case has its own special facts. In most cases, the offender would be hardly likely to intend to cause the exact injuries inflicted which led to the death of the victim. It must be kept in mind that the inquiry, as mentioned earlier, is "broad-based and simple and based on common sense".

**[65]** The requisite intention, like most criminal cases, can be gathered from the surrounding circumstances. The most damning factor would probably be the case where the killing was premeditated or where there existed a pre-arranged plan to do so. This must necessarily involve a consideration of the genesis of the crime and all the circumstances leading to the death. Other factors which may provide a clue as to the intention are whether the death occurred during the commission of another crime like robbery or kidnapping or if it was motivated by a sense of rage, jealousy, greed or revenge. Or whether the death occurred in a spur of the moment, for example, in a sudden fight or whether there existed a history of animosity between the offender and the victim. Or whether there was grave provocation prior to the death.

**[66]** The case law suggests that the usual and in most cases the decisive factors are the place and nature of the injuries, the number of persons involved, the type of weapon or weapons used, how they are used, the force applied, and the

vital organs targeted by the offender. These are but some examples as found in many cases. For obvious reasons, it would be impracticable to provide a comprehensive list.

**[67]** Having dealt with the law on the issues raised, it is necessary to come back to the facts of the present case. As noted earlier, the learned trial Judge found that the act of the appellant fell under s 300(c) PC. In particular, the learned Judge noted:

> "[38] The gravity of the injuries inflicted on the deceased as found by the pathologist, clearly pointed out to an intention by the accused. The accused would know the changes on the face and the tongue of the deceased during the strangulation. Despite the severe condition of the deceased, he continued with the strangulation until she died. Her death was in fact brought about by the action of the accused. It was obvious that the accused had the intention of causing that injury to his ex-wife. As what PW3 said, the injury was in the natural course of nature could cause death."

**[68]** This finding was affirmed by the Court of Appeal. The reasons given for doing so appear in the following paragraphs of the judgment of the Court of Appeal:

> "[29] We find that interference with the trial judge's finding that the appellant intended to cause the bodily injury that is sufficient in the ordinary course of nature to cause death is not warranted. The pathologist explained in detail the cause of death. It was fatal compression of the neck which was caused by manual strangulation of the victim. He explained the evidence that he found upon examining the body that led him to conclude that the cause of death was strangulation apart from the information given to him. He said there was bluish discoloration of the face and tongue due to lack of oxygen. The tongue bite that was noted was due to pressure on the neck. He found fractures on the neck that were consistent with the victim being strangled. His summary of the evidence of strangulation is found in the following passage in the notes of proceedings:
>
> "Q: In your findings you said cause of death "fatal compression of neck". Can you explain to the court what you mean by compression of neck?
>
> A: My Lord compression of neck is evidence at autopsy in the form of injuries to the skin of the neck, congestion of the face, haemorrhage in the eyes, haemorrhage of struct muscle of the neck, haemorrhage of the soft tissue of the neck and fractures of the bone and cartilage of the neck (soft bone).
>
> Q: Why you said that upon your examination "injury to the neck structures were consistent with manual strangulation".
>
> A: My Lord it was opinion by conclusion there was no evidence of ligature mark on the neck so ligature strangulation was ruled out. Most importantly, the injuries to the neck /the haemorrhage on the neck was pre-dominantly on one side of neck that is the left side. With small haemorrhage on the right side. My Lord these are

common findings in manual strangulation."

[30] During cross-examination, the pathologist further explained that the compression to the neck prevented the supply of oxygen. He said as follows:

> "The findings of this autopsy were associated to the lack of oxygen supply because of the blood vessel compression of the neck. That is why we found haemorrhage in the eyelids and congested face and haemorrhages around the face all. All this because of lack of oxygen. It's like a heart attack."

[31] The expertise of the pathologist who had conducted 5000 autopsies in his long career was not successfully challenged. The appellant did not produce any expert rebuttal evidence in respect of the cause of death. The appellant said that he was physically attacked by the deceased who had tried to prevent him from leaving the hotel suite and that he defended himself. Be that as it may, both appellant and deceased were purportedly involved in a robust physical struggle as the appellant said he defended himself. The pathologist found a head injury on the deceased which he said may have rendered her partially unconscious before she was manually strangled. But the head injury was not the cause of death. The deceased died because she was strangled to death. By his own account, the appellant was the only person in the hotel suite with the deceased at the material time. As the medical evidence proved the cause of death was manual strangulation and the appellant and the deceased were locked in a physical struggle, the only inference that can be drawn is that the appellant had strangled the deceased to death. Therefore, the trial judge's finding on this point is not open to challenge unless, of course, for sake of argument, it was possible for the deceased to have strangled herself."

