

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
CRA No. 284 of 2014

1. Pooran Lal Janghel S/o. Mankhan Lal Janghel, aged about 27 years,
 2. Makhan Lal Janghel S/o Charan Janghel, aged about 60 years,
- Both R/o. Village : Thandar, Police Station Gandai, Civil & District
Rajnandgaon, CG.

---- Appellants

Versus

- State Of Chhattisgarh through Police Station Gandai, District
Rajnandgaon, CG.

---- Respondent

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- Mrs. Indira Tripathi, counsel for the appellants.
 - Mrs. Hamida Siddiqui, Additional Advocate General for the
State/respondent.
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D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor

Order on Board

Per Manindra Mohan Shrivastava, J.

25.01.2021

This appeal is directed against impugned judgment of conviction and order of sentence dated 22.01.2014 passed in Session Trial No. 25/2012 by which the appellants have been held guilty of commission of offences under Section 302 IPC by imposing sentence of life imprisonment and fine of Rs. 5000/-, plus default stipulation.

2. The prosecution case as is reflected from the impugned judgment and records of the case is that deceased Kamath Janghel was the son of appellant/Makhan Lal and brother of Pooran Lal. According to prosecution, Makhan Lal had effected partition of the joint property between his two sons but their existed dispute between Makhan Lal and Pooran Lal on one side and deceased Kamath on the

other, ever since partition i.e. about 15 years. They were residing in separate house and were using certain part of land as common convenience. It is also the case of the prosecution that many a times, the brothers had entered into dispute arising on account of use of the 'Gali' (narrow passage) reports were lodged in the police station and cases are also pending. In this background, on 06.05.2012 at about 10 AM in the morning, while the deceased, his wife and son were transporting soil using a bullock cart and stacking it by the side of the wall, it was objected to by appellants Makhan and Pooran. Thereafter, the accused surrounded the deceased and Pooran assaulted on the head of Kamath with the help of shovel due to which, Kamath fell down and thereafter the accused also attempted to assault his wife and son who ran away to save themselves. Allegedly, Kamath was assaulted by Pooran and Makhan on his neck, head and back due to which Kamath finally succumbed to death.

3. Upon filing of FIR by Chandrika Bai (PW-6), police reached the place of occurrence, inquest over dead body was prepared and it was sent for postmortem. Upon conducting postmortem, number of injuries were found on the body and the opinion of the doctor was that due to the injuries, the deceased succumbed to death and it was opined to be homicidal death. After conducting usual investigation, which included seizure of soil from the spot, clothes of the deceased and the accused, weapon said to be used in the commission of offence and sending stained articles for forensic test, upon completion of investigation, charge-sheet was filed against the appellants and other co-accused on the allegation that with intention to cause death, they assaulted with a deadly weapon and thereby committed offence

of murder. The charges were denied as the accused/appellants did not feel guilty and demanded trial. The prosecution thereafter led as many as 12 witnesses and led several documentary evidence from Ex. P-1 to Ex. P-29. Accused/appellants along with other co-accused were examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against them in the evidence led by the prosecution to which, the appellants denied having committed any offence on the alleged criminal overt act and stated that they are innocent and have been falsely implicated. No defence witness was examined. Though learned trial Court acquitted three co-accused namely Gajanand, Kunti and Munni Bai by giving them benefit of doubt, it held that as far as Pooran Lal and Makhan are concerned, they are guilty of commission of offence as the evidence of eye witnesses proves that these two accused/appellants, with the use of axe and shovel, assaulted the deceased resulting in injury on the vital parts, particularly the head, which proved to be fatal. Aggrieved by the aforesaid judgment, this appeal has been preferred.

