

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 561 of 2005**

- Brijlal & Another

---- Appellants**Versus**

- State Of Chhattisgarh

---- Respondents

For Appellants : Shri AK Prasad, Advocate
For Respondents-State: Shri Arvind Dubey, PL for the State

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Anil Kumar Shukla

Order On Board By**Prashant Kumar Mishra, J****22/11/2016**

1. Appellants have assailed the legality and validity of their conviction under Section 302 IPC and Section 302/114 IPC respectively, for which they have been sentenced to undergo life imprisonment and to pay a fine of Rs.1000/-. The charge is for committing murder of deceased Birbal at about 4PM on 11-11-02.
2. Facts of the case, briefly stated, are that Beerasai, Hirasai and Birbal (deceased) are three brothers. The accused No.1/appellant No.1 Brijlal is the son of Beerasai whereas

accused No.4 Hirasai is one amongst the above named three brothers. Accused No.2 Lakhpatri and accused No.3 Shesh Ram are the sons of Hirasai. Land belonging to Beerasai was purchased by deceased Birbal in the name of her daughter-in-law PW-7 Mohmati, however, on allegation that Birbal has not paid the entire amount of consideration, Brijlal, S/o Beerasai was claiming that the land still belongs to them.

3. On the date and time of incident, deceased Birbal had brought paddy and was dumping the same in the threshing yard (Kothar) established on the disputed land. Brijlal raised objection as to why Birbal is dumping paddy over there, on which Birbal stated that he has already purchased the land and it belongs to him, therefore, he has every right to use the same. Hearing this, appellant Brijlal got enraged and while abusing the deceased he was about to charge on him. Seeing Brijlal coming towards him, deceased Birbal used "Si/vas" (a kind of bamboo stick having sharp edges on both ends) to stop Brijlal, due to which Brijlal fell on the ground. Hearing the alarm/shout of Brijlal other accused persons namely appellant No.2 Hirasai, Shesh Ram and Lakhpatri rushed to the place and Hirasai exhorted Brijlal to finish Birbal. Brijlal got up, positioned himself and inflicted one axe blow on the front part of right shoulder of deceased Birbal, on which he fell down and started bleeding profusely. The incident was said to be witnessed by PW-2 Fulbasiya, PW-3 Naphulan Bibi, PW-7

Mohamati, PW-9 Sadir Ali, PW-10 Ishhaq Ali & PW-11 Jabir Ali. While PW-2 Fulbasiya is the wife of deceased and PW-7 Mohamati is daughter-in-law of the deceased, the other eyewitnesses are the neighbors of the deceased.

4. The FIR (Ex-P/1) was lodged by PW-1 Ram Sai at about 19:00 hours on the date of incident. The postmortem was conducted by PW-4 Dr. DK Vishwakarma, who submitted his report (Ex-P/4) stating that cause of death is shock due to haemorrhage (due to injury). Nature of death is homicidal. Duration within 12-24 hours. After recording case-diary statements of witnesses, effecting seizure etc., the charge-sheet was filed against the above stated four accused persons alleging commission of offence under Section 302/114 IPC. While accused No.2 Lakhpati and accused No.3 Shesh Ram have been acquitted of the charges, the present appellant No.1 Brijlal has been convicted under Section 302 IPC and appellant No.2 Hirasai has been convicted under Section 302 IPC with the aid of Section 114 of IPC.
5. Shri AK Prasad, learned counsel for the appellants would argue that there being material contradictions and omissions in the statements of eyewitnesses, the entire prosecution case has become doubtful, therefore, the appellants deserve to be acquitted. He would submit that the neighbours are the

interested witnesses because PW-9 Sadir Ali is a witness in the sale deed executed by Beerasai in favour of PW-7 Mohamati. The other so called independent witnesses are members of family of PW-9 Sadir Ali, therefore, all of them have joined together to falsely implicate the accused persons.

6. Per contra, Shri Arvind Dubey, learned State counsel would support the impugned conviction on submission that all the witnesses have remained firm on the substantive prosecution case, therefore, minor contradictions or omissions, if any, would not frustrate the case of the prosecution. According to him, the present appellants' involvement in the crime is fully proved, therefore, the impugned judgment deserves to be upheld.
7. We have heard learned counsel for the parties at length and perused the record.
8. The case of the prosecution rests on the statement of PW-2 Fulbasiya, PW-3 Naphulan Bibi, PW-9 Sadir Ali, PW-10 Ishhaq Ali & PW-11 Jabir Ali, while PW-2 Fulbasiya, PW-3 Naphulan Bibi and PW-9 Sadir Ali has attributed extortion made by appellant No.2 Hirasai, the other witnesses PW-10 Ishhaq Ali & PW-11 Jabir Ali have only stated that Hirasai did nothing and was merely sitting at the place of incident. All the witnesses have stated that it was Brijlal who inflicted one axe blow on the front side of right shoulder on the person of deceased Birbal, therefore, the finding

recorded by the trial Court that appellant Brijlal is guilty of causing fatal injury to the deceased is fully borne out from the record.