**[69]** Now, these findings were assailed by learned counsel for the appellant. It was argued that the appellant had absolutely no intention to inflict the fatal injury on the deceased. He was a mere hours away from departing to Manila, Philippines and only came back to the hotel suite after the announcement over the PA system and as well as out of concern for the distress the deceased was in. It was submitted that the appellant's concern for the deceased completely negated any presumption or inference that he had intended to inflict such bodily injury that was sufficient in the ordinary course of nature to cause death or outright kill her.

**[70]** In our considered view, there was much force in this submission. There was no need for the appellant to come back to the hotel. He was on his way to meet his wife in the Philippines. The deceased was his ex-wife and he owed no obligation to her. He only came back, as learned counsel told us, out of the goodness of his heart. It was for the same reason that although they had been divorced, he had continued to look after her. He had been with her for some 35 years. So, there is not the slightest doubt that the appellant had no intention to cause her death. There was certainly no premeditated plan to kill her and no such motive was ever suggested at the trial.

**[71]** It was also plain from the evidence, as noted earlier, that it was the deceased who had started the struggle as she did not want the appellant to leave her. In

the struggle between them, it would appear that he had applied too much force on the neck area which eventually led to her death. There was certainly no intention to cause this injury as his only purpose was to get away from her and leave for the airport.

**[72]** Considering the totality of the evidence, we were of the view that the courts below were plainly wrong in convicting the appellant for murder under s 300(c) PC. To our minds, not only was the finding of guilt against the weight of evidence but the error of the courts below was exacerbated by relying almost completely on the pathologist's evidence to ascertain the intention to cause the bodily injury. From the mere medical fact that the injury caused was sufficient in the ordinary course of nature to cause death, it does not necessarily follow that the appellant intended to cause that particular injury. The other evidence, which we have alluded to in the foregoing, was not given due consideration or completely ignored. There was also no consideration to the principles of law we have highlighted pertaining to s s 300(c) PC. In short, and with respect, the courts below adopted a rather facile approach to the legal niceties implicit within s 300(c) PC.

**[73]** In the circumstances, we were persuaded that the conviction of murder under s 302 PC could not be sustained in law and on the facts. We considered that on the facts and evidence adduced, a conviction could only be justified for a lesser offence of culpable homicide not amounting to murder under s 304(b) PC.

**Exception 4 To Section 300 Penal Code**

**[74]** Although the foregoing analysis and conclusion is sufficient, in our view, of settling the core issues in this appeal, for the sake of completeness, we also considered the alternative argument raised by the appellant. The appellant argued that in the event that the appellant failed in raising the defence of private defence or self-defence, the appellant's case still falls within Exception 4 to s 300 PC which applies to lower the culpability of an offender who has killed another in a sudden fight situation.

**[75]** For convenience, Exception 4 is reproduced again as follows:

> "Exception 4-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner."

**[76]** It is trite law that culpable homicide is not murder if the case falls within any of the five exceptions to s 300 PC. Exception 4 covers acts done in a sudden fight. It acknowledges that in the heat of passion, a man's judgment may be clouded by a momentary loss of control of his essential mental faculties governing emotion. Exception 4 becomes relevant only when Exception 1 does not apply. To invoke Exception 4, the following conditions must be satisfied:

(a) it was a sudden fight which originated from a sudden quarrel;

(b) there was no premeditation;

(c) the act occurred in the heat of passion; and

(d) the accused had not taken unfair advantage or acted in a cruel or unusual manner.

**[77]** It was submitted that the learned trial Judge failed to consider the possibility that the appellant's case fell within Exception 4 and this non-direction amounted to a misdirection. The only mention made bythe trial Judge in the judgment as to the exceptions was as follows:

> "[46] As far as the prosecution case is concern, what had happened on the deceased, what the accused did on her and the conduct of the accused immediately after the strangulation, all of which did not fall under any of the exception of s 300 of the Penal Code"

**[78]** It was similarly argued that the Court of Appeal also failed to adequately consider the merits of the exceptions under s 300 PC as reflected in the following passage in the judgment:

> "[40] In the final oral reply submission, counsel for the appellant raised the issue that grave and sudden provocation could have been given by the deceased or that a sudden fight that occurred between them could bring the case within the exceptions to s 300 and thereby avail the appellant the benefit of a lesser charge under s 304 of the Penal Code. The defence never raised the exceptions to s 300 in the trial court. Nonetheless, the trial court could consider whether the case came within the exceptions at the end of the whole case. However, in the instant case, no evidence at all was led either by the prosecution or the defence to bring the case within the said exceptions. The appellant never said that he acted under grave and sudden provocation or that he killed the deceased in a sudden fight in the heat of passion. The sole line of defence taken was that the appellant acted in self-defence when attacked by the deceased."

