

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 516 of 2005

Manoj Kumar, S/o Ravindra Nath Nikunj, Aged about 21 years,
Caste : Oraon, R/o Village : Korandha, Police Station : Kusmi,
District Surguja (Chhattisgarh)

---- **Appellant**

Versus

State of Chhattisgarh through the Police Station Kusmi, District
Surguja (Chhattisgarh)

---- **Respondent**

For Appellant:	Shri V.K. Pandey, Advocate.
For State/Respondent:	Shri Arvind Dubey, Panel Lawyer.

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

Judgment on Board By

Prashant Kumar Mishra, J.

17/10/2016

1. The appellant has been convicted for offence punishable under Section 302 of the IPC and sentenced to life imprisonment for committing murder of deceased Santram who died during intervening night of 26th/27th November,2003 on account of altercation and assault between the appellant and the deceased at about 5.00 p.m., on 26-11-2003.
2. The prosecution case, as emerging from the material on record particularly the FIR (Ex. P-11) is that on the date of incident i.e. 26-11-2003 there was weekly market at Village Korandha, where

Garajman (PW-5) had established a small make shift restaurant. At about 5.00 p.m., the appellant was present in the hotel. At that time, the deceased came to the hotel and requested Garajman (PW-5) to exchange a bigger note to obtain smaller notes or coins. During conversation between Garajman (PW-5) and deceased Santram, the appellant intervened and enquired from the deceased as to why he has come to the hotel. The altercation escalated whereupon the appellant grabbed the shirt of the deceased and assaulted him by hand and fist. Thereafter, the deceased sat beside the road. The incident was witnessed by Garajman (PW-5) and Sattu Ram (PW-6) (who also intervened to separate the appellant and the deceased) and Dharmu (PW-7).

3. On the next morning i.e. 27-11-2003, Kotwar Heera Ram (PW-10) was informed by Lalu, Sarpanch of Village Korandha and Ramchandra Ram (PW-9), Sarpanch of Village Premnagar that Santram is lying dead near village nala at Korandha-Karamtola junction. Both the sarpanchs came near the nala and witnessed the dead body. The Kotwar lodged morgue intimation (Ex. P-8) at 14.00 hours on 27-11-2003. Naksha Panchnama was prepared vide Ex. P-2 on 28-11-2003 and the Postmortem Report was conducted by Dr. T. Sai (PW-2) on 29-11-2003 vide Ex. P-4. After the morgue enquiry was over, the FIR was registered on 05-12-2003 vide Ex. P-11. During further investigation, the case diary statements of witnesses were

recorded wherein Garajman (PW-5), Sattu Ram (PW-6) and Dharmu (PW-7) informed the police about the complicity of the appellant. Since the assault has been made by hand and fist, there is no recovery of any weapon nor any memorandum statement has been recorded.

4. It is argued by Shri V.K. Pandey, learned counsel for the appellant, that there is no cogent or reliable evidence for convicting the appellant, therefore, the judgment deserves to be set aside. He would further submit that even if the prosecution case is believed in respect of the first incident which happened at 5.00 p.m., there is no evidence that in the said quarrel or assault the deceased had sustained any injury, therefore, the reason for which the deceased died is not relatable to the altercation or *mar-peeet* which took place at 5.00 p.m.
5. Per contra, learned State counsel would argue that there is abundance of evidence to the effect that the deceased was beaten by hand and fist at about 5.00 p.m. on 26-11-2003 which resulted in fracture of ribs which was the cause for rupture of lungs and liver due to which the deceased died. Therefore, the conviction is well founded.
6. Having heard learned counsel for the parties and on perusal of the record, it is found that the entire case of the prosecution hinges around the statements of Garajman (PW-5), Sattu Ram (PW-6) and Dharmu (PW-7). Garajman (PW-5) speaks about

two incidents; the first one occurred at about 5.00 p.m., and the second at about 8.00 p.m. According to him, after the first assault at 5.00 p.m., the deceased sat near the road and the appellant moved away. However, the appellant came near his hotel at about 8.00 p.m. and beaten the deceased mercilessly. However, this witness has not disclosed to the police about the second incident in his case diary statement (Ex. D-1). The other eyewitnesses namely, Sattu Ram (PW-6) and Dharmu (PW-7) have not stated anything about the second incident. As a matter of fact, Sattu Ram (PW-6) has not at all supported the prosecution. However, he has not been declared hostile. Insofar as Dharmu (PW-7) is concerned, he speaks about the appellant slapping the deceased as also assaulting over his head and pressing his neck.

