

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 1273 of 2015

Abhay Miri Aged About 39 Years R/o Village Kusmul Barahipara, P.S. Dabhra,
Distt. Janjgir Champa Chhattisgarh., Chhattisgarh

---- Appellant

Versus

State Of Chhattisgarh Through Police Station Malkharauda, Distt. Janjgir
Champa Chhattisgarh., Chhattisgarh

---- Respondent

For Appellant	:	Shri Vikas Pandey, Advocate
For State	:	Shri Ashutosh Mishra, Panel Lawyer

**D.B. :Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Smt. Justice Vimla Singh Kapoor**

Judgment On Board

07/09/2021

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 09/02/2012 passed by learned Additional Sessions Judge, Sakti, District- Janjgir Champa (CG) whereby and whereunder the appellant has been held guilty of commission of offence punishable under Sections 302, 324 IPC and sentenced as below:-

Conviction	Sentence
u/S 302 IPC	Life imprisonment and fine of Rs.500/-, in default of payment of fine, additional RI for 3 months
u/S 324 IPC	RI for 6 months

2. The prosecution story, as unfolded from the records of the case is that Meena Bai (PW1), mother of the deceased -Ritu lodged FIR in Ex.P-2 at 7:00 AM on 20.9.2010 wherein it was stated that previous night, at about 8:00 pm appellant, her son-in-law went inside the room while preparation of food were going on, she heard a quarrel and then she went inside and found that the appellant was assaulting her daughter Ritu by using axe, due to which, Ritu sustained multiple injuries and fell down on the cot. Having recorded FIR, the police proceeded to place of occurrence and the administration was also informed in consequence of which, Executive Magistrate Anupam Tiwari (PW12) reached at the spot, gave notices to the witnesses and prepared inquest over the dead body in Ex.P-10. Dead body was found in the house of Meena Bai (PW1). It was sent for postmortem and Dr.R.P. Kurre (PW10) conducted postmortem and prepared report in Ex.P-14. Three injuries were found on the body of the deceased. They were described as one cut injury on the occipital part where bone was fractured and brain matter had come out. The other was cut injury on left auricular region and the third was cut injury on the left side of the neck. The cause of death as stated by the doctor was excessive bleeding as a result of injury leading to shock and death and according to doctor, it was homicidal in nature.
3. On that day, Meena Bai (PW1) who had lodged FIR, complained of she having also been assaulted by the appellant, she was examined by Dr. R.P. Kurre (PW10). In her medical examination, in the ulna bone of right side of hand, a fracture was found and external injury was contusion, multiple abrasions over the right wrist and she also complained of pain in the chest. Upon completion of usual investigation, charge sheet was filed and the learned trial Court framed charges against the appellant for alleged commission of offence, charging the appellant under Section 302 IPC that he had murdered his own wife as also under Section 326 IPC on the allegation that he assaulted his mother-in-law Meena Bai by an axe and caused grievous injury. The appellant having abjured guilt, was put to trial. In order to prove its case, the prosecution examined as many as 14

witnesses including eyewitnesses Meena Bai (PW1) and Kiran (PW8), sister of the deceased. The appellant was thereafter examined under Section 313 Cr.P.C., wherein he denied having committed the offence but no defence witness was examined. Learned trial Court, relying upon the evidence led by the prosecution, held the appellant guilty of commission of offence as described above, giving rise to present appeal.

4. Learned counsel for the appellant made pointed submission that in the present case, though the evidence of Meena Bai (PW1), mother-in-law and Kiran (PW8) sister-in-law is to the effect that the appellant assaulted his own wife by axe and killed her, the background and genesis of incident and the condition of the appellant and deceased has been revealed by the prosecution witnesses. This makes out a case of alteration of the appellant's conviction from Section 302 IPC to that under Section 304 IPC. Elaborating his submission, learned counsel for the appellant would submit that the prosecution witnesses have stated that on the date of the incident, the appellant had come to visit in-laws house where his wife was already staying and there was no dispute between husband and wife on that day. The evidence of the witnesses are to the effect that the appellant was requested by mother-in-law to stay overnight and accept hospitality of dinner which was accepted by the appellant and thereafter, he went to market for purchase and there is evidence that the appellant and his wife both consumed liquor and came back to the house. Incident happened in the house when the maternal-grand-father of the deceased-wife came there and scolded the appellant and also slapped as to why he offered liquor to Ritu (the deceased), which led to some dispute and the deceased was not happy with the manner her husband was treated by grand-father and she went inside the room and according to witnesses, a quarrel had also taken place between the husband and deceased. He submits that in such background, when the appellant and deceased were having cordial relation, they had consumed liquor, purchased chicken from market for being cooked at the dinner, it reveals that whatever happened was either because of sudden grave provocation as a result of an incident of slap on