4. Learned counsel appearing for the appellants would argue that the learned Court below having doubted the evidence of the prosecution witness, as far as other accused is concerned, based on contradictions and exaggerations ought not to have relied upon the evidence of the testimony of Chandrika (PW-6) and Ajay (PW-5) who are relative witnesses and interested in falsely implicating the appellants. It is next submitted that the trial Court having disbelieved the testimony of Jay Singh Thakur (PW-3), the only independent witness, ought to have given the appellants benefits of doubt. It is next submitted that the evidence of Chandrika Bai and Ajay is full of

contradictions and omissions not only with regard to the genesis of dispute but also with regard to the manner in which and the order in which the assaults were made on the deceased. It is also submitted that the evidence is also doubtful because the part of the body where the assault is said to have been given and the part where the injury has been found are also is not coherent. Learned counsel for the appellants would argue that though, the place where the dispute is said to have arisen, was surrounded by house of number of persons, no independent witnesses has come to the Court to support the prosecution case and the entire case of the prosecution stands only on the testimony of interested witnesses, namely, the wife and son of the deceased with whom, a long standing dispute with regard to use of common places was going on since long.

Learned counsel for the appellants would further argue that as far as Makhan is concerned, he cannot be said to have shared common intention with his son Pooran in assaulting his another son Kamath because even according to the evidence of the eye witnesses, the injury on the head is said to have been given by Pooran and not Makhan. According to prosecution witnesses, Makhan was holding an axe but no incised wound has been found to suggest nor has the doctor stated that the injuries found on the body of the deceased, particularly head injury could be caused by the axe. If Makhan had any such intention, he would have certainly used the sharp side of the axe. The assault leading to death, if held to be caused by Pooran, as far as Makhan is concerned, he is entitled to be acquitted from the charges of murder even if it is held that contusion on the back of the deceased were as a result of assault given by the

back side of the axe by Makhan. This act, at the most, could be a case of causing simple injury but not sharing common intention with Pooran because the dispute arose at the spot and it is not a case that with any preparation, Makhan accompanied Pooran the co-accused, to with intention to cause death of his own son Kamath.

An alternative submission has been made by the learned counsel for the appellants that even if it is held, relying upon the evidence of eye witnesses, that deceased died as a result of injury caused by assaults on him given by the accused/appellants, the proved circumstances of the case, genesis of the dispute and the evidence of the prosecution witnesses coupled with number and nature of injuries make out a case of exception carved out under Section 300 IPC. She would submit that even according to prosecution, dispute arose at the spot because while accused persons were spreading soil, the deceased gathered an impression as if they were filling the well, which otherwise, was being used as common source of water by both the parties. The assaults is said to have been given by the appellants when deceased objected and resisted the act of the appellants in filling-up the well with soil. Therefore, it is not a case of any intention behind causing death but the quarrel between the appellants and the deceased arose all of a sudden, at the spot and the weapon used was axe and *shovel* (Fawada) which they were otherwise holding at the spot as they were engaged in digging and filling of soil. As such, equipment of agriculture activity alone were in the hands of the appellants. In support of the submission that it was a case of free fight, learned counsel for the appellants has relied upon the forensic report which shows that blood of A group was found on

the collar of the accused Pooran which suggests that there was free fight in which the accused Pooran had also sustained injury. Therefore, it could be case of quarrel followed by sudden fight and assault, if any, without any premeditation and therefore, in such circumstances, criminal overt act as alleged would not travel beyond the scope and ambit of Section 304-II IPC. It is therefore prayed that the conviction of the appellants may be altered to that under Section 304-II IPC. The appellants have undergone more than 8 and a half years of jail sentence by now, therefore, they be set free by reducing the sentence for the period already undergone. In support her submission, learned counsel for the appellants placed reliance upon **2009 AIR SCW 6710 (Gurmukh Singh Vs. State of Haryana); (2017) 5 SCC 796 (Surain Singh Vs State of Punjab); (2018) 16 SCC 614 (Hansram Vs. State of CG); (2020) 2 SCC 511 (Ananta Kamliya Vs. State of West Bengal); (2020) 9 SCC 520 (Jugat Ram Vs. State of CG); 1993 CRI.L.J. 274 (Golak Chandra Nayak and anr. Vs. State of Orissa and Ors.); 2020 CRI.L.J. 4734 (Gulia Majhi Vs. State of Odisha); and 2020 CRI.L.J. 4407 (Nanda Lall Sharma Vs. State of Sikkim).**

