

ATU/RMA

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 662 OF 2015

1. Mangesh Sadanand Masane

Age : 27 years, Occ.: Agriculturist.

2. Sadanand Namdev Masane

Age : 54 years, Occ.: Agriculturist,

Residing at Village Waje,

Tal.: Panvel, Dist.: Raigad.

(At present serving the sentence of rigorous imprisonment at Kolhapur Jail)

Appellants

(Ori. Accused

.. Nos.1 and 2)

Versus

1. The State of Maharashtra.

[Navin Panvel Police Station

Tal. Panvel, Dist. Raigad.]

2. Santosh Laxman Patil,

Age.: 37 years, Occ.: Service,

Residing at Village Waje, Tal. Panvel,

Dist.: Raigad.

.. Respondents

Mr. R.D. Suryawanshi, Advocate for Appellant.

Mr. Ajay Patil, APP for Respondent No.1 – State.

Mr. Rahul S. Kulkarni, Advocate for Respondent No.2.

CORAM

: A.S. GADKARI &

MILIND N. JADHAV, JJ.

RESERVED ON

: 03rd August 2022.

PRONOUNCED ON

: 06th September 2022.

JUDGMENT (PER : MILIND N. JADHAV, J.)

. This Appeal questions the legality of the Judgment and Order dated 27.04.2015, passed by the learned Additional Sessions Judge, Raigad at Alibag in Sessions Case No.97 of 2011, convicting

Appellants (Original Accused Nos.1 and 2) under Section 235(2) of the Code of Criminal Procedure (for short “Cr.P.C.”) for offence punishable under Section 302 of Indian Penal Code (for short “IPC”) and sentencing them each to suffer rigorous imprisonment for life and pay fine of Rs.5,000/- each and in default thereof suffer further rigorous imprisonment for one year. Both Appellants have also been convicted for offences punishable under Sections 326 read with 34 IPC and sentenced to suffer rigorous imprisonment for 5 years and pay fine of Rs.1,000/- each and in default thereof to suffer rigorous imprisonment for two months; both sentences to run concurrently.

2. Appellant No.1 is the son of Appellant No.2. They shall be referred to as accused No. 1 and accused No. 2.

3. Prosecution’s case is based on ocular evidence to the incident. The gist of facts necessary for determination of the present Appeal are as under:

3.1. Complainant/First informant Santosh Laxman Patil (PW-1) is son of deceased Laxman. He was residing along with his wife Nirmala (PW-3) and two sons (Aniket (PW-4) and Abhishek) on the first floor of a newly constructed house in village Waje, Taluka: Panvel, whereas his parents Laxman and Sushila Patil alongwith his younger brother Bharat (PW-2) and his wife resided on the ground floor of the same house. On 28.12.2010, family of complainant i.e. Patil family

performed a housewarming (Gharbharani) ceremony of their newly constructed house and started residing therein. Family of accused namely Masane family resided in the structure/house adjacent to the newly constructed house of Patil family. There was a small alley separating the two houses and an open space separating both structures. Both Patil and Masane family are related to each other and claimed right and entitlement in respect of the alley and the open space in front of their structures.

3.2. On 29.12.2012 at 6:00 a.m. in the morning, complainant's son took bath; at 6:15 a.m. Nirmala (PW-3) heard screams of accused Nos. 1 and 2 along with Original Accused Nos.3 Vithabai and No.4 Sulouchana hurling abuses at Patil Family while standing in the open space in front of their house; on hearing abuses, father of complainant i.e. Laxman Patil came out of the house but he was assaulted by accused No.1 with axe on his chest and by accused No.2 with sword on his left arm. Laxman sustained grievous injuries and fell to the ground; by this time complainant rushed to his rescue but was assaulted by accused No.1 with axe on the right hand and accused No.2 assaulted him with sword on his right leg. Original Accused No.3 (Vithabai) and Original Accused No. 4 (Sulochana) assaulted complainant with sickle and sticks. On hearing their screams, PW-2 Bharat Patil rushed out of the house but was assaulted by accused