the face of the appellant by maternal-grand-father of the wife or it could also possibly be sudden quarrel between appellant and his wife and in that sudden quarrel, all of sudden, without premeditation and in the heat of moment, appellant may have wielded axe without any intention to kill his wife, which unfortunately led to her death. Therefore, either *first exception* to Section 300 IPC of grave and sudden provocation is applicable or in any case, the fourth exception of sudden fight and assault without premeditation would be applicable and in either case, the conviction would not be under Section 302 IPC but under Section 304 IPC. The appellant by now, has undergone more than 11 years of jail sentence, therefore, the conviction of the appellant may be altered and he may be sentenced for the period already undergone by him and released.

5. Per contra, learned counsel for the State would submit that even if the evidence of the prosecution witnesses with regard to what happened before assault was given by the appellant on his wife is taken as it is, none of the exceptions are made out. He submits that mere quarrel or scolding given by the grandfather of the deceased cannot be said to be an act of grave provocation so as to bring it within the scope of first exception to Section 300 IPC. He next submit that even if the appellant was intoxicated, it is not a case that he was intoxicated against his will or without knowledge, therefore, intoxication would not come in aid to his defence. It is not a case covered by *fourth exception* also because from the act of the appellant in picking up axe and giving repeated axe blows on the head, auricular and neck of the deceased with the sharp edged side of the axe clearly shows intention. There is no element of fight between the husband and wife and mere altercation followed by assault is not enough.
6. We have heard learned counsel for the parties and perused the records.
7. In the present case, the lodging of FIR has been proved from reliable testimony of Meena Bai (PW1), mother of the deceased, at 7:00 am on 20th September 2010. While Meena (PW1) has clearly stated regarding she having lodged FIR, the Investigating Officer G.S. Jauhar (PW11) has clearly

stated regarding lodging of FIR in Ex.P-2 and they have proved their signatures on the FIR. Contents of FIR disclosed name of the appellant as assailant.

The incident is said to have happened at night at 8:00 pm on 19.9.2010. Though we find that FIR was lodged after 11 hrs. of the incident, on the next day, there is satisfactory explanation offered for such delay by Meena (PW1), Kheek Bai (PW2) and Praveen Banjare (PW3). Meena Bai (PW1) has stated in para-6 of her evidence that after her daughter Ritu had sustained injury and was bleeding, she was preparing to take her hospital but vehicle was not available and then her daughter died. Number of persons had gathered around and then on the next day, at about 6:00 morning, she went to the police station. A report has been lodged at around 7:00 am. In the cross-examination, this part of evidence has not been controverted so as to indicate that without any reason, FIR was not lodged for long time about 11 hrs.

In the evidence of Kheek Bai (PW2) it has been stated that after Ritu had sustained injury, she was taken care at home and search was being made for vehicle.

Praveen Banjare (PW3), brother of the deceased has also stated that after the incident, on the request of Meena Bai (PW1), he went to inform Sarpanch, Kotwar and Panchas and it was raining, therefore, they could not come.

8. A conjoint reading of the aforesaid evidence of three witnesses would show that incident happened after 8:00 pm in the night on 19.9.2010 and it was raining, vehicle was not available and Panch, Sarpanch and Kotwar were also sent for so that they may come at the spot. Place of the incident is stated to be about 10 km away from the police station. The explanation emerging from Meen Bai (PW1), Kheek Bai (PW2) and Praveen Banjare (PW3) is satisfactory as to why in the night, the FIR could not be lodged and it took some time to get report lodged in the police station next day early in

the morning.