5. On the other hand, learned counsel for the State would argue that guilt of the appellants has been found proved from reliable testimony of not one but more than one eye witnesses. She would argue that the prosecution led as many as three eye witnesses namely, (PW-3) Jai Singh Thakur, (PW-5) Ajay and (PW-6) Smt. Chandrika. Though (PW-3) Jay Singh Thakur was an independent eye witness and clearly stated regarding the incident of assault witnessed by him, learned trial Court giving undue weightage to minor

discrepancies, has disbelieved the evidence of this eye witness who is otherwise reliable in support of the case of the prosecution. In any case, it is argued, the trial Court has placed reliance upon the evidence of (PW-5) Ajay and (PW-6) Smt. Chandrika who have clearly stated regarding assault on the deceased by the accused persons. He would submit that merely because witnesses PW-5 and PW-6 are the son and wife of the deceased, their evidence cannot be discarded. The learned trial Court has very cautiously and minutely scrutinized the evidence of these witnesses. She would next submit that the evidence of these prosecution witnesses is also corroborated from the medical evidence with regard to the nature of injury and the place of the body where the injury is said to have been caused. She would next argue that as far as Makhan is concerned, the evidence has come that when the deceased objected to filling of well by the appellants, both of them picked-up two different weapons. Makhan picked up axe and he assaulted the deceased. It is contended that when Pooran and Makhan both opened assault and deceased sustained fatal injury because of the assault given on his head by Pooran. Makhan was who had also given assault was apparently sharing common intention and it is not necessary that each and every injury given by Makhan should also be a fatal injury. Makhan was the father and instead of pacifying the dispute, he took the side of his son Pooran with whom he was otherwise residing and joined Pooran in assault.

It is also argued that present is not a case for alteration of conviction to that under Section 304-II IPC because there is no evidence on record to prove either emerging from the evidence of the

prosecution witness or from the accused examination or any other established circumstance that the deceased and the appellants had entered into any fight. Learned counsel for the State would argue that there is no evidence that deceased had also opened assault on the appellants and both the parties had entered into free fight with each other therefore, one of the most essential ingredient for attracting applicability of Exception 4 of Section 300 IPC is completely absent.

On the other hand, it is argued, the appellants took undue advantage in assaulting the deceased who was neither assaulting nor was armed with any weapon. Learned counsel for the State would further argue that there are more than one injuries found on the head of the deceased and thus giving repeated assault with the shovel that too on the vital part on the head and around with considerable force so much so that it would result in fracture in the scalp and causing internal damage, taken together make out a case of a clear intention to cause death or in any case to cause an injury which the appellants fully knew that it was sufficient in ordinary course of nature to cause of death. Learned State counsel would further submit that the applicability of exceptions having not been made out, the only punishment which could be awarded to the appellant was that under Section 302 IPC and nothing less than that. Reliance has been placed on Public Prosecutor Vs. Somasundaram and ors (AIR 1959 Mad 323); and Supreme Court judgment in the case of Guru @ Gurubaran & ors Vs. State Rep. by INSP. of Police (Criminal Appeal No. 1893 of 2010) vide order dated 27th of September 2019.

6. We have heard learned counsel for the parties, perused the record and given our anxious consideration to various submissions made at the bar in support of their respective cases.