**[79]** In this respect, it is important to reflect that because there are a myriad of factors attendant upon the commission of the crime, and in the case where the trial court takes the preliminary view that there is sufficient evidence of murder, it is good practice for the trial judge to satisfy himself if the facts and evidence adduced fell within any of the exceptions to s 300 PC. Although even capital offences are tried as part and parcel of the adversarial process, and even if there are no submissions by the accused on this issue, it remains the duty of the court to ensure its decision is correct on the facts and the evidence and is sustainable in law.

**[80]** To this end, and if deemed necessary and appropriate, the court can insist on further submissions on any troubling issue. This would be in accordance with

the right to a fair trial which is the cornerstone of our criminal jurisprudence and the foremost duty of any trial judge. It would be salutary to remember, and we remind ourselves as well, that the twin principles of the presumption of innocence and the right to a fair trial inform our criminal justice system.

**[81]** In our judgment, there was unfortunately a breach of these principles. If all the evidence adduced at the trial had been duly considered, it would have become plain that the case fell within Exception 4. There was more than sufficient evidence of a sudden fight which emanated from a sudden quarrel between the appellant and the deceased. There was certainly no evidence of any premeditation or pre-existing malice by the appellant against the deceased. The only evidence was that the appellant returned to the scene of the incident out of concern for the deceased.

**[82]** The death of the deceased was caused by the appellant in the heat of passion as he testified and there was no time for passions to cool down. Although it was determined that the appellant had applied excessive force leading to her death, it could not be said that he had acted in a cruel or unusual manner. As was observed earlier, the fight was started by the deceased and during the sudden fight, no weapons were used. In all the circumstances of the case, the appellant was entitled to the benefit of Exception 4. For this reason as well, the finding and conviction of murder cannot be sustained.

**Conclusion**

**[83]** In the circumstances, and for the reasons we have given, we were of the view that there were merits in the appeal. Having scrutinised the whole of the evidence, and for the reasons provided, a conviction for murder under s 302 PC was not justified and palpably unsafe. Accordingly, we set aside the conviction and sentence for murder and substituted it with a conviction for culpable homicide not amounting to murder under s 304(b) PC. After considering the mitigation plea and submissions in reply, we imposed a sentence of seven years' imprisonment with effect from date of arrest.

