

NANDLAL

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v.

THE STATE OF MAHARASHTRA

(Criminal Appeal No. 510 of 2019)

MARCH 15, 2019

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**[R. BANUMATHI AND R. SUBHASH REDDY , JJ.]**

*Penal Code, 1860 – s.302/34 or s.304 Part II – Conviction under – Prosecution case that there was exchange of abuse between the two parties over expenses of the construction of wall – Victim and his brother tried to pacify the parties – However, they were not able to control the situation – Appellant, accused No.2 & 3 caused injuries to the victim – Victim died – Trial court convicted all three accused u/s.302/34 of IPC – High Court held that only appellant caused fatal injuries to the victim and affirmed his conviction and acquitted accused No.2 & 3 – Appellant contended that incident occurred in a sudden quarrel and after he was attacked by PW-1 – In a sudden fight, appellant went to his house and came back and attacked the victim – Appellant further contended that he had no intention to commit murder of victim, hence the case falls within Exception 4 to s.300 of IPC – Held: Appellant rightly contended that the incident was in a sudden quarrel and there was no premeditation – One of the conditions of Exception 4 is that the offender ought not to have taken the “undue advantage” or acted in a cruel or unusual manner – Appellant inflicted a single blow injury with gupti which pierced into the lung of the victim – After having sustained a stick blow from PW-1, in the sudden quarrel and in the heat of passion, the appellant inflicted injury on victim – Thus, the case falls within the Exception 4 to s.300 – Accordingly, the conviction of appellant-accused u/s.302 IPC modified as s.304 Part II IPC.*

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**Partly allowing the appeal, the Court**

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**HELD: 1. In the light of the settled principles, this Court has to consider whether facts of the present case fall under Exception 4 to Section 300 IPC or not? PW-1/complainant is the real brother of victim-deceased and ‘D’ and the appellant is the**

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A cousin brother of their father. The house of the appellant and the house of 'D' are adjacent to each other and 'D' constructed a common wall between his premises and the house of the appellant and there was a dispute between them in sharing the expenses of the construction of wall and this became the reason for frequent quarrels between the parties. On the date of occurrence, there was an exchange of abuse between 'D', his wife PW-4 and the appellant. PW-5, son of 'D' called PW-1. Accordingly, PW-1 and his brother victim went to the house of 'D' and tried to pacify the situation which could not be controlled. In that process, victim abused the appellant who got annoyed and assaulted victim with stick on his back. On seeing this, PW-1 gave a stick blow on the head of the appellant. It was thereafter, the appellant went to his house and returned back armed with *gupti* and other accused and inflicted injury with *gupti* on the left armpit of victim. The above incident happened only after the exchange of abuse and the stick blow given by PW-1 on the head of the appellant. As noted above, the dispute between the appellant and 'D' was due to construction of a common wall and non-sharing of expenses. The house of the appellant, being the next house of 'D', there was no time gap between the first incident and the incident that followed, in which the appellant inflicted *gupti* injury on the left armpit of the victim. Both the incidents cannot be said to be two different parts but are integral part of the same incident. [Para 14][205-F-H; 206-A-C]

2. It is rightly contended by the appellant, the incident was in a sudden quarrel and there was no premeditation. One of the conditions of Exception 4 is that the offender ought not to have taken the "undue advantage" or acted in a cruel or unusual manner. The appellant inflicted a single blow injury with *gupti* on the left armpit which pierced through the upper end of the left arm and then entered the chest causing fracture of fourth rib and reached till the lung causing rupture of left lung vasculature. Though, the *gupti* was a dangerous weapon, the appellant-accused caused a single injury which pierced into the lung. Having sustained a stick blow from PW-1, in the sudden quarrel and in the heat of passion, the appellant inflicted the injury on victim-deceased. Considering the facts and circumstances of the case, the case falls within Exception 4 to Section 300 IPC. The conviction

of the appellant-accused under Section 302 IPC is liable to be modified as Section 304 Part II IPC. [Para 15][206-G, H; 207-A, B]

*Sridhar Bhuyan v. State of Orissa* (2004) 11 SCC 395 – relied on.

*Surain Singh v. State of Punjab* (2017) 5 SCC 796; *Pappu v. State of M.P.* (2006) 7 SCC 391 : [2006] 3 Suppl. SCR 394; *Asif Khan v. State of Maharashtra and Another* 2019 (4) SCALE 7 – referred to.

#### Case Law Reference

(2017) 5 SCC 796	referred to	Para 8
(2004) 11 SCC 395	relied on	Para 13
[2006] 3 Suppl. SCR 394	referred to	Para 13
2019 (4 ) SCALE 7	referred to	Para 15

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 510 of 2019.

From the Judgment and Order dated 26.08.2010 of the High Court of Judicature of Bombay, Bench at Aurangabad in Criminal Appeal No. 293 of 2008.

Dinesh Chandra Pandey, Vishal Rai, Advs. for the Appellant.

Nishant Ramakantrao Katneshwarkar, Anoop Kandari, Advs. for the Respondent.