7. Injuries on the deceased and he having died homicidal death is not substantially in dispute in view of reliable testimony of the Dr. Leela Ramteke (PW-11) who conducted the postmortem and proved its report and stated that when the dead body was brought for postmortem he found that blood had oozed out from nose, mouth, ear and on the right occipital part of the head, two injuries were found and there was one fracture injury on the right occipital part, three lacerated wounds were also found on the back of the deceased. All these injuries were ante mortem in nature. In para 2 of his evidence, doctor has stated that the cause of death was intracranial bleeding in the head and the it was homicidal in nature. He had also opined and given response to query that injury on the head and neck could be caused by shovel and axe. In the cross-examination, doctor has admitted that the basis of his opinion in Ex. P-18 that the injuries could be caused by hard and blunt object, has been given after examination of the nature of injury. Though, other statements that the injury could be caused because of fall has also been elicited, the overall nature of injury on the face of the evidence and as a genesis of dispute leaves no manner of doubt that deceased died homicidal death as a result of injury caused on his head which resulted in excessive bleeding.

8. The next issue which arises for consideration whether the prosecution has succeeded in proving that the deceased sustained injury caused by the appellants. The prosecution examined as many as three witnesses as eye witnesses who are (PW-5) Ajay - the son of

the deceased, (PW-6) Smt. Chandrika – the wife of the deceased and Jai singh Thakur (PW-3).

9. PW-6 wife of the deceased Chandrika has proved lodging of FIR, by clearly stating in her evidence that when the police had arrived she had given the details of the incident to the police and at the spot, Dehati Merg intimation in Ex. P-11 was recorded which was duly signed by her, followed by recording of Merg intimation Ex. P-12 which is also signed by her. Spot Dehati Nalsi (Spot FIR) in Ex. P-13 was also lodged by her and signed which was followed by preparation of map of the spot in Ex. P-10 signed by her. On this aspect of she giving a report and details of the incident, nothing could be elicited to disbelieve such version. In her evidence, she has stated that on the date of incident, while she, along with her husband was leveling *Kaccha* house and accused persons were filling the well, a quarrel had taken place. Though, according to her, there were other accused in addition to Pooran and Makhan, the evidence of this witness with regard to other accused has been disbelieved in view of contradictions. However, this witness has stated that Pooran assaulted on her husband and gave a blow on the neck with the help of *shovel* (Fawada) and Makhan assaulted with axe. She cried for help, thereafter, the accused chased her declaring that they have also to be killed due to which, she ran away up to the door of her house and entered inside. Thereafter, accused again approached the place where her husband was present and then it was said that Kamath Janghel died. She has been subjected to detailed cross-examination to impeach her deliberately as an eye witness to the incident from paragraphs 3 up to 35.

10. In her detailed cross-examination, this witness has admitted that the house of the accused is adjacent to the well and house of this witness is on the back of the well. She has also admitted having raised barbed wire surrounded by various trees. A suggestion that the well is in the Kothar (enclosure) of the accused has been denied and the witness has stated that both the parties fetch water and it falls on the land belonging to both the parties. An important fact has been elicited that accused Pooran always indulges in dispute and therefore, reports were also lodged by her as also by Pooran – the appellant. An attempt has been made to elicit that there existed dispute between the two brothers i.e. appellant Pooran and deceased Kamath. Omission with regard to filling of well, as stated in the Court statements, has been elicited by confronting the witness with her 161 Cr.PC statement. Merg intimidation as also Dehati Nalsi lodged by this witness. The other omission regarding accused running away from the spot after gathering of crowd has also been elicited. Suggestion that accused were not working on the land with the help of shovel and pickaxe has been denied and she has reiterated that accused persons were filling the well. Suggestion that at that time, she was not present at the spot but cooking food has been denied and has added that accused persons were bitterly beating her husband and she and her son were crying for help. In Para 20 of her cross-examination, she has admitted that they had crossed the border after removing the barbed wire by adding that this was necessitated for crossing of bullock cart. She has also admitted that her husband fell on the barbed wire while he was running away. Her admission with regard to common use of well for Nistari purpose by both the parties is also elicited. A suggestion that