**Mickelson Gerald Wayne**
**v. PP**


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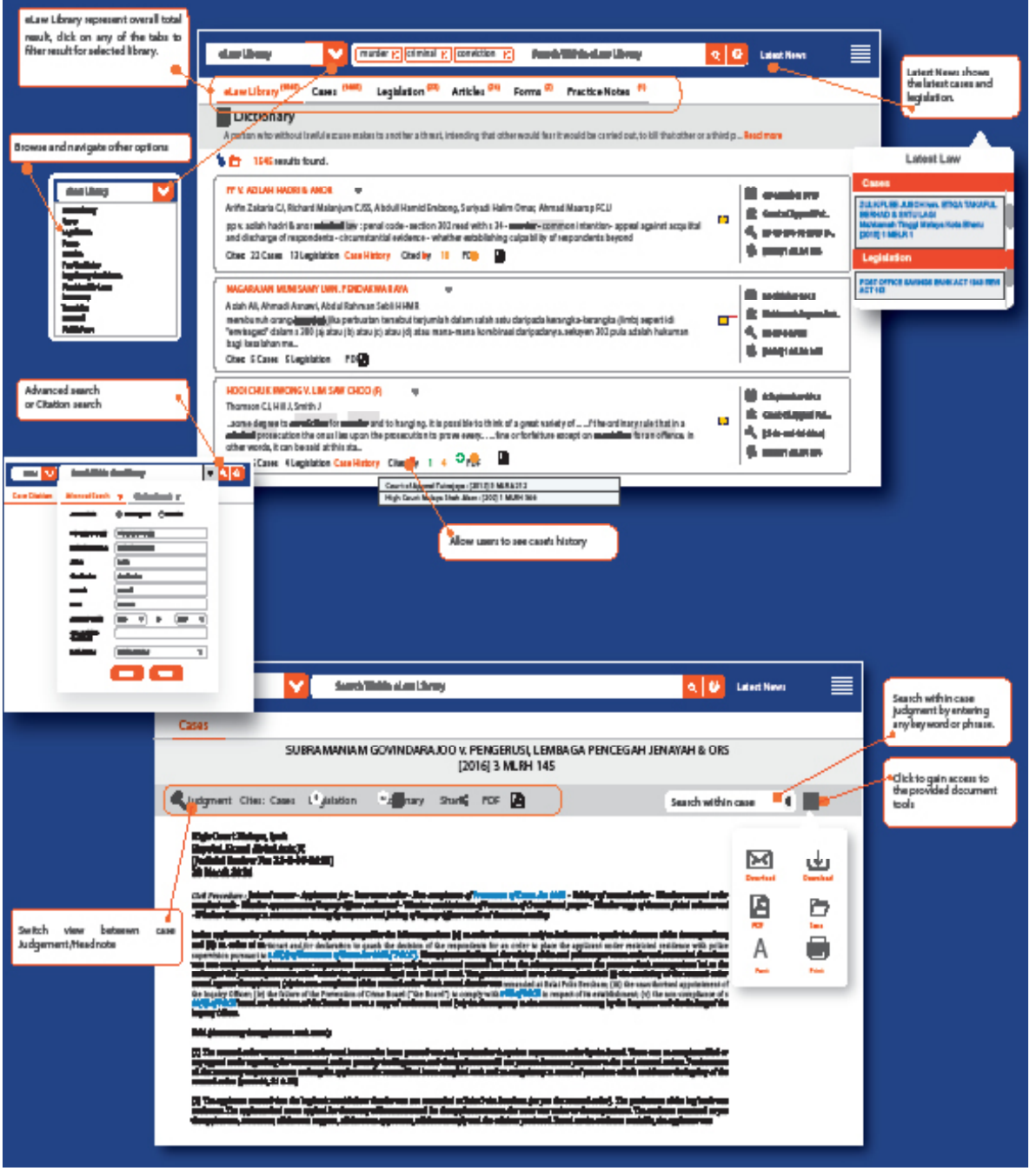

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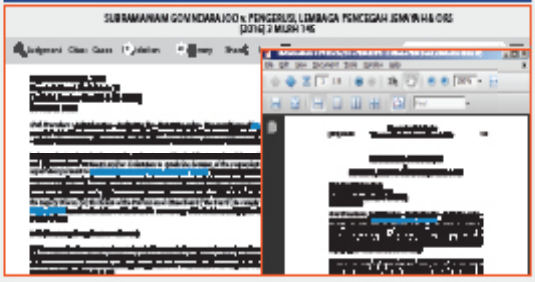

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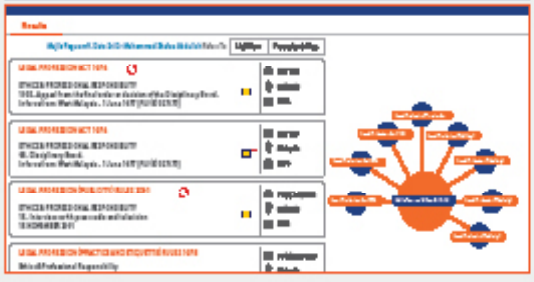

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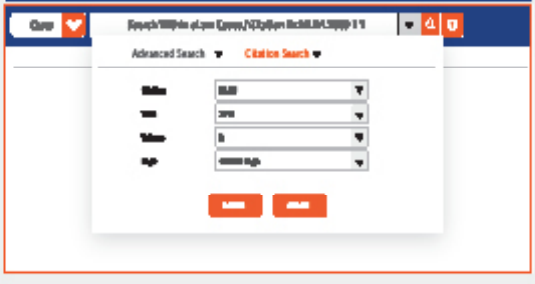

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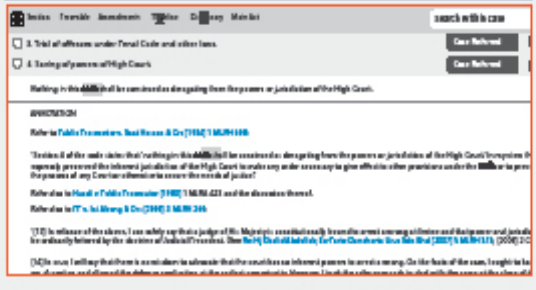

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