No.1 with axe on his left leg and by original Accused Nos.3 and 4 with sticks. Bharat sustained bleeding injuries. PW-4 (son of complainant) witnessed the entire incident from the gallery of house. Laxman was taken to Gandhi Hospital at Panvel and declared dead. PW-1 and PW-2 were treated for their injuries. Inquest Panchanama Exh. 56 of the dead body of Laxman Patil was prepared by PI - Walchand Mundhe and it was sent for post-mortem to Rural Hospital, Panvel. Spot Panchanama vide Exh. 79 was carried out by PW-7 and blood-stained clothes, sickle without handle and stick were recovered and seized. Further seizure of axe, sword and stick used in the crime was made vide Exh. 81 from the backside portion of tin-tank at the instance of accused No.1. Blood stained clothes of accused Nos. 1 and 2 were recovered at their instance and marked as Articles 13 to 15; axe was marked as Article 10, sword was marked as Article 11 and Bamboo stick was marked as Article 12. These articles were recovered from the house of one Vasant Masane, relative of Appellants at their instance.

3.3. Seized articles were sent for chemical analysis to obtain C.A. Report. After completing investigation, charge-sheet was submitted in the court of Judicial Magistrate First Class, Panvel.

4. As offences under Sections 302 and 307 IPC and were exclusively triable by the Court of Sessions, learned Judicial Magistrate

First Class, Panvel committed the case to the Sessions Court for trial.

5. Charge under Sections 143, 147, 148, 302, 307, 504, 506 read with 149 IPC, Sections 4 and 25 of Indian Arms Act, 1959 and Section 135 of Bombay Police Act was framed vide Exhibit No.36 and read over and explained to both accused in vernacular; they pleaded not guilty and claimed to be tried; defence of accused is of total denial.

6. To bring home guilt of accused, prosecution examined 10 witnesses viz; PW-1 - Santosh Laxman Patil, complainant (Exhibit No.62), PW-2 - Bharat Laxman Patil (Exhibit No.65), PW-3 -Nirmala Santosh Patil (Exhibit No.69), PW-4 - Aniket Santosh Patil was 17 years old on the date of incident (Exhibit No.70), PW – 5 - Dr. Trupti Laxman Lokhande (Exhibit No.73), PW-6 - Hanuman Govind Patil panch (Exhibit No.77), PW-7 - Ramesh Pundalik Patil, panch (Exhibit No.78), PW-8 - Subash Narayan Gaikwar, panch (Exhibit No.80), PW-9 - Dr Pramod Hansraj Gandhi (Exhibit No.88) and PW-10 - PI. Walchand Pandharinath Mundhe, Investigating Officer (Exhibit No.94.)

Trial Court convicted Original Accused Nos. 3 and 4 under Section 34 IPC and acquitted them under Section 302 IPC.

7. The trigger for the incident on 29.12.2010 was the draining of foul water from the bathroom of the first floor of the newly constructed house of Patil family through the outer drain-pipe which

was not connected to the drain. The foul water from the bathroom on the first floor fell directly on the roof top of Masane's house, which enraged them leading to the incident.

8. PW-1 - Santosh Laxman Patil is the eye witness. The deposition and version of PW-1 is followed by PW-2. On reading the evidence of PW-2, PW-3 and PW-4 it is seen that their evidence is consistent and corroborates with the deposition of PW-1. PW-1 has deposed that on 29.12.2010, he woke up at 6:00 a.m. to the screams of conflict as he was informed and called by Nirmala (PW-3) that his father was been beaten by Appellants and therefore he rushed to the spot of incident where he saw accused no.1 attacking his father Laxman with axe on his chest; Accused No.1 immediately thereafter attacked PW-1 - with the same axe on his right hand and accused No.2 followed by attacking him with sword on his right leg. PW-1 saw his father Laxman falling down. By this time PW-2 also rushed to the spot of incident but accused No.1 assaulted PW-2 with axe on his right leg twice whereas other accused i.e. Sulochana and Baki caught hold of his hair and pulled him towards the ground and assaulted him with sickle on his back; by this time some villagers gathered at the spot and rescued them. He deposed that Baban Kondiram Patil took his father and PW-2 to Gandhi Hospital in his vehicle. In his cross-examination he has deposed that as soon as he came out of his house, he pleaded

with accused no.1 and accused no.2 and by saying “मारू नका” (not to beat); that thereafter PW-3 i.e. his wife came to the spot along with mother and other family members. He categorically, deposed that there was no scuffle between the members of the two parties.