her husband has assaulted Pooran on his back with the help of shovel due to which, there was bleeding staining the cloth has been denied and she has reiterated that Pooran has assaulted her husband. Specific suggestion that when he was running away after assaulting Pooran, he fell on barbed wire has been denied. She has admitted that on the either side of the barbed wire, the house of Pooran and Kamath are situated and the well is in between. In this manner, what has been elicited in the cross-examination of the witness, no material contradiction or omission with regard to incident has come. The location of the well and houses has been clearly stated. She has admitted that her husband had fallen on the barbed wire, but there is nothing in her cross-examination elicited to show that her husband sustained fatal injury because of fall on the barbed wire. A suggestion that deceased also assaulted Pooran with the help of shovel has been specifically denied. Some other omissions have been pointed out which are not very material nor can be made a basis to altogether disbelieve the testimony of the wife of the deceased who has emphatically stated regarding her presence at the time of the incident.

11. The other witness of the prosecution who has witnessed the incident is PW-5 (Ajay), the son of the deceased. In his examination-in-chief, he has stated when his father and mother had brought soil from the pond and it was unloaded from the cart, Pooran raised an objection as to why it was being unloaded on his land to which, his father stated that the soil is being unloaded in his own land. Thereafter, Pooran came from behind and assaulted his father with the help of shovel on the back of the neck, followed by assault by Makhan with the help of axe due to which his father fell on the barbed

wire and thereafter, Pooran and Makhan again assaulted. He has stated that when Pooran chased to assault his mother, they ran away to their house. This witness has also been subjected to detailed cross-examination from Para 2 to 31. He has stated that the house of both the parties are situated inside the same boundary and both the families fetch water from the well. He has stated that the old house was being demolished and the soil was being used for filling of the well. A suggestion that at the time of incident, his father (the deceased) assaulted Pooran with the help of shovel, has been denied and has specifically denied that Pooran's shirt were stained with the blood because of the assault given by the deceased to Pooran. He has stated that while filling the well, the accused persons were holding, shovel, pickax etc. Certain omissions with regard to role allegedly played by acquitted co-accused Gajanand has been given. He has admitted a suggestion that because of the cries and noise, villagers had approached the spot of incident and others persons namely Manihar and his wife Sajjan Bai also witnessed the incident. In para 14 his cross-examination, it has been elicited that the land belongs to Pooran and they have been provided access up to well for fetching water and because of this, there exists dispute between both the parties and even report has also been lodged in the police station. A suggestion that his father fell down from the mango tree and sustained injury and appellants had come only to see the incident has been specifically denied. A suggestion that appellants have been falsely implicated due to existing property dispute has also been denied. Omission with regard to another incident a day before when Pooran had picked up pickax to assault his father has been elicited. In

his cross-examination, it has also come out when his father and mother had brought soil in the cart, Pooran and other labours were demolishing the old house of the Pooran and debris it was being used for leveling. A suggestion that when they reached Pooran was engaged in spreading soil to raise a small wall near the well has also been accepted. However, a suggestion that a dispute arose because his father objected to such act of raising a short boundary against the wall near the well led to dispute has been denied. In his cross-examination, he has admitted that when for the first time, soil was brought, the dispute did not arise but when another heap of soil was brought near Pooran's boundary, the dispute arose. Suggestion given that false report has been lodged has been denied.

12. Though certain minor contradictions and omission have come, none of the omissions or contradictions are of such a nature as would warrant rejection of the evidence of the above two witnesses. From the evidence of both the witnesses and what has been stated in their examination-in-chief as well as elicited in their cross-examination, what is clear is that there existed a well which was of common use by both the parties, but the houses of the two brothers namely Kamath - the deceased and Pooran - the appellant were divided by a barbed wire and the deceased and his family used to go to the well to fetch water. On the date of incident, Pooran had demolished the wall of his existing house and he was attempting to obstruct approach, the debris for raising a wall and at the same time, the deceased Kamath and his wife Chandrika (PW-6) were bringing soil from outside in the cart and dumping. The dispute arose because of the activities carried on by Pooran which gave an impression to deceased Kamath that Pooran

was attempting to fill the well which was of common use of both the parties. Moreover, suggestion given to both the witnesses that deceased gave an assault on the back of Pooran, resulting in bleeding and blood stain in the cloth has been specifically denied. The suggestion that deceased started running away from the spot after giving an assault on Pooran and in that process, he fell down on the barbed wire has been admitted but there is no admission of the fact that the fatal injuries were caused on the deceased because of fall on the barbed wire.