9. There may be some minor contradictions & omissions in the statements of eyewitnesses, but there is no exaggeration which would negate their entire evidence so as to brand them as untrustworthy witness.
10. In **Thoti Manohar Vs. State of Andhra Pradesh**¹, the Supreme Court has held that minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution. Giving undue importance to them would amount to adopting a hyper-technical approach. The Court, while appreciating the evidence, should not attach much significance to minor discrepancies, for the discrepancies which do not shake the basic version of the prosecution case are to be ignored. {See **State of U.P. Vs. M.K. Anthony**², **Appabhai Vs. State of Gujarat**³, **Rammi Vs. State of M.P.**⁴, **State of H.P. Vs. Lekh Raj**⁵, **Laxman Singh Vs. Poonam Singh**⁶, **Dashrath Singh Vs. State of U.P.**⁷}
11. With the above findings, we are now required to consider as to what offence appellant Brijlal has committed in the given set of evidence. Thus, we are required to consider as to, if the appellant had no intention or knowledge to commit culpable homicide of the deceased, what would be the actual offence

1 (2012) 7 SCC 723
 2 (1985) 1 SCC 505
 3 1988 Supp SCC 241
 4 (1999) 8 SCC 649
 5 (2000) 1 SCC 247
 6 (2004) 10 SCC 94
 7 (2004) 7 SCC 408

committed by him and the commensurate sentence which should be imposed on the appellant.

12. It is practically admitted position that both the factions have subsisting dispute for a piece of land owned by **Beera Sai** which was allegedly sold by way of sale deed in favour of PW-7 Mohamati, however, the entire consideration has not been paid to Beerasai. With this background, when the incident took place, the appellant Brijlal and deceased started quarreling by hurling abuses. Although appellant Brijlal initiated aggression by charging over the deceased on which he used *Silvas* to bring down appellant Brijlal on the ground, however, thereafter appellant Brijlal gave only one axe blow on the front side of right shoulder which is not vital part of the body. It is not the story of the prosecution that appellant Brijlal wanted to cause injury over the head of the deceased but somehow the injury was caused on the shoulder. On the contrary, when Brijlal inflicted the injury and the deceased fell down, Brijlal did not repeat the assault even though he had enough time to repeat the assault as other members of his family were available on the spot whereas Brijlal was all alone.

13. The question as to when conviction under Section 302 of the IPC can be converted into culpable homicide, not amounting to murder under Section 304 Part I & Part II of the IPC has been

considered by the Supreme Court in ***Bangaru Venkata Rao v. State of Andhra Pradesh***⁸ and it has been held thus in paras 10 & 11 :

“10. 9. The residuary plea [relates to the] applicability of Exception 4 to Section 300 IPC.

10. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

11. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that

one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

11. '19. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In *Kikar Singh v. State of Rajasthan* it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were likely to cause death he had taken undue advantage. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons

were ripped open and internal organs had come out. In view of the aforesaid factual position, Exception 4 to Section 300 IPC has been rightly held to be inapplicable.”

14. Yet again the said aspect has been considered by the Supreme Court in **Mangesh v. State of Maharashtra**⁹, in the following manner in para 13 :

“13. The judgment cited by the learned counsel for the State, *Pulicherla Nagaraju v. State of A.P.*¹⁰, is quite distinguishable from the present case as in that case the knife-blow that caused death was given with full force and the single injury was found to be 12 cm deep. Even in that case the law has been laid down as under: (SCC p. 458, para 29)

“29. ... The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases

9 (2011) 2 SCC 123

10 (2006) 11 SCC 444

which may throw light on the question of intention.” This Court has reiterated the same view in *Sridhar Bhuyan v. State of Orissa*¹¹ and *Gali Venkataiah v. State of A.P.*¹²

15. In a recent case in the matter of **Dilip Kumar Mondal and another v. State of West Bengal**¹³, the Supreme Court has held in paragraph 22 as under:

“22. This Court in *Sridhar Bhuyan v. State of Orissa*¹⁴ reaffirmed the same and held as under (SCC pp. 396-97, paras 7-8).