9. PW-2 – Bharat in his evidence has deposed that on 29.12.2010 at about 6:15 a.m. when he was sleeping in his house he heard noise of quarrel from the adjacent house and came out of his house and saw that his father was lying in a pool of blood in the open space in front of his house; he witnesses both accused assaulting his brother Santosh (PW-1); at that time PW-1 told him to save his father first; hence he rushed to help Laxman and called his wife and asked her to bring water; that when he was giving water to his father, accused No. 1 assaulted him with axe on his left leg on the knee bone and accused Sulochana and Baki assaulted him with sticks on his back; by this time the neighbours arrived at spot and rescued them; Baban Kondiram Patil took him, his brother Santosh and Laxman in his car to Gandhi Hospital, Panvel for treatment. He further deposed that his father sustained injury on chest and right hand and Santosh (PW-1) sustained bleeding injuries due to assault. In his cross-examination, he has deposed that till he reached out to Laxman with drinking water, accused did not assault him but thereafter he was assaulted; by this time villagers arrived at the spot.

10. Before PW-1 and PW-2 came on spot of incident, PW-3 and PW-4 heard the shouts / screams and abuses of members of Masane family and came into the gallery/window on the first floor and witnessed the abuses and attack on Laxman. PW-3 in her deposition has stated that she prepared food for her sons at 6:00 a.m. and her sons after taking bath dressed up for going to their classes; that she came in the gallery on the first floor alongwith her sons when accused Vithabai came to their courtyard and screamed loudly by uttering the words “ए शेड्या बाहेर ये तुमच्या घरातील पाणी आमच्या जागेत पडते”. She has deposed that, her father-in-law Laxman came out of their house and she realised that the accused would assault Laxman, hence she and her son Aniket (PW-4) gave a loud shout to PW-1 and informed him, upon which PW-1 rushed to the ground floor. She has deposed that accused No. 1 assaulted Laxman with axe on chest, while accused No. 2 assaulted Laxman with sword on his left arm and after sustaining bleeding injuries Laxman fell to the ground. She has further deposed that all accused Nos. 1 to 5 started assaulting PW-1 when he went to Laxman’s aid; that accused Sulochana caught his hair; accused Sunita caught his hands from back and accused Vithabai assaulted him with sickle. She deposed one of their neighbour, Naresh Damodar Patil tried to rescue PW-1 and Laxman, but accused did not listen; so also many villagers gathered there and they held accused No. 1 but he did not listen. She further deposed that PW-2 Bharat also rushed out and

was giving water to Laxman when he was assaulted by accused No. 1 with axe on his right leg and other accused Sulochana and Sunita assaulted her mother-in-law i.e. Laxman's wife with sticks; that Baban Kondiram Patil, neighbour came there alongwith his maruti car and took Laxman and PW-2 to Gandhi hospital, Panvel for treatment. In her cross-examination she has stated that until Laxman and PW-1 sustained injuries PW-3 was inside the house and he came to the spot after Naresh Patil pacified the accused persons and after Laxman and PW-1 had collapsed to the ground. She has deposed that it did not happen that when Bharat came to the spot, he went to save her husband; she has denied the suggestion put to her that someone assaulted Laxman and he was lying in an injured condition near their house and they suspected the accused as assailants on account of the dispute of land and a scuffle had taken place between the family members and therefore they sustained injuries.

11. PW 4 is the 17 years old son of PW-1 and PW-3; he has deposed that on 29.12.2010 he took bath in the morning and was standing in the gallery of the house alongwith his brother; at that time their neighbour Vithabai came in the courtyard of the house and called his grand father by uttering the words "शेट्या बाहेर ये"; at that time accused No. 1, Sadanand, Sunita and Sulochana came there by holding axe, sword and sticks; that after Laxman came out he was

attacked by Accused No. 1 with axe on his chest, accused No. 2 assaulted Laxman with sword on his hand; that when his father Santosh arrived at the spot accused No. 1 assaulted him with axe on his hand and accused No. 2 assaulted his father with sword. He has further deposed that when his uncle Bharat (PW-2) came to the spot accused No. 1 assaulted him with axe and accused Sunita and Sulochana assaulted his grand mother Sushila with sticks; so also accused Sulochana caught hold of his father's hair and Sunita caught hold of him and accused Vithabai assaulted him with sickle. He further deposed that his grandfather Laxman fell to the ground in an injured condition and his father (PW-1), uncle Bharat (PW-2) and Laxman were taken to Gandhi hospital by Babankaka in his vehicle. In his cross-examination he admitted that he did not come to the ground floor after hearing the quarrel and he was present in the gallery and witnessed the entire incident alongwith his mother (PW-3) and both of them came to the spot only after the incident was over and after departure of accused from the spot.

12. From reading of the above depositions of the eye witnesses, it is discernible that the case of the prosecution is based on ocular evidence which is corroborated by the medical evidence.

13. PW-5 - Dr. Trupti Lokhande conducted autopsy on the dead body of Laxman in Rural Hospital, Panvel and found the following five

external injuries:-

- (1) Abrasion left shoulder 1 x 1 cm.;
- (2) Incised wound left arm 10 x 2.5 x 2.5 cm.;
- (3) Abrasion left wrist 1 x 1 cm.;
- (4) Incised wound left little finger of hand palm aspect 2 x 2 cm; and
- (5) Incised wound left side chest below nipple 16 x 4 cm.

13.1. PW-5 has deposed that there was a fracture of the fifth rib on the left side and all these injuries were ante-mortem injuries; that on internal examination of thorax she found the left side fifth rib fracture and there was by-lateral pulmonary conjection to both lungs; so also the heart was ruptured i.e. right ventricle (3 x 2 cm.); that heart was empty and death occurred more than 4 hours after the last meal and according to her the probable cause of death was on account of hemorrhagic shock due to multiple injuries over the body; she issued P.M. report vide Exh. 74 and advance death certificate vide Exh. 75; that injury No.5 mentioned in column No.17 and the injury mentioned in column No.18 correspond to the injury mentioned in column No.20(a)(f) and (g) of the P.M. report; that there was no blood in the heart due to a bleeding due to injury and considering the injury to heart, instant death was possible; she has deposed that injury No.5 mentioned in column No.17 of P.M. report is possible due to the muddemal "axe" shown to her, while injury Nos.2 and 3 are incised

wounds which are possible due to sharp edged weapon like sword and injury Nos.1 and 3 are possible due to assault by sticks and that injuries mentioned in the P.M. report are sufficient to cause death in the ordinary course of nature. In her cross-examination she has deposed that injury No.5 is fatal, while injury Nos.1 to 4 are minor in nature. She admitted that injury No.18 is possible due to blunt trauma; so also, incised wound is possible due to muddemal "sword". She has admitted in cross-examination that injury No.5 mentioned in column No.17 of P.M. report is not possible due to muddemal "sword" and she cannot say whether injury No.5 is possible only with muddemal "axe". The deposition of this witness is helpful to the prosecution to prove homicidal death of Laxman.

14. PW-9 - Dr. Pramod Gandhi treated injured PW-1 and found the following injuries:-

- (1) Incised wound over left shoulder size 8 x 1 x 0.5 cm.;
- (2) Incised wound over back to right chest size 2.3 x 1 x 0.5 cm.;
- (3) Incised wound over back of chest to the left side size 3 x 1 x 1 cm.;
- (4) Incised wound over the right calf of left size 4 x 2 x 0.5 cm.;
- (5) Incised wound over right thigh lower end lateral side of size 2 x 1 x 0.5 cm.;

- (6) Incised wound over right wrist of size 7 x 2 x 1 cm.;
- (7) Incised wound over right arm anterior aspect size 1.5 x 0.5 x 0.5 cm.;
- (8) Compound comminuted fracture ulna right side.

14.1. PW-1 was admitted in hospital on the date of incident and was discharged on 31.12.2011 after 5 days of treatment.

15. Following injuries were found on PW-2:-

- (1) Incised wound over the anterior aspect of leg size 4 x 2 x 0.5 cm.;
- (2) Incised wound over left leg on shin of tibia size 2 x 0.5 x 0.5 cm.

16. So far as the incident of assault on Laxman is concerned, the evidence on record shows that accused No. 1 assaulted deceased Laxman with axe on chest while accused No. 2 assaulted him with sword on his hand. We have seen that PW-5 – Dr. Lokhande has deposed that injury No.5 mentioned in column No.17 of P.M. report is possible due to muddamal “axe” shown to her, while injuries Nos. 2 and 3 are incised wounds which are possible due to sharp edged weapon like sword and injury No.5 is sufficient to cause death in the ordinary course of nature. PW-5 has certified that injury No.5 is a fatal injury. It is seen that PW-3 and PW-4 have categorically deposed that they saw accused Nos. 1 and 2 assaulting Laxman; hence the evidence on record clearly points out that accused Nos. 1 and 2 in collusion

with other family members committed murder of Laxman with the weapons i.e. axe and sword.

17. Mr. Suryawanshi, learned counsel appearing for accused Nos. 1 and 2 submitted that on an overall reading of deposition of prosecution witnesses and the medical evidence, it is clear that there was no pre-meditation on the part of the Appellant to commit the crime; that the assault on Laxman; PW-1 and PW-2 occurred due to a trivial incident which acted as a prelude to the actual incident; that the time of incident is crucial in order to appreciate the fact that there was no pre-meditation whatsoever on the part of accused; that at about 6.00 a.m. in the morning family members of both families were all sleeping in their respective houses; that foul water drained out and fell down from the open drain pipe on the first floor of the Patil household onto the rooftop of the Masane household; that the Masane house was an old structure with manglore roofing and foul waste water from the drain pipe directly fell on the rooftop of the structure and seeped into their residential house; that this angered and triggered engagement amongst the Masane family members and all of them suddenly rushed towards the Patil family with anger; that the incident which occurred thereafter was not pre-meditated or planned by the Masane Family; nor there was any prior quarrel between the two families; hence it cannot be presumed that the act of accused was

pre-meditated so as to attract the provisions of Section 302 IPC and in the given facts of the present case since Appellants did not take any undue advantage of the situation prevailing after committing the offence; the act of the accused squarely falls within the Exception 4 to Section 300 IPC and the conviction of Appellants should therefore be altered under Section 304 Part-II IPC. He submitted that Appellants deserved to be exonerated for conviction under Section 302 IPC for having not acted in a cruel or unusual manner and having not taken undue advantage after committing the crime.

18. Mr. Suryawanshi has referred to and relied upon the following decisions in support of the proposition that the case of the Appellants fairly falls within Exception 4 to Section 300 IPC and thus deserves to be considered in the alternative under Section 304 Part II IPC.

- (1) Rameshkumar @ Tony Vs. State of Haryana¹;*
- (2) Dattu Shamrao Valake Vs. State of Maharashtra²;*
- (3) Adu Ram Vs. Mukna & Ors.³;*
- (4) Trimbak Vs. State of Maharashtra⁴;*
- (5) Posuram Deshmukh Vs. State of Chhatisgarh⁵;*
- (6) Ghapoo Yadav Vs. State of M.P.⁶;*
- (7) Saroj @ Suraj Panchal Vs. State of Bengal⁷;*

1 AIR 2009 SUPREME COURT 2447

2 (2005) 11 SCC 261

3 (2005) 10 SCC 597

4 (2018) 17 SCC 213

5 AIR 2009 SUPREME COURT 2482

6 (2003) 3 SCC 528

7 2014 AIR SCW 3473

- (8) *Nanak Ram Vs. State of Rajasthan*⁸;
(9) *Lachman Singh Vs. State of Haryana*⁹; and
(10) *Khanjan Pal Vs. State of U.P.*¹⁰

19. The gist of the above judgments enumerated by Mr. Suryawanshi is that in the facts and circumstances of the present case there was no prior quarrel of any nature between the two families; that the offence was committed in the heat of passion due to a sudden quarrel triggered due to the incident of foul water falling on the rooftop of the structure housing the Masane family; that due to this sudden incident quarrel took place without any pre-meditation and thus provisions of Exception 4 of Section 300 IPC covers such acts done in a sudden fight. Plea of accused is therefore based on applicability of Exception 4 of Section 300 IPC to the facts of the present case.

20. Section 300 IPC reads as under:-

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

(Secondly) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

(Thirdly) If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

8 (2014) 12 SCC 297

9 (2006) 10 SCC 524

10 (1990) 4 SCC 53

(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. Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

‘Exception 4. —Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.’

21. In the case of ***Vishal Singh Vs. State of Rajasthan***¹¹, the Apex court in paragraph 11 of the said Judgement while dealing with and enumerating the law relating to applicability of Exception 4 of Section

11 (2009) 11 SCC 674

300 has held as under:

“11. The Fourth Exception of 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 reasons 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 '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'. These aspects have been highlighted in Dhirajbhai Gorakhbhai Nayak v. State of Gujarat (2003 (5) Supreme 223], [Parkash Chand v. State of H.P.](#) (2004 (11) SCC 381), [Byvarapu Raju v. State of A.P. and Anr.](#) (2007 (11) SCC 218) and *Hawa Singh and Anr. v. State of Haryana (SLP (Crl.) No.1515/2008 disposed of on 15.1.2009).*"*

22. From the above discussion and findings and on reading of Exception 4 to Section 300 IPC, it is seen that the following ingredients are a mandatory prerequisite for applicability of the said provision:-

- (1) that there was no premeditation;
- (2) that there was no sudden fight;
- (3) that the act was committed in the heat of passion;
- (4) that the offender had not acted in a cruel or unusual manner.

23. **PER CONTRA**, Mr. Ajay Patil, learned APP and Mr. Rahul Kulkarni, learned Advocate appearing for Respondent No.2 has vehemently argued that in the given facts of the present case, accused Nos. 1 and 2 cannot take recourse to the benefit of Exception 4 to Section 300 IPC. They submitted that in the present case there was no sudden quarrel took place between the two families; nor any scuffle took place whatsoever; that Masane family members were the aggressors and authors of the crime whereas Patil family members i.e. Laxman, PW-1 and PW-2 (injured) were at the receiving end; that even after the assault on Laxman, PW-1 and PW-2 attempted to save his life and in the bargain were attacked by the accused Nos. 1 and 2

and their family members in the most cruel and unusual manner; that role of accused Nos. 1 and 2 stands fully established and proven by ocular evidence of PW-1, PW-2, PW-3 and PW-4; that injuries suffered by PW-1 and PW-2 as also the injuries on deceased Laxman have been established and corroborated by medical evidence; that deadly weapons like axe and sword have been used in the assault and these articles have been seized; therefore according to them none of the ingredients of Exception 4 of 300 IPC stand satisfied in the present case. In view thereof, both learned Advocates have prayed for dismissal of the present Appeal.

24. Respondents have referred to and relied upon the following judgments in support of there contentions viz. ***State of Karnataka Vs. Papanaika and Ors***¹²; Vishal Singh (*Supra*) and ***Rambir Vs. State (NCT of Delhi)***¹³.

25. Mr. Kulkarni, learned counsel appearing for Respondent No.2 has drawn our attention to the observations of the Apex Court in the case of State of Karnataka (*Supra*) as observed in paragraph No.10 of the said judgment and contended that in the present case testimony of injured witnesses supported by medical evidence and corroborated by testimony of other eye witnesses fully substantiates the prosecution case. He submitted that testimony of PW-1 (injured) is fully corroborated by testimony of PW-2, PW-3 and PW-4 and is completely

¹² 2005 ALL MR (Cri) 519 (S.C.)

¹³ (2019) 6 SCC 122

supported by testimony of PW-5 (Doctor). The relevant observation in paragraph No.10 of the Apex Court's judgment reads as under:-

"10. Therefore, from the ratio of the above decisions it is more than clear that while the High Court has full power to interfere with the finding of the trial court but the High Court should be very slow in reversing the decision of the trial court because the trial court has the occasion to watch the demeanor of the witnesses very closely. There is no two opinion that the High Court has full power to re-appreciate the evidence and come to a conclusion independently but the conclusion which is arrived at by the High Court should be rational and proper appreciation of the testimony of the witnesses. In the present case, the High Court has not examined the statement of the witnesses and just on a bald statement that when the prosecution version has been accepted in full and the witnesses have tendency to over implicate, then what is the guarantee that other part is also true. The Division Bench has disbelieved the entire prosecution evidence. This approach of the High Court, in our view, is not correct. There should be proper appreciation of evidence and finding has to be recorded against each witness as to why the said witness is not being believed when he was believed by the trial court. On the contrary, we have closely examined the evidence of the witnesses and after taking chaff from the grain we found that so far as the statement of P.W.1, the wife of the deceased and P.W.4, Shankar, the nephew of the deceased, their testimony is trustworthy and there is no reason to disbelieve these two witnesses leave apart other eye witnesses. These two witnesses who were injured witnesses as they were examined by the doctors and P.W.4, Shankar who received such serious injuries that he became unconscious, therefore, the testimony of these two witnesses is wholly reliable so far as these accused persons are concerned and they have been corroborated by other eye witnesses i.e. P.Ws.5,6 & 7 and they have been supported by the medical evidence also. We are of the view that the testimony of these witnesses fully substantiate the prosecution case."