13. The aforesaid evidence of the two eye witnesses is supported by the medical evidence also with regard to the nature of injuries and the place where the injury was found on the body of the deceased. This has already been discussed herein-above, while referring to the medical evidence. Therefore the ocular testimony is also corroborated from medical evidence.

14. True it is that the learned trial Court has disbelieved the evidence of another eye witness Jay Singh Thakur (PW-3), but only on that count, the evidence of the wife and son of the deceased could not be disbelieved. It is well settled legal position that merely because the witnesses are relative of the deceased, their evidence cannot be discarded at the threshold but the rule of caution is that their evidence is required to be scrutinized with care and caution. In view of aforesaid minute scrutiny of the evidence of Chandrika Bai (PW-6) and Ajay (PW-5), there is no iota of doubt that the deceased was assaulted by Pooran and Makhan Both.

The submission that in view of admission of both the witnesses that their houses are surrounded by other inhabitant of the village but

no other person has come to support the case of the prosecution except the wife and the son, could not be made a basis to disbelieve the testimony of eye witnesses who are otherwise found reliable upon scrutiny of their evidence. It is not the quantity but the quality of evidence which is important. Even one witness, if reliable, can fully support the case of the prosecution and it may lead to conviction. In the present case the prosecution case of assault on Kamath by appellant Pooran and Makhan on the deceased has been proved by the evidence of Chandrika Bai and Ajay and corroborated from the medical evidence also. It cannot be lost sight of that both the parties had existing dispute over the property and even reports are said to have been lodged in the police station. That shows that the relation between the two brothers Kamath and Pooran were strained. In the absence of any material contradiction and omission, the evidence of Chandrika Bai (PW-6) and her son Ajay (PW-5) have rightly been believed by the learned trial Court to hold that deceased was given blow on the vital parts by Pooran and assault on the back of the deceased by appellant/Makhan, the father of the deceased.

15. It is however important note that the incident of assault on the deceased happened at the spot and as stated by PW-6 (Chnadrika Bai) – wife of the deceased, the cause of dispute was that the accused persons were filling the well which was objected to by the deceased. At this juncture, while Pooran picked up a shovel and gave lethal blow on the head of the deceased, Makhan, his father, though holding an axe in his hand, chose to give blows from the blunt side of the axe and that too, on the back of the deceased. It is not a case where Pooran and Makhan have come prepared at the spot to open

assault on the deceased. The injury on the back of the deceased also does not show that it was an incised grievous wound but only a minor injury. Certainly, if Makhan had shared common intention, nothing prevented him from giving fatal blows on the vital parts of the body with the sharp edge of the axe which he was holding in his hand. This Court has also found that the learned trial Court has acquitted other accused of the case including Gajanand on whom the prosecution alleged that the Gajanand at the spot had declared that accused has to be killed and then assault was opened by Pooran and Makhan. Once Gajanand has been acquitted disbelieving the said part of the prosecution case, this Court is of the opinion that Makhan cannot be said to have shared common intention to cause death of Kamath. Pooran and Makhan would be liable for their individual criminal overt act and not for that of each other. The fatal blow on the head was given by Pooran and not by Makhan. The assault by Makhan was only on the back that too with the blunt side of the axe. He was the father of the deceased. In all probability, as deceased raised objection to filling of well, Makhan may have thought of deterring the deceased from the spot. It was for the prosecution to prove by clinching evidence that the Makhan had assaulted on the deceased with intention to cause death or that the injury caused by him was with the knowledge that it was sufficient to cause death. That being not the case here, as far as appellant/Makhan is concerned, he would be liable only for the criminal overt act of giving assault on the back of the deceased which resulted in a minor injury.

16. Vociferous arguments have been advanced by learned counsel for the appellant to convince the court that criminal overt act of

appellant Pooran would not travel beyond the scope and ambit of section 304-II IPC as present is not a case of murder but culpable homicide not amounting to murder by application of exception 4 to Section 300 IPC. Number of judgments have also been cited before us.

17. 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 **(2017) 5 SCC 796 (Surain Singh Vs State of Punjab)** 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”.

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.](#)”

9) [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.....”

10) [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....”

18. 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 sudden fight in the heat of passion upon a sudden quarrel and without the offenders 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 element 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. Even if it is held on the basis of the evidence of the prosecution witnesses that it was a case of sudden quarrel between Pooran and Makhan on the one side and deceased Kamath on the other because Kamath was objecting to filling of the well, there is no evidence emerging from the evidence of the prosecution witnesses or from the examination of the accused under Section 313 Cr.PC nor is there any defence evidence that Kamath sustained injury in the course of fight with his brother Pooran and father Makhan. The evidence shows that when Kamath objected to filling of the well his brother Pooran and father Makhan got enraged and assaulted. Suggestions regarding fight, given to the eye witnesses have been specifically denied and no witness has admitted that a fight took place all of a sudden at the spot in course of which injury was caused on the head of the deceased due to assault given by Pooran. The element of fight is completely absent.

19. Learned counsel for the appellant would argue that in the forensic report of the shirt seized from the appellant during

investigation, a blood spot has been found in the collar. Suggestion has been given to eye witnesses, though denied, that the deceased also opened assault and assaulted Pooran. Therefore, the defence story of appellant/Pooran also having sustained injury meaning thereby there was fight between appellant/Pooran and the deceased/Kamath is not plausible. The submission deserves to be rejected because the FSL report does not talk of the group and origin of the blood and in the absence of there being any evidence of deceased opening any assault on the appellant/Pooran, it cannot be concluded by any standards that the deceased also opened assault on appellant/Pooran and it was during fight between the two brothers that the deceased sustained fatal injuries. Even in the statement under Section 313 Cr.PC, appellant/Pooran has not stated that he was assaulted due to which he sustained injury on any part of his body which led to blood stains in his clothes. There is no evidence on record to show that Pooran sustained any injury on any part of his body.

Therefore, it cannot be said that all the essential ingredient to attract applicability of exception 4 Section 300 IPC are made out. The submission of learned counsel for the appellant is that the it was a case of heat of passion and before it could cool down the incident happened. According to her, it was a case of sudden quarrel. Even if such argument is accepted that a sudden quarrel arose and in the heat of passion assault was given, in the absence of their being any evidence of a sudden fight between the brothers, exception 4 could not be attracted when the deceased did not indulge in any fight either by using of weapon or otherwise. Where an oral objection to an act is

responded to by fatal assault, it cannot be said to be a case of sudden fight. There is yet another reason why exception 4 would not be attracted and that is it is also a case of taking undue advantage by Pooran. There is no evidence on record that at the time when Kamath raised objection to filling of the well, he threatened to assault or he was holding and wielding any weapon to assault Pooran. He was simply raising an objection to which a violent response was given by Pooran by giving forceful blow on the head of the deceased with the help of a heavy iron made shovel used in agricultural activities. Therefore, it would be a case of taking undue advantage by Pooran. It is not a case where Pooran as well as deceased Kamath both were holding weapon in the hands, exchanging blows and causing injury to each other and on that sudden fight, deceased sustained fatal injury on his head. In the absence of their being any evidence of deceased holding any weapon much less opening any assault on Pooran to desist him from filling the well, exception 4 cannot said to be attracted in the present case.

