

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 560 OF 2012

WITH

CRIMINAL APPEAL NO.418 OF 2013

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CRIMINAL APPEAL NO. 560 OF 2012

Bhagwan Waman Solanke, .. **Appellant**
Age-23 years, Occu-Labour,
R/o. Digras (BK),
Tq. Kandhar, Dist. Nanded

Versus

The State of Maharashtra .. **Respondent**

Mr.A.M.Gaikwad, Advocate for the appellant.
Mr.S.D.Ghayal, APP for the respondent/State

WITH

CRIMINAL APPEAL NO.418 OF 2013

The State of Maharashtra .. **Appellant**
Through Police Station,
Naigaon (Bz),
Dist. Nanded

Versus

Waman S/o. Fakira Solanke, .. **Respondent**
Age-55 years, Occu-Labourer,
R/o.Digras (Bk),
Tq. Kandhar, Dist. Nanded

Mr.S.D.Ghayal, APP for the Applicant/State
Mr.A.M.Gaikwad, Advocate for the respondent

**CORAM : A.V.NIRGUDE &
INDIRA K.JAIN, JJ.
DATED : 13.01.2016**

ORAL JUDGMENT : [PER : A.V. NIRGUDE,J.]:-

1. Both these appeals can be disposed of by this Common judgment. These appeals arise from judgment and order dated 04.08.2012 passed by learned Additional Sessions Judge, Kandhar, in Sessions Case No.7 of 2011. There were four accused in this case. All the accused were charged for the offence punishable under section 302 r/w section 109 of the Indian penal Code. Accused No.1 is eventually convicted for offence punishable under section 302 of the Indian Penal Code; whereas accused Nos.2 to 4 were acquitted. Criminal Appeal No.560 of 2012 is filed by accused No.1 against conviction and another appeal bearing Criminal Appeal No. 418 of 2013 is filed by the State challenging acquittal of accused No.2 only.

2. Accused No.1-Bhagwan, accused No.4-Shivaji and deceased Laxman were sons of accused Nos.2-Waman and accused No.3-Sonabai. On 30.11.2010 in the evening time quarrel took place between Laxman on one side and accused on other side. Laxman was demanding partition of land and plots owned by the joint family. The altercations were going on between them, which attracted attention of villagers. During the quarrel, accused No.2-Waman said to accused No.1-Bhagwan as to why he was quietly listening to the quarrel. This was taken as provocation and accused No.1-Bhagwan picked up a hammer, which was lying on the ground and gave one blow on Laxman's head. The blow was so fierce that Laxman died on the spot due to the hemorrhage. This incident was witnessed by number of people. Laxman's wife was not present when the incident took place in the village. She was away. When she learnt about the incident during the night, she rushed to the village and after confirming that her husband was dead, she rushed to the police station and lodged her complaint at about 5.50 a.m. The offence was

registered. The investigation took place. During the investigation, police could succeed in getting murder weapon produced at the hands of the accused No.1-Bhagwan. The post-mortem report was obtained and the charge-sheet was filed.

3. During the trial, 14 witnesses were examined. Out of them, P.W.Nos.5-Ganesh & 6-Hanmant are most important. They were eye witnesses who supported the prosecution case. P.W.1 to 4 were also eye witnesses, but they did not support the prosecution case. P.W.10 and 12 were panchas of discovery panchanama. They also turned hostile. The Investigating Officer, however, could state in his deposition that after three months rather belatedly in September, 2011, he could recover the murder weapon at the instance of accused No.1. However, the weapon was not sent for chemical analysis and therefore whether it was stained with blood of the victim is not relevant question.

4. The prosecution case thus depended solely on the depositions of P.W.5 and 6. Learned Judge believed them and came to the conclusion that accused No.1 had committed murder of Laxman but the prosecution case that other accused abetted this offence was rejected.

5. We heard learned Counsel for the parties. Following questions arise for our consideration.

(i) Whether prosecution witness Nos. 5 & 6 are believable?

(ii) If offence of culpable homicide is proved against accused No.1, whether he could show that his case would fall within exception No.4 of Section 300 of the Indian Penal Code?

(iii) Whether the prosecution could prove that accused No.2-Waman abetted commission of offence?

6. We have to, therefore, first of all analyze the depositions of P.W.5 & 6. Both depositions are quite identical. Both these witnesses stated that on 13th November, 2010 in the evening time when they heard commotion near accused No.2's house, they went there.

They both asserted that before they could reach the spot, there were several other persons gathered there. All were watching altercation that was taking place between the victim Laxman on one side and his father and the accused on the other side. They further admitted that this quarrel/altercation was going on for quite some time. P.W.5-Ganesh stated that during the quarrel, accused No.2 asked accused No.1 as to why he was sitting idle. He then said that accused No.1 thereupon picked up a hammer and dealt one blow on the head of the victim. The first question that comes for our consideration is whether the attack took place because of what was stated by Waman to accused No.1 Bhagwan. We could clearly know that what accused No.2 said to accused No.1 was certainly a provocative utterance. He challenged accused No.1 and suggested that the victim should be taught lesson. Upon such provocation it was for accused No.1 to decide as to what action he would take. He could have either ignored provocative statement or could have taken a milder action. But accused No.1 apparently took extreme step

and picked up a hammer and dealt blow on the head i.e. vital organ of the victim. It cannot be assumed that accused No.1 suggested by his utterance that accused No.1 should cause victim's death. So, we are not of the view that whatever accused No.2 uttered would amount to abettment for the offence of homicide. The line of cross-examination did not suggest any particular defence. The cross-examiner suggested all throughout that the injury to the head of the victim was caused due to fall. We are, therefore, inclined to believe depositions of P.W. Nos.5 and 6.

7. Next question is whether accused No.1 could bring his case within the parameters of exception No.4 of section 300 of IPC. Said Section 300 reads as under :-

Section 300 in The Indian Penal Code

300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

(Secondly) —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, or—

(Thirdly) —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—
(Fourthly) —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.

8. Exception 4 has several ingredients. To bring ones case in exception 4, the accused should be able to show that there occurred sudden quarrel which led to heat of passion and in such state sudden fight occurred. In such fight the assailant had no premeditation and had not taken undue advantage of his position and had not acted in cruel and unusual manner.

9. Leading authority on this subject is judgment of the supreme Court in the case of Babulal Bhagwan Khandare Vs. State of Maharashtra (2005) 10 SCC 404. The Supreme Court explained how exception No.4 would apply to facts of a case. The Supreme Court observed as under :—

“18. 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 'fight' occurring in Exception 4 to [Section 300, IPC](#) is not defined in the [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'.

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](#) (AIR 1993 SC 2426) 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 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 come

out. In view of the aforesaid factual position, Exception 4 to Section 300 I.P.C. has been rightly held to be inapplicable."

10. Due to flaring of passion a fight would take place and during such fight violence occurs. If such violence is found to be not premeditated or the assailant did not take undue advantage of his position or the assailant did not act in a cruel or unusual manner, it is only then such assailant would be in a position to take advantage of exception 4.

11. Learned Counsel for accused No.1 tried to suggest that provocation given to accused No.1 was sudden. It is because of the provocation that came from father, son's passion was heated up and at that point of time suddenly accused No.1 picked up nearby weapon without any premeditation and there was only one blow which cannot be said to be cruel or unusual attack. We do not agree with this submission. We find that before such provocation could be given, verbal quarrel was going

on. There was no physical attack between the parties. Accused No.1 could have chosen to assault the victim by hands or by kicks to pacify or to drive him away from the spot. His act of picking up a deadly weapon and catching the victim unaware amounts to a cruel act, mainly because the first blow was so fierce that it proved fatal and when the victim fell down, the assailant had no reason to continue the attack.

12. In the result, both the appeals are dismissed. The judgment and order dated 04.08.2012 passed by Additional Sessions Judge, Kandhar, in Sessions Case No. 7 of 2011 is maintained.

[INDIRA K.JAIN,J.]

[A.V.NIRGUDE,J.]