9. The nature and extent of injury and cause of death as contained in the postmortem report (Ex.P-14), proved by Dr. R.P. Kurre (P.W10) and the evidence of doctor with regard to cause of death are not substantially disputed. The deceased died due to excessive bleeding as a result of multiple injuries. The deceased sustained as many as three injuries, one on occipital part of head, second one in the auricular part and third was on left side of neck. All these injuries have been found to be caused by sharp edged weapon. There are cut injuries. Therefore, it is clear from the evidence of doctor that Ritu was murdered by appellant using a sharp edged weapon on most vital parts of the body.
10. Involvement of the appellant in the alleged commission of offence is based on the evidence of two eyewitnesses one is Meena (PW1) mother of the deceased and second one is Kiran (PW8), sister of the deceased.
11. Meena Bai (PW1) has stated in her evidence that on the date prior to the date of incident, her son-in-law, the appellant, had come to her house while her daughter Ritu, the deceased, was already staying there and she had come to her maternal house few days before to celebrate festival and Pooja. She has further stated that on the request of the appellant, chicken was cooked/prepared. The appellant had gone to village liquor shop along with daughter Ritu wherefrom they returned after consuming liquor and after return, her daughter went inside the room to take rest, stating that she was not feeling well and went to sleep on the cot. At that time, the appellant, being unhappy with her daughter in not returning back to matrimonial house, started abusing and picked up an axe which was lying there and assaulted her daughter. She was sleeping. According to this witness, assault was given in the neck and head thrice, due to which, daughter cried for help. She states that when she reached there, the appellant had given two more blows and she tried to stop him from assaulting due to which, she also sustained injury on her hands and suffered fracture. She has stated that when the appellant, holding axe, had

raised hands to continue assault, she caught hold of his hands from behind but even then the appellant was not prepared to leave the axe. When she called for help, her daughter- Kiran and her sister-in-law Photo Bai came. They snatched the axe from the hands of the appellant. It was thrown in the courtyard, appellant was dragged towards door and while he was trying to run away, he was given a lathi blow. He fell down and then he was tied up with the help of cloth. In the cross-examination, it has been elicited that earlier, the appellant had run away with Ritu, having an affair and later on, he married. This witness has been confronted with her case diary statement (Ex.D-1) and evidence regarding appellant and the deceased coming in intoxicated condition, appellant complaining that wife is not returning, hurling abuses and other minute details of the whole incident of assault, attempt made to prevent the assault by catching hold of the appellant, fracture, third and fourth assault and other subsequent acts up to tying down the appellant have been elicited as omission from the case diary statement (Ex.D-1).

None of the suggestions which has been accepted is to the effect that this witnesses have not seen the incident. However, the minute details of what happened before the incident, at the time and thereafter, there are certain omissions which we also find after going through the case diary statement ExD-1. However, in the case diary statement, the incident of prior details, assault and past assaults have been broadly stated and it cannot be said that entirely new story, different and contrary from what has been stated in the case diary has been built up in the evidence by Meena Bai (PW1). She happened to be the mother-in-law of the appellant who is the husband of her deceased-daughter. Nothing has been elicited in her cross-examination as to why Meena would falsely implicate the appellant and allow to go scot free the real culprit who killed her daughter. Minor discrepancies are not sufficient to form an opinion that the evidence of this witness is false and fabricated or otherwise exaggerated in nature.

A suggestion that after having returned from liquor shop, the appellant had again left the house was denied. Another suggestion that on the date of

incident, in the room, where her daughter was sleeping, there was darkness, was also denied by stating that there was a bulb providing light. A suggestion that the deceased was having illicit relation with another villager has been denied.

12.Smt. Kiran (PW8), sister of the deceased, has also fully corroborated the evidence of Meena Bai (PW1) with regard to what happened on the date of incident and that assault was given by the appellant on the deceased. There is no reason elicited in her cross-examination as to why she would falsely implicate the appellant in murder of her own sister. Her statement as to why incident happened has also been substantially the same as what has been stated by her mother Meena Bai (PW1). Except this, this witness has also come out with one more episode of quarrel and also slap by the maternal grand father of the deceased that the appellant offered the deceased to consume liquor along with him. Except this, all other details which were given by Smt. Kiran PW8 in her evidence are substantially the same as stated by Meena Bai (PW1).