7. Thus, from the evidence on record, it appears that the appellant assaulted the deceased at about 5.00 p.m., by means of hand and fist. The deceased did not die instantly nor there is any evidence that he became unconscious or was otherwise complaining of some serious problem after this incident.
8. Dr. T. Sai (PW-2) who conducted the postmortem has found the following injuries on the person of the deceased:
 1. Bruise and clot over left parietal region of scalp in the size of 6 x 4 cms.
 2. Bruise on right cheek in the size of 4 x 3 cm;
 3. Bruise on left cheek in the size of 3 x 2 cm;

4. Bruise on right chest in the size of 6 x 4 cm;
5. Bruise on left buttock in the size of 3 x 2 cm.

During internal examination, he found fracture of 4th, 5th, 6th and 7th right ribs and rupture of right lung and of liver. Due to the fracture on ribs, the thoracic and abdominal cavity were full of bloody serum. The cause of death was reported as asphyxia and internal hemorrhage due to rupture of right lung and liver due to injury and mode of death was homicidal.

9. There being direct evidence of the first incident which occurred at 5.00 p.m., and there being absence of evidence about other intervening factor after this incident and the sighting of dead body by two sarpanchs, the only conclusion is that the injuries suffered by the deceased over his ribs were result of the assault made by the appellant. Hence, he has rightly been found to have caused death of the deceased.
10. The next question is - whether the act committed by the appellant would amount to murder or it would be culpable homicide not amounting to murder?
11. 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**¹ and it has been held thus in paras 10

¹ (2008) 9 SCC 707

& 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.”

12. Yet again the said aspect has been considered by the Supreme Court in **Mangesh v. State of Maharashtra**², 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.*³, 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

² (2011) 2 SCC 123

³ (2006) 11 SCC 444

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.” This Court has reiterated the same view in *Sridhar Bhuyan v. State of Orissa*⁴ and *Gali Venkataiah v. State of A.P.*⁵

13. In recent cases also reported in the matters of **Dilip Kumar Mondal and another v. State of West Bengal**⁶, the Supreme Court has held in paragraph 22 as under:

“22. This Court in *Sridhar Bhuyan v. State of Orissa*⁷ 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

4 (2004) 11 SCC 395

5 (2007) 14 SCC 475

6 (2015) 3 SCC 433

7 (2004) 11 SCC 395 : 2004 SCC (Cri) Supp 98

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 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'."

14. It has been further held in para 20 in the matter of **Bivash**

Chandra Debnath alias Bivash & others vs. State of West

Bengal⁸, as under:

“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.**⁹, 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

8 (2015) 11 SCC 283

9 (2006) 11 SCC 444 : (2007) 1 SCC (Cri) 500

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 which may throw light on the question of intention. "Be that as it may".

15. The present case appears to be a case where the appellant had no intention to commit murder of the deceased. We have reached to the conclusion because there is no evidence of any prior enmity between the appellant and the deceased. At the time when the deceased came to the hotel of Garajman (PW-5), he was having conversation with the witnesses and not with the appellant. Of course, the appellant had no reason to intervene but yet there is no genesis of any dispute between the appellant and the deceased and the '*maar-peet*' took place without premeditation. Moreover, there is no evidence that the appellant wanted to assault the deceased in such a manner with

full knowledge and intention that it will cause murder of the deceased. More importantly, the appellant was neither armed nor used any other article as weapon but has only used hand and fist to assault the deceased. There is no evidence either of the fact that immediately after the assault, the deceased became unconscious or developed any serious bodily problem nor did he suffer any serious external injury. For all these broad features, it would clearly appear that the appellant did assault the deceased but without any knowledge or intention that the assault would fracture the ribs which in turn would rupture the lungs and liver and the deceased would ultimately die.

16. In our considered view the act committed by the appellant would fall within 4th exception to Section 300 of the IPC and he would be guilty of culpable homicidal not amounting to murder punishable under Section 304 Part II of the IPC.
17. Accordingly, his conviction under Section 302 of IPC is set aside and instead he is convicted under Section 304 Part II of the IPC.
18. Learned counsel for the parties would inform that the appellant has remained in jail for a period of about 4 years and 9 months. Considering the entire fact situation of the case, the jail sentence already suffered by the appellant is found sufficient, therefore, he is sentenced to the period already undergone. The appellant is

on bail. His bail bond shall remain in force for a period of six months as provided under Section 437-A of Cr.P.C.

Sd/-
JUDGE
(Prashant Kumar Mishra)

Sd/-
JUDGE
(Anil Kumar Shukla)

Kvr