

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1419 of 2017**

Atvaram, S/o Late Kalma, Aged About 40 Years, R/o Village Karra, Thana Rajpur, District Balrampur, Ramanujganj, Chhattisgarh.

---- Appellant**Versus**

State Of Chhattisgarh Through Police Station Rajpur, District Balrampur Ramanujganj, Chhattisgarh.

---- Respondent

For Appellant	:	Shri Arjun Lal Singroul, Advocate.
For Respondent/State	:	Shri Rajendra Tripathi, Panel Lawyer.

Hon'ble Shri Prashant Kumar Mishra &**Hon'ble Shri Sanjay Agrawal, JJ****Judgment on Board By Prashant Kumar Mishra, J****17.02.2018**

1. The appellant has been convicted for offence punishable under Section 302 of the IPC and sentenced to undergo imprisonment for life for committing murder of deceased Sukhamaniya @ Soniya during the intervening night of 30.09.2010 and 01.10.2010 which happened after altercation and assault between the appellant and the deceased for the reason that Sukhmaniya prepared excess quantity of Potato curry.
2. The case of prosecution, as projected in the charge-sheet, is that Naresh Das, Kotwar heard the cries of Anjali (PW-8), aged about 3 years, on which Naresh Das went inside the house of the accused and found that appellant's wife Sukhamaniya @ Soniya is lying dead having suffered injuries over her head and right hand. Anjali (PW-8) did not inform anything to Naresh Das, Kotwar.

3. In course of investigation, statement of eyewitness Anjali (PW-8) was recorded wherein she disclosed that her father Etwaram has committed murder on a dispute concerning preparation of Potato curry in excess quantity.
4. Dr. Ramprasad Tirkey (PW-15), who conducted the postmortem, has found the following injuries on the person of the deceased:
 1. Lacerated wound in the size of 2x1 cm on left temporal region;
 2. Lacerated wound in the size of 3x2 cm on right wrist;
 3. Lacerated wound in the size of 2x2 cm on left wrist;
 4. Multiple abrasions over knees.He has also found fracture on tenth & eleventh ribs and second & fifth ribs of the right side of the chest. The cause of death was on account of injuries sustained on the temporal region, which was accompanied with fracture of ribs.
5. Based on the statement of the eyewitness Anjali (PW-8), the trial Court has convicted the accused for committing offence under Section 302 of IPC.
6. Shri Arjun Lal Singroul, learned counsel for the appellant would submit that Anjali (PW-8) is a child witness, therefore, her statement should have been carefully scrutinized, which the trial Court has failed to do. He would also submit that the appellant was not present in the house at the time of occurrence, therefore, the conviction deserves to be set aside. In the alternative, it is argued by Shri Singroul that even if the appellant is held responsible for causing injuries, the offence would fall under Section 304 Part I or II of IPC instead of under Section 302 of the IPC. The appellant

has remained in jail since 09.11.2010 till date. The sentence already undergone by him should be treated as adequate sentence for the said offence.

7. *Per contra*, Shri Rajendra Tripathi, learned State counsel would support the impugned judgment.
8. We have heard learned counsel for the parties at length and perused the record.
9. Bifo Bai (PW-1) is mother of the appellant. She was not present in the house at the time of occurrence. Mani Sai (PW-2) is the brother-in-law of the appellant. He is a resident of different village and as such he was also not present at the place of occurrence. Lakhu Ram (PW-3) is the cousin of the appellant. He has not supported the prosecution case and has been declared hostile. Chairman (PW-4) and Sukra (PW-5) both are co-villagers and both of them have been declared hostile.
10. Kenda (PW-6) is the witness of memorandum statement. This witness has also been declared hostile. Similarly, Shivnath (PW-7) is a witness to Ex.P-2, P-3 & P-5 and has admitted his signature on these documents.
11. Anjali (PW-8) is the most important witness examined by the prosecution. She is a witness to the incident as being daughter of the accused and the deceased, she was present in the house at the time of occurrence. She would depose that on a dispute concerning preparation of excess quantity of potato curry, her father Etwaram committed murder of her mother Sukhamaniya @ Soniya. She would state that her father Etwaram gave one blow over the head of her mother Sukhamaniya @ Soniya by means

of Axe. She remained firm on her statement during cross-examination, therefore, there is nothing in her statement denting the prosecution case.

12. Khankhaniya Bai (PW-09) would depose that for about one month after the incident the appellant did not return to the village. Naresh Das (PW-10), Kotwar of the village, has also stated that the appellant was not available in the village for about two to three months after the incident. Fulsai (PW-11), Shankar Uraon (PW-12) and Nehru Uraon (PW-13) have been declared hostile. A. Toppo (PW-14) is the Investigating Officer and Arvind Minj (PW-16) is an Inspector, who had conducted some part of the investigation. Durgesh Rawte (PW-17) has also conducted the investigation.

13. From the statement of eyewitness Anjali (PW-8), it is apparently proved that appellant Etwaram has committed murder of his wife Sukhamaniya @ Soniya. The presence of Anjali (PW-8) in the house was very natural as she was one of the family members, therefore, there is nothing to doubt her statement. The assault caused by the appellant over the head on temporal region of the deceased, as stated by Anjali (PW-8), is corroborated by the postmortem examination conducted by Dr. Ramprasad Tirkey (PW-15). The finding recorded by the trial Court with regard to guilt of the appellant is based on the material available on record and the same does not deserve to be interfered with.

14. We shall now consider as to whether the act committed by the appellant would amount to culpable homicide or culpable homicide not amounting to murder?

15. 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 or Part II of the IPC has been considered by the Supreme Court in the matter of **Bangaru Venkata Rao Vs State of Andhra Pradesh, (2008) 9 SCC 707**, wherein the Supreme Court has laid down the following principles:

“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."

16. Yet again the said aspect has been considered by the Supreme Court in

Mangesh v. State of Maharashtra (2011) 2 SCC 123, 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. (2006) 11 SCC 444*, 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 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* (2004) 11 SCC 395 and *Gali Venkataiah v. State of A.P.* (2007) 14 SCC 475.”

17. In recent cases also reported in the matter of **Dilip Kumar Mondal and another v. State of West Bengal** (2015) 3 SCC 433, the Supreme Court has held in paragraph 22 as under:.

“22. This Court in **Sridhar Bhuyan v. State of Orissa** (2004) 11 SCC 395 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 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'."

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

Debnath alias Bivash & others vs. State of West bengal, (2015) 11

SCC 283, 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 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".

19. We shall now examine the evidence available on record including medical evidence to find out whether the appellant has committed offence under Section 302 or under Section 304 Part I or Part II of the IPC.

20. There is no evidence that the husband and wife were not pulling on well or that they used to quarrel regularly or any altercation took place between them in the past. There is no allegation that on the date of incident, the appellant was in an inebriated condition or was consistently torturing the deceased for sufficient length of time and eventually committed murder in a premeditated state of mind. The origin of the dispute, as stated by Anjali (PW-8), was on account of preparation of excess quantity of potato curry. It would thus appear that the appellant assaulted the deceased in a state of anger which was not premeditated. He used axe for causing injuries. However, ordinarily axe is available in

every house in villages. Although the deceased has sustained more than one injury but the other injuries were not caused on any vital part of the body. Fracture of ribs is accompanied with bruises on chest wall which may have been sustained during fall after sustaining the injury on temporal region as there is no mention in the postmortem report that fracture on the ribs was due to injury caused by some hard and blunt object.

21. Considering the entire gamut of evidence including medical evidence, particularly, the genesis of the occurrence, we are of the considered opinion that the appellant has committed the offence in a heat of anger and was not premeditated. The offence would, therefore, fall within the fourth exception to Section 300 of IPC but the appellant having used an axe to cause injury over head, he was certainly aware that the injury may cause death of the deceased, therefore the offence would fall under Section 304 Part-I of IPC.

22. Considering the fact that the appellant is in jail since 09.11.2010 i.e. for more than seven years, we hold that the jail sentence already suffered by the appellant would be sufficient for conviction under Section 304 Part -I of IPC. We accordingly impose the jail sentence of the period already undergone by the appellant.

23. The appellant be released forthwith if he is not required in any other case.

24. In view of the above, the appeal is partly allowed.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Sanjay Agrawal)
Judge