20. The judgments which have been relied upon by the learned counsel for the appellant have been referred in myriad circumstances depending upon the evidence before the Court and on facts conviction under Section 302 IPC was altered to that under Section 304-II IPC. In all the decision cited before this Court, there is a common thread that exception 4 has been applied and invoked if death is caused “(a) without premeditation”, “(b) in a sudden fight” ; “(c) without the offender having taken undue advantage or acted in a cruel or unusual manner”; and “(d) the fight must have been with the person killed. In one of the decision in **2009 AIR SCW 6710 (Gurumukh Singh Vs.**

State of Haryana) the Supreme Court relied upon its earlier decision in the case of **Pappu Vs. State of MP, (2006) 7 SCC 391** to clearly underline the essential ingredients for application of exception 4 as below:-

"20.....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'.

It cannot be laid down as a rule of universal application that whenever one blow is given, [Section 302](#) IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body it was given and several such relevant factors.

Considering the factual background in the case at hand it will be appropriate to convict the appellant under [Section 304](#) Part II IPC, instead of [Section 302](#) IPC as has been done by the trial court and affirmed by the High Court. Custodial sentence of eight years would meet the ends of justice. The appeal is allowed to the aforesaid extent."

21. The Supreme Court clearly emphasized upon their being a fight to attract exception 4. Moreover, it has also been highlighted that it has to be further shown that the offender had not taken undue advantage. The expression 'undue advantage' as used in the provision means unfair advantage. Moreover, it has also been emphasized that it cannot be laid

down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force which with the blow was given, part of the body it was given and several such relevant factors.

22. In the case of **Guru @ Gurubaran & Ors. Vs. State, Represented by Inspector of Police (Criminal Appeal No. 1893/2010 decided by the Supreme Court on 27th September, 2019)**, it was held that in a given case, exception may not be applicable, it is ruled out because of the manner in which blow was given. In that case, it was held, it would be covered squarely within clause fourthly of Section 300 IPC. Relevant portion of Paragraph 7 of this judgment is reproduced as below:-

“7....Even otherwise, we feel that Exception 4 is not applicable because the manner in which the blow was given right on the middle of the head, brings this case squarely within clause “Fourthly” of [Section 300](#) IPC, which reads as follows:

“300. Murder - xxx xxx xxx
 Secondly xxx xxx xxx
 Thirdly xxx xxx xxx
 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.”

In all the cases cited at the bar from side of the appellant, on facts the Court, found that it was a case of fight and taking into consideration the background and genesis of dispute, conviction under Section 302 IPC was altered to that under Section 304-II IPC, which is not the case, on facts, here.

23. However, as far as appellant/Makhan is concerned, the evidence on record, as stated by eye witnesses PW-5 and PW-6, does not prove that two appellants shared common intention to cause death of Kamath.

Appellant Makhan is the father of Pooran and Kamath. He appears to be taking side of his son Pooran and therefore, when the dispute arose on account of appellants filling the well which was objected to by deceased Kamath, appellant/Makhan, though, was holding an axe in his hand, chose not to inflict injury on any vital part by the sharp edged side of the axe. The evidence shows that the Makhan gave certain blows due to which some contusion was caused on the back of the deceased. Had there been any intention on the part of the Makhan, nothing prevented him to assault Kamath by using the sharp side of the axe and choosing vital parts of the body of the deceased. There is no evidence to show that after the incident, Makhan and Pooran went together and then returned with certain arms. Therefore, in these circumstances, appellant/Makhan cannot be held liable for criminal overt act committed by co-accused/Pooran. He would be liable only for his individual criminal overt act and that is of giving assault on the back of the deceased resulting in certain minor injuries.

24. In the result, appeal of Pooran is **dismissed** and his conviction is affirmed. Appeal of appellant - Makhan is **partly allowed** and his conviction under Section 302 IPC is altered to that under Section 324 IPC. Taking into consideration the period of imprisonment which Makhan has already undergone, sentence is awarded for the period undergone which is the maximum sentence that could be awarded under Section 324 IPC. Therefore, Makhan be released forthwith.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Vimla Singh Kapoor)
Judge