The Judgment of the Court was delivered by

**R. BANUMATHI, J.** 1. Leave granted.

2. This appeal arises out of the judgment dated 26.08.2010 passed by the High Court of Bombay at Aurangabad Bench in Criminal Appeal No.293 of 2008 in and by which the High Court affirmed the conviction of the appellant under Section 302 IPC read with Section 34 IPC and the sentence of life imprisonment imposed upon him. By the same judgment, the High Court acquitted accused No.2 and 3-Parshuram and his son-Sanjay respectively.

3. Appellant-Nandlal Baviskar and one Dilip Waman Baviskar are close relatives. In the year 2005, Dilip constructed a common wall in

A between his premises and the house of the appellant. As Dilip had incurred total expenses of the construction of wall, he demanded half of the expenses from the appellant which was refused by him. This became the reason for frequent quarrels between the parties. On 16.05.2006 at around 04:00 PM., there was an exchange of abuse between Dilip, his wife Sakhubai-PW-4 and the appellant. Ganesh-PW-5-son of Dilip called B Gopichand Waman Baviskar-PW-1. Accordingly, Gopichand and his brother Lakhichand (deceased) who was physically disabled went to the house of Dilip and they tried to pacify the situation. In that process, Lakhichand had also abused the appellant. Being annoyed, the appellant assaulted Lakhichand with stick on his back. On seeing the said assault C on his brother, Gopichand gave a stick blow on the head of the appellant. The appellant thereafter went away from the spot to his house and returned back along with Parshuram and his son Sanjay-accused No. 2 and 3 respectively. At this time, the appellant was armed with a *gupti*, while Parshuram was allegedly armed with *ballam* and Sanjay was armed with a stick. When Gopichand, Dilip and Lakhichand saw the appellant D approaching towards them along with two other persons, having weapons in their hands, it is alleged that Gopichand and Dilip went at one side but because of physical disability, Lakhichand was not quick enough to move. The appellant attacked Lakhichand with *gupti* on his left armpit. Parshuram assaulted Lakhichand with *ballam*; while Sanjay assaulted E him with stick. Due to assault, Lakhichand sustained bleeding injuries on his chest, left armpit and became unconscious there. Thereafter, the appellant and the other accused persons ran away from the spot. Gopichand-PW-1 along with his sister in law-Sakhubai-PW-4 and others took Lakhichand to Government Hospital, Adawad where on examination, he was declared dead. Law was set in motion. F

4. Upon completion of investigation, charge sheet was filed against the appellant and two other accused under Section 302 IPC read with Section 34 IPC.

G 5. To substantiate the charges against the appellant and the other accused, the prosecution examined sixteen witnesses including four eye-witnesses and also produced material objects and exhibited number of documents. The accused were questioned under Section 313 Cr.P.C. about the incriminating evidence and circumstances and they denied all of them. Based upon the oral evidence and recovery of *gupti* from the appellant-accused, the trial court found the appellant-accused guilty. The H

trial court pointed out that the injuries caused by the appellant has pierced through the upper end of left arm and then entered the chest by causing small fracture to the fourth rib and caused injury to the lungs. Based on the evidence of the eye-witnesses and other evidence, the trial court held that the appellant caused the fatal injuries to the deceased and accused No.2 and 3 have assaulted the deceased with *ballam* and stick and convicted all three of them under Section 302 IPC read with Section 34 IPC and sentenced each of them to undergo life imprisonment.

6. In appeal, the High Court held that only the appellant caused fatal injuries to the deceased with lethal weapon and the High Court affirmed the conviction of the appellant and the sentence of life imprisonment imposed upon him. Insofar as accused No.2 and 3, the High Court held that accused No.2 and 3 came along with the appellant to the place of occurrence only in the later part of the incident and that there was no common intention to commit murder of the deceased and therefore, the High Court acquitted accused No.2 and 3.

7. Aggrieved by the judgment of the High Court, the appellant-accused has filed this appeal. When the matter came up for hearing, this Court *vide* order dated 04.09.2018 issued notice only limited to the nature of offence and the quantum of sentence.

8. Placing reliance upon *Surain Singh v. State of Punjab* (2017) 5 SCC 796, the learned counsel for the appellant submitted that the incident occurred in a sudden quarrel and after the appellant was attacked by Gopichand-PW-1, the appellant went to his house and came back and in a sudden fight attacked the deceased and that there was no intention on the part of the appellant to commit murder of deceased Lakhichand and hence, the case falls within Exception 4 to Section 300 IPC.

9. Refuting the contention, the learned counsel for the respondent-State submitted that the blow was inflicted on the appellant by Gopichand in the first incident and thereafter, the appellant ran away from the spot and went to his house and returned with a *gupti* in his hand along with accused No.2 and 3 and therefore, the occurrence cannot be said to be a case of “sudden fight”. It was further submitted that the appellant’s conduct in going to his house and bringing the *gupti* and attacking the deceased Lakhichand clearly shows that the occurrence was not in the heat of sudden fight and thus the offence was clearly a case of murder falling under Section 302 IPC and not falling under any of the exceptions.

A        10. We have heard Mr. Dinesh Chandra Pandey, learned counsel appearing for the appellant and Mr. Nishant Ramakantrao Katneshwarkar, learned counsel appearing for the respondent-State and perused the impugned judgment and materials on record.

B        11. The only point falling for consideration is whether the appellant-accused has made out a case for modification of his conviction under Section 304 Part II IPC instead of Section 302 IPC?

C        12. In order to bring the case within Exception 4 to Section 300 IPC, the following conditions enumerated therein must be satisfied:- (i) The act must be committed without premeditation in a sudden fight in the heat of passion; (ii) upon a sudden quarrel; (iii) without the offender's having taken undue advantage; and (iv) the accused had not acted in a cruel or unusual manner.

D        13. Even if the fight is unpremeditated and sudden, if the weapon or manner of retaliation is disproportionate to the offence and if the accused had taken the undue advantage of the deceased, the accused cannot be protected under Exception 4 to Section 300 IPC. Considering the scope of Exception 4 to Section 300 IPC, in *Sridhar Bhuyan v. State of Orissa* (2004) 11 SCC 395, this Court held as under:-

E        “7. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

F        8. 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.....

G        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

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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.

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It is to be noted that the “fight” occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression “undue advantage” as used in the provision means “unfair advantage” **[underlining added].**”

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The same principle was reiterated in *Pappu v. State of M.P.* (2006) 7 SCC 391 and in *Surain Singh v. State of Punjab* (2017) 5 SCC 796 where the conviction under Section 302 IPC was modified under Section 304 Part II IPC.

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14. In the light of the above principles, we have to consider whether facts of the present case fall under Exception 4 to Section 300 IPC or not? Gopichand-PW-1/complainant is the real brother of deceased Lakhichand and Dilip and the appellant is the cousin brother of their father. The house of the appellant and the house of Dilip are adjacent to each other and Dilip constructed a common wall between his premises and the house of the appellant and there was a dispute between them in sharing the expenses of the construction of wall and this became the reason for frequent quarrels between the parties. On the date of occurrence i.e. on 16.05.2006 at around 04:00 PM, there was an exchange of abuse between Dilip, his wife Sakhubai-PW-4 and the appellant. Ganesh-PW-5, son of Dilip called Gopichand-PW-1.

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- A Accordingly, PW-1 and his brother Lakhichand (deceased) went to the house of Dilip and tried to pacify the situation which could not be controlled. In that process, deceased abused the appellant who got annoyed and assaulted Lakhichand with stick on his back. On seeing this, Gopichand-PW-1 gave a stick blow on the head of the appellant. It was thereafter, the appellant went to his house and returned back armed with *gupti* and other accused and inflicted injury with *gupti* on the left armpit of Lakhichand. The above incident happened only after the exchange of abuse and the stick blow given by Gopichand on the head of the appellant. As noted above, the dispute between the appellant and Dilip was due to construction of a common wall and non-sharing of expenses. The house of the appellant, being the next house of Dilip, there was no time gap between the first incident and the incident that followed, in which the appellant inflicted *gupti* injury on the left armpit of the deceased. Both the incidents cannot be said to be two different parts but are integral part of the same incident.
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- D 15. In the judgment cited by Mr. Nishant Ramakantrao Katneshwarkar, learned counsel appearing for the respondent-State in Criminal Appeal Nos.286-288 of 2019, *Asif Khan v. State of Maharashtra and Another* dated 05.03.2019, the accused thereon went away from the scene of occurrence on the motorcycle and he came back after ten to fifteen minutes and then attacked the deceased and in such facts and circumstances, it was held that both are two different incidents. The facts of the case in hand stand on a different footing. The deceased abused the appellant who got annoyed and first attacked Lakhichand and on seeing this, Gopichand gave a stick blow on the head of the appellant and thereafter, the appellant went to his house situated next door and came back with a *gupti*. Inflicting injury on the deceased is part of the same incident and cannot be said to be a different part to hold that the act was premeditated and intentional. As rightly contended by learned counsel for the appellant, the incident was in a sudden quarrel and there was no premeditation. One of the conditions of Exception 4 is that the offender ought not to have taken the “undue advantage” or acted in a cruel or unusual manner. The appellant inflicted a single blow injury with *gupti* on the left armpit which pierced through the upper end of the left arm and then entered the chest causing fracture of fourth rib and reached till the lung causing rupture of left lung vasculature. Though, the *gupti* was a dangerous weapon, the appellant-accused caused a
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single injury which pierced into the lung. Having sustained a stick blow from Gopichand-PW-1, in the sudden quarrel and in the heat of passion, the appellant inflicted the injury on deceased Lakhichand. Considering the facts and circumstances of the case, in our view, the case falls within Exception 4 to Section 300 IPC. The conviction of the appellant-accused under Section 302 IPC is liable to be modified as Section 304 Part II IPC.

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16. In the result, this appeal is partly allowed and the conviction of the appellant under Section 302 IPC is modified as conviction under Section 304 Part II IPC and the appellant is sentenced to undergo imprisonment for twelve years.

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