13.From the evidence of these two witnesses there is no doubt left that it is the appellant who had assaulted his own wife.

14.Though some discrepancy with regard to availability of light has been elicited and accepted in the cross-examination of one of the prosecution witness Kheek Bai (PW2), the situation and circumstances which existed at the time of alleged commission of offence are clearly borne out from the evidence of this witness that appellant was present in the house of in-laws where his wife, mother-in-law, sister-in-law were present and then it is stated that appellant went inside the room where his wife had already gone and when cries were heard and witnesses went there they found appellant assaulting deceased. Therefore, the evidence with regard to lack of proper light at the spot in the room does not cast any doubt on the involvement of the appellant and the criminal overt act. It is also relevant to mention that Meena Bai (PW1) is injured witness. R.P. Kurre (PW10) has proved fracture injury in the ulna bone and certain bruises also which is fully corroborates

the oral testimony of Meena Bai (PW1) that when appellant was assaulting her daughter, she attempted to prevent, but the appellant was continuing with assault by keeping hold of axe, due to which, she also sustained injury in her hands and therefore, the evidence of this witness, corroborated by evidence of Smt. Kiran (PW8) on all material particulars proves that it is the appellant who assaulted the deceased Ritu, his wife.

- 15.If the evidence of eyewitness is found reliable, it is not necessary for us to further deal with other part of the evidence relating to recovery of blood stained soil, clothes of the accused which were all found to be stained with blood in the report of FSL.
- 16.As to whether the case of the appellant would be covered under any of the exceptions under Section 300 IPC, particularly *exception first* or exception four thereof, as has been contended by learned counsel for the appellant, we are required to look in the relevant principle of law and then apply the same to the evidence on record with regard to manner in which incident happened.
- 17.As far as *first exception* of grave and sudden provocation is concerned, as is embodied in Section 300 IPC, the requirement is not only of it being sudden but also grave. From evidence of Meena Bai (PW1) and Smt. Kiran (PW8), what is borne out is that on the date of incident, the appellant had come to the house of in-laws where his wife was already staying. He was requested by mother-in-law Meena Bai (PW1) to stay overnight and for that, he put a condition that he is prepared to stay back provided he is given a lavish dinner. There is evidence also to show that thereafter, the appellant went to market along with his wife Ritu to purchase chicken and there in the liquor shop, both of them consumed liquor and came back to house in intoxicated condition. The evidence of Smt. Kiran (PW8) further proves that when they came back, maternal-grand-father also came after some time and scolded the appellant and also slapped him that he offered liquor to the deceased and coming in intoxicated condition. According to Smt. Kiran (PW8), this incident of appellant being slapped by her maternal-grand

father was taken otherwise by deceased- Ritu and she went inside the room saying that she wants to sleep. According to evidence of Meena Bai (PW1) and Smt. Kiran (PW8), thereafter, the appellant went inside the room. They heard the sounds of quarrel between husband and wife and when they went inside the room they found that appellant was assaulting deceased with the help of axe. If the entire incident prior to assault is taken into consideration, then certainly, it cannot be said to be a grave provocation. It is not a case where wife of the appellant had assaulted or slapped her husband. According to evidence of Smt. Kiran (PW8), appellant was slapped by maternal-grand-father. How it could be treated as a grave provocation for the appellant to kill his own wife notwithstanding that this might give rise to some kind of quarrel between them. But in order to bring the case within the scope of first exception of 'grave and sudden provocation' much more is required to be proved from the side of defence or emerging from evidence of prosecution witnesses to constitute the provocation in the category of it being a grave one. We do not find that genesis of dispute was of such nature that it resulted in a grave provocation.