26. From a minute perusal of the evidence on record, it is clear that that the incident took place at 6:15 a.m. in the morning and probably may have been triggered by the falling of foul water from the open drain-pipe onto the house of Masane family. It is clearly seen

that Patil family i.e deceased Laxman along with PW-1 and PW-2 (both injured) were at the receiving end; that they were attacked by accused Nos. 1 and 2 and their family members with axe, sword, sickle and sticks; that they did not retaliate or respond or attack in retaliation but merely tried to save Laxman i.e. their father and themselves from the attack by accused Nos. 1 and 2 and their family members. As observed by the Apex Court the fact whether a sudden quarrel took place or not is ascertainable only from the proved facts of each case. In the facts of the present case after carefully scrutinizing the evidence of PW-1 to PW-4, it is clearly perceptible that there was no sudden fight or quarrel as envisaged in Exception 4 to Section 300 IPC; that Masane family members arrived in the open space opposite the structure housing Patil family, abused and attacked Laxman, PW-1 and PW-2 in that sequence with axe, sword, sickle and sticks. It has come in the deposition of prosecution witnesses that after the attack on Laxman, PW-1 and PW-2 arrived at the incident spot from inside the house and they tried to help their father rather than fight or retaliate with accused Nos. 1 to 5; that in that process PW-1 and PW-2 attempted to help Laxman but the accused attacked them also. In the face of this evidence given by the injured witness PW-1 and which stands corroborated by the ocular evidence of injured witness PW-2 as well as PW-3 and PW-4, it cannot be concluded that there was a sudden fight between the two families. A fight is a combat between

two people with or without weapons, that apart, the weapons which were used by accused namely axe, sword, sickle and sticks have been recovered at the instance of accused No.1; the recovered weapons had blood stains and the same have been proved by C.A. Report to be the blood stains of human blood; that blood stained clothes of deceased, injured PW-1 and PW-2 as also Appellant Nos.1 and 2 have been seized and identified to have human blood stains. The weapons i.e. the axe, sword and sickle have been seized and marked as Article Nos.10, 11 and 3 and identified by the prosecution witnesses. It is stated that presence of sword used by accused is not a common thing; a sword is normally not kept in the house and picked up in anger to commit an assault; presence and use of sword clearly shows premeditation and intention to kill on the part of accused. These attending circumstances are of such a nature that they show that, there was not only motive in the minds of accused to perpetrate and carry out the assault with dangerous weapon on members of the Patil family but to give ultimate effect to it. It has come in evidence that there was previous enmity between the two families with respect to the open plot where the Patil family has built their new house and conducted the house warning ceremony one day prior to the date of incident; it is further seen that original Accused No.3 Vithabai abused and called the deceased to come out of his house at about 6:15 a.m. in the morning and the other accused were at that time ready and armed

with deadly weapons and authored the crime; that no explanation is offered by the defence in evidence pertaining to seizure of the incriminating articles and weapons having human blood stains; that ocular evidence stands fully corroborated by the medical evidence in the present case and is not shattered at all; that there is no evidence of any scuffle much less any sudden fight or sudden quarrel between the two families right before the incident; that submission by Advocate as to whether injury No.5 was fatal or otherwise and it was not possible to be caused by an axe and it was possible only by sword cannot be countenanced as there were multiple injuries on Laxman which have been proven by medical evidence; that coupled with the fact that blood stained clothes of accused were recovered and seized from the house of one of their relatives namely Vasant Masane at the behest and instance of accused No.1 does not entitle the accused Nos. 1 and 2 to any benefit of doubt.

27. In our considered opinion that being so and having regard to the evidence on record, Exception 4 to Section 300 IPC has no applicability in the present case. Plea of accused Nos. 1 and 2 related to applicability of Exception 4 to Section 300 IPC has no pertinence to the facts of the present case. Accused Nos. 1 and 2 have been rightly convicted in terms of Section 302 IPC read with 34 and 326 IPC.

28. The Judgment dated 27.04.2015 passed by the learned Trial Court does not call for any interference. There is no infirmity in the said judgment.

29. Criminal Appeal No. 662 of 2015 dismissed.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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