“7. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

8. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appreciate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly

11 (2004) 11 SCC 395

12 (2007) 14 SCC 475

13 (2015) 3 SCC 433

14 (2004) 11 SCC 395 : 2004 SCC (Cri) Supp 98

not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused; (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the word 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

16. It has been further held in para 20 in the matter of **Bivash Chandra Debnath alias Bivash & others vs. State of West Bengal**¹⁵, as under:

¹⁵ (2015) 11 SCC 283

“20. On appreciation of evidence on record of the present case, we agree with the contention of the learned Senior Counsel for the appellants that since it is a case of sudden fight and there was no premeditation on the part of the appellants and the offenders have not acted in “unusual manner”, their acts are covered under Exception 4 to Section 300 IPC. In the similar case in **Pulicherla Nagaraju v. State of A.P.**¹⁶, in para 29, this Court has discussed the issue as to when the conviction can be converted from an offence punishable under Section 302 IPC to Section 304 Part I or Section 304 Part II IPC and the same is reproduced hereunder: (SCC pp. 457-58, para 29)

“29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters – plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quar-

16 (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500

rel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. "Be that as it may".

17. The law is thus well settled that when the assailant had no intention to commit the murder but had knowledge that the deceased may die after sustaining injury, the case would fall under Section 304-II of the IPC. There is a reason as to why the case would fall under Section 304-II and not under Section 304-I because in para 13 of his deposition PW4-Dr. DK Vishwakarma has stated that the deceased has died on account of bleeding from the injury sustained by him and it is true that if the deceased would have been given immediate treatment or the efforts would have been made to stop the bleeding by tying some clothes over the injury, he might not have died. He has also stated that the deceased was brought to him after considerable delay and at that time the deceased was breathing last and died after 10 to 15 minutes. The gist of the statement made by this witness is that the death is not a direct result of the injury but (after sustaining the injury and before his death) there was an intervening cause

of profused bleeding during the period he sustained injury and later on died.

18. It has been held by this Court in the matter of **Jagarnath Vs. State of MP (now C.G.){CRA 1535/1997}**

“31. In Modi's Jurisprudence and Toxicology, 24th Edition, Chapter-26, the author has dealt with the topic **causes of death from wounds**. The following part of the chapter can be profitably referred:-

“Causes of death from wounds.-

.....

It should be noted that a person could be convicted of culpable homicide, if he causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity and thereby accelerates the death of that other person. However, the intention or the knowledge with which the act that caused death was committed in a necessary ingredient to bring about a conviction under these offences. In such a case, even if the medical officer has proved from post-mortem examination the existence of the disease that caused the death, and its relation to the injury alleged to have accelerated it, the court will have to be satisfied from the evidence before giving a decision:

(a) that the death at the time when it occurred was not caused solely by the disease; and

(b)that it was caused by the bodily injury to this extent that it was accelerated by such injury.

32. Modi, thereafter, deals with the topic as to when causes of death from wounds are immediate or direct and remote or indirect. (i) haemorrhage (ii) injury of a vital organ and (iii) shock are considered as immediate or

direct causes of death. Haemorrhage is dealt with by Modi in the following manner:-

“Haemorrhage.- This may be external or internal. External haemorrhage may produce marked fall of blood pressure and consequent shock causing death either rapidly, if a large blood vessel such as the carotid or femoral artery has been wounded, or slowly, if a number of small vessels have been injured. The amount of haemorrhage required to cause syncope varies according to circumstances. The sudden loss of blood is more dangerous than the same quantity lost slowly. The loss of one-third of the blood of the body is almost enough to cause death, and the total quantity of blood in the body of an adult is on an average about five per cent of the body weight of about 750 ml per 10 kg of body weight. Children, women and old persons die from the loss of much smaller quantity. Persons with haemorrhage diathesis or haemophiliacs may die of haemorrhage even from a trifling injury.”

Emphasis supplied

19. Modi's observation as to the cause of death from wounds as well as haemorrhage, when applied in the facts of the present case, in conjunction with the statement of PW-4 Dr. DK Vishwakarma, it may be concluded that the deceased has not died instantly on account of the injury but he has died after few hours on account of bleeding from the injury.
20. Thus, it is a case where the appellant may have had the knowledge that the deceased may die on account of the injury but he had no intention to kill the deceased. It is a case squarely falling under exception IV to Section 300 IPC and is punishable under Section 304-II IPC.

21. In the result the appeal preferred by appellant No.1 Brijlal is allowed in part. His conviction under Section 302 IPC is set aside and instead he is convicted under Section 304-II IPC and sentenced to the period already undergone by him. The appeal preferred by appellant No.2 Hirasai succeeds and is allowed. His conviction under Section 302/114 IPC is set aside and he is acquitted of the said charge. Both the appellants are on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A Cr.P.C. The appellants shall appear before the higher Court as and when directed.

Sd/-

Judge

Prashant Kumar Mishra

Sd/-

Judge

Anil Kumar Shukla

Ashu