18. Having said so, we have also examined the incident in the light of evidence and manner in which the assault was given, weapon used and part of the body which was chosen for assault by the appellant and the criminal overt act of the appellant during the course of incident. Even though, there was some kind of quarrel between the appellant and the deceased, there is hardly any evidence to show that deceased was also holding some weapon or that she had started assaulting her husband and all of sudden, without premeditation, some injury was caused to her by the appellant, without any intention constituting mens rea to commit offence of murder. The evidence led by the prosecution is only to the effect that appellant and deceased were intoxicated. Deceased was not feeling well. She went inside the room to sleep and then the appellant followed her, went inside the room, picked up an axe and assaulted her out of some quarrel. There is no evidence to even prima facie indicate any fight between appellant and deceased. The evidence is only to the effect that after the deceased went inside the room

to sleep saying that she was not feeling well, the appellant also went inside the room behind her after some time and then, sounds coming. The allegation of fight between the appellant and the deceased is not proved from any evidence led by the prosecution nor emerging from defence of the appellant. In the absence of there being a fight which essentially is one of the most essential ingredient, fourth exception is not attracted.

19. Distinction between culpable homicide not amounting to murder and murder has been a matter of consideration of the Courts and the principles behind such provisions has been stated and restated by their Lordships in the Supreme Court time and again. Since in the present case, the focus of argument for altering conviction u/s 304-II IPC is on the basis of exception 4 to Section 300 IPC, it would be useful to refer to the interpretation of the said provision contained in exception 4 by the Supreme Court in the case **Surain Singh Vs State of Punjab** (2017) 5 SCC 796, wherein it was explained as below:-

“13. Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation 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.

14. 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 had 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 a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

15. In State of A.P. vs. Rayavarapu Punnayya and Another (1976) 4 SCC 382, this Court while drawing a distinction between Section 302 and Section 304 held as under:-

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

* * *

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be,

whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to murder”, punishable under the first part of Section 304, of the Penal Code.”

16. In *Budhi Singh vs. State of Himachal Pradesh* (2012) 13 SCC 663 this Court has held as under:-

“18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of

universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

19. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder....."

17. In Kikar Singh vs. State of Rajasthan (1993) 4 SCC 238, this Court held as under:-

“8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number

of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder.

9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4”

20. It is thus clear that the legal position as to when exception 4 would apply has been well settled. For applicability of exception 4, all the ingredients

as stated “without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner” had to be fulfilled.

Furthermore, the explanation appended to exception 4 provides that it is immaterial in such cases which party offers the provocation or commits the first assault. One of the essential ingredient to attract exception 4 is that the criminal overt act is committed in a sudden fight in the heat of passion upon a sudden quarrel. Words 'fight' and 'quarrel' have been used in the same line therefore, they have to be differently understood. A quarrel cannot be treated to be a fight. Fight is more than verbal altercation and involves physical violence. The term “fight” has not been defined in the Indian Penal Code but it can be said that it takes at least two to make a “fight”. In order to constitute a “fight”, it is necessary that blows should be exchanged though it is not necessary that a weapon should be used. Two persons can fight either with the help of a weapon or even without a weapon.

21. In view of the aforesaid discussion of law, it is difficult to uphold the contention of learned counsel for the appellant to bring into application, *fourth exception*, contained in Section 300 IPC.

22. From the evidence of Meena Bai (PW1) and Smt. Kiran (PW8), it is clear that the appellant had picked up an axe and used the sharp edged side of the same to assault his wife on three vital parts of the body, one being her head, the second one auricular part and the third on her neck. Giving assault repeatedly on such vital parts from the sharp edged side of an axe clearly manifests intention to cause death. The first blow was very heavy and with great force so much so that it fractured the occipital bone to such an extent that even brain matter had come out. Not only this, the other two blows also were on the most vital parts and again sharp edged side was used.

23. Moreover, it is quite clear and noticeable as to what has been stated by Meena Bai (PW1) in her evidence that while appellant was repeating assault, she caught hold of the appellant by hand and the axe from behind and in that process, she also sustained injury and though, she was making all attempts to snatch the axe away and resist the appellant from assaulting, the appellant continued with blows. Nowhere in the evidence of Meena Bai (PW1) and Smt. Kiran (PW8), it has been stated that deceased was also freely participating in the fight. Even no suggestion has been given to these two witnesses that appellant and deceased were fighting.

24. In the result, we do not find any merit in the submission that the circumstances of the case entitled the appellant to get his conviction altered to that under Section 304 IPC. The appeal is therefore dismissed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge