

AWADHESH KUMAR

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v.

STATE OF U.P. & ANR.

(Criminal Appeal No. 1670 of 2019)

NOVEMBER 08, 2019

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**[ARUN MISHRA, M. R. SHAH AND  
S. RAVINDRA BHAT, JJ.]**

*Penal Code, 1860: s.304 Part I – Appeal by complainant challenging the impugned order whereby High Court partly allowed the appeal of original accused no.1-respondent no.2 and converted his conviction from s.302 to s.304 Part I – Prosecution case was that on the fateful day, complainant's mother made grievance to respondent no.2 regarding the bad behaviour of his nephew-accused no.2 – At that time, accused no.3 and 4 were also present there – All the accused persons started fighting with her – When the accused were asked to go away from there, accused no.2 to 4 exhorted respondent no.2 to fire at her – Respondent no.2 fired with his country made pistol which resulted in her death – Trial Court convicted respondent no.2 u/s.302 as the specific role of firing was attributed to him while other 3 accused were acquitted – High Court partly allowed the appeal of respondent no.2 holding that the case fell under Exception 4 to s.300 and converted conviction to s.304 Part I on the grounds that it was not a planned crime; that there was no prior intention; and that it took place in the heat of passion and in the spur of the moment – Aggrieved complainant filed instant appeal – Held: None of the persons from the complainant side, including the deceased, was having any weapon – There was no further grave and sudden provocation by the deceased which led to the accused to fire on her and, that too, from a very close range – By the accused firing from a close range, the accused was supposed to know that it was so imminently dangerous that it must, in all probability, cause death or such bodily injury as was likely to cause death – In the facts and circumstances of the case, High Court materially erred in applying Exception 4 to s.300 – The judgment passed by trial court convicting respondent No. 2 u/s.302 is restored.*

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**A         Allowing the appeal, the Court**

- HELD:** The material/evidence on record, the deposition of the original complainant and the case of the prosecution proved that the incident in question took place half an hour after there was abusive language used by the cousin of original accused No. 1 with the deceased. The deceased made a grievance to accused No. 1-respondent No.2 with respect to the abusive language used by accused No.2 (cousin of original accused No. 1) and, in that moment, respondent No. 2 started abusing. At that time, the deceased and others told them not to use abusive words in future and told them to go away.
- B    accused No. 1 with the deceased. The deceased made a grievance to accused No. 1-respondent No.2 with respect to the abusive language used by accused No.2 (cousin of original accused No. 1) and, in that moment, respondent No. 2 started abusing. At that time, the deceased and others told them not to use abusive words in future and told them to go away.
- C    Respondent No. 2 told the deceased and others not to challenge him and he said "Do you not know that I have been convicted, now I do not have any kind of fear". Thereafter, respondent No. 2 fired from close range. None of the persons from the complainant side, including the deceased, was having any weapon. There was no further grave and sudden provocation by the deceased which led the accused to fire at the deceased and, that too, from a very close range. In the facts and circumstances of the case, the High Court has materially erred in applying Exception 4 to Section 300 IPC by holding that it was not a planned crime and there was no prior intention and it took place in the heat of passion and in the spur of the moment. In view of the material/evidence on record, the case fell under clause fourthly to Section 300 IPC and, therefore, the Trial Court was right in convicting the accused for the offence punishable under Section 302 IPC. [Paras 8.1, 8.5, 8.6, 9] [190-C-G; 191-D-E]
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*Bhagwan Munjaji Pawade v. State of Maharashtra*  
**(1978) 3 SCC 330 – referred to.**

**Case Law Reference**

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| <b>G   (1978) 3 SCC 330</b>  | <b>referred to</b> | <b>Para 8.3</b> |
| CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1670 of 2019.  |                    |                 |
| From the Judgment and Order dated 18.12.2015 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Criminal Appeal No. 2517 of 2009. |                    |                 |

Shail Kumar Dwivedi, Siddharth Krishna Dwivedi, Ms. Vibha A Dwivedi, Ms. Nidhi Dwivedi, Advs. for the Appellant.

Ratnakar Das, Sr. Adv., Adarsh Upadhyay, Ms. Garima Prashad, Anukul Raj, Shantanu Krishna, Shashank Shukla, Ms. Nikita Raj, Shikhre Deep Aggarwal, Advs. for the Respondents.

The Judgment of the Court was delivered by B

**M. R. SHAH, J.**

1. Leave granted.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 18.12.2015 passed by the High Court of Judicature at Allahabad at Lucknow Bench in Criminal Appeal No. 2517 of 2009 by which the High Court has been pleased to allow the appeal preferred by the original accused partly and has converted the conviction from Section 302 IPC to Section 304 Part I IPC, the original complainant has preferred this appeal. C D

3. Brief facts of the case of the prosecution was that the complainant Awadesh Kumar lodged an FIR at Police Station Khiri, District Lakhimpur Kheri on 11.07.2006 at 18:45 hours alleging therein that on 11.07.2006 at about 5:30 p.m. his mother Smt. Lajjawati was making complaint to Ravinder Verma (original accused No. 1- respondent No. 2 herein) regarding bad behaviour of his nephew Vishun Kumar. At that time, Sudhir @ Ramaudh, Rakesh, Vishun Kumar were also present there. When the mother of the complainant was making complaint, meanwhile all the above named four persons started quarrelling with his mother. In the meanwhile, the brother of the complainant Anoop Kumar and his father Ram Lakan also reached there. Then all the four accused persons were asked by these persons to go away from there. Feeling annoyed by this conduct of the complainant side, Vishnu Kumar, Rakesh Kumar and Sudhir @ Ramaudh exhorted Ravinder to fire at the deceased, Ravinder, with his country-made pistol fired on the complainant's mother. The complainant along with other persons took his injured mother to police station and lodged the FIR. E F G

4. That, initially the case was registered under Section 307, 504, 506/34 IPC, however, subsequently on the death of Smt. Lajjawati on 11.07.2006, the case was converted into one under Section 302 IPC. H

- A After investigation, the Investigating Officer filed the charge-sheet against all the four named accused persons, including respondent No. 2 herein. All of them were tried by the learned Court of Sessions for the offence punishable under Section 302 IPC. The learned Trial Court convicted respondent No. 2 herein (Ravinder) as the specific role of fire on the deceased was attributed to him. The learned Trial Court acquitted the other three accused persons. The Respondent No.2 herein (original accused no.1) feeling dissatisfied with the order of conviction passed by the learned Trial Court convicting him, preferred Criminal Appeal before the High Court. By the impugned judgment and order, the High Court has modified the conviction from that of punishable under Section 302 IPC to Section 304 Part I IPC and sentenced him to undergo rigorous imprisonment for ten years with a fine of 20,000/- . Feeling aggrieved by the impugned judgment and order passed by the High Court modifying the conviction from Section 302 IPC to 304 Part I IPC, the original complainant has preferred the present appeal.
- D 5. Learned Advocate on behalf of the appellant - original complainant has vehemently submitted that the High Court has committed a grave error in modifying the conviction from that of Section 302 IPC to that of under Section 304 Part I IPC.
  - E 6. It is further submitted by the learned Advocate appearing on behalf of the original complainant that, as such, the accused fired on the deceased from a close range, due to which the deceased sustained serious injuries and ultimately died and, therefore, the case would fall under clause fourthly to Section 300 IPC. It is submitted that, therefore, when the case falls under Clause fourthly to Section 300 IPC, the act of the accused would be culpable homicide amounting to murder.
  - F Learned Advocate appearing on behalf of the original complainant has submitted that the High Court has materially erred in holding that the offence committed by the accused Ravinder would come within Exception 4 to Section 300 IPC by observing that it was not a planned crime and there was no prior intention and it took place in the heat of
  - G passion on the spur of moment. It is submitted by the learned Advocate appearing on behalf of the original complainant that Exception 4 to Section 300 IPC would be attracted only when there is a fight or quarrel which requires mutual provocation and blows by both sides in which the offender does not take undue advantage. In support of his above submission, learned Advocate appearing on behalf of the original complainant has heavily relied upon the decision of this Court in the
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case of *State of Madhya Pradesh v. Shivshankar* (2014) 10 SCC 366. It is submitted that, in the present case, there was no blow by the complainant side of the deceased. The complainant side and the deceased did not have any weapon. The accused came with a country-made firearm after there was some altercation/exchange of words by his cousin with the deceased. It is submitted that therefore the case would not fall under Exception 4 to Section 300 IPC. It is submitted that therefore the High Court has materially erred in converting the conviction from the offence punishable under Section 302 IPC to that of Section 304 Part I IPC.

7. Learned Advocate appearing on behalf of the original accused No. 1 – respondent No. 2 herein has made strenuous efforts to support the impugned judgment and order passed by the High Court ultimately convicting the accused for the offence under Section 304 Part I IPC. It is submitted by the learned Advocate appearing on behalf of respondent No. 2 – original accused No. 1 that the High Court has rightly observed that it was not a planned crime and there was no prior intention and it took place in the heat of passion on the spur of moment. It is submitted by the learned Advocate appearing on behalf of respondent No. 2 that therefore the High Court has rightly observed that Exception 4 to Section 300 IPC would be attracted and, therefore, the High Court has rightly converted the conviction from that of Section 302 IPC to that of Section 304 Part I IPC.

7.1 Learned Advocate appearing on behalf of respondent No. 2 has taken us through the finding recorded by the learned Trial Court while acquitting the other three accused and has submitted that while acquitting the other three accused persons, the learned Trial Court has clearly observed that there was no prior intention to commit the murder with pre-planning and rather the incident took place all of a sudden, when Lajjawati went to complain to Ravinder. It is submitted that the finding recorded by the learned Trial Court has gone unchallenged. It is submitted that, therefore, the case would fall under Exception 4 to Section 300 IPC and therefore also the High Court has rightly converted the conviction for the offence punishable under Section 302 IPC to that of Section 304 Part I IPC.

8. We have heard the learned counsel appearing for the respective parties at length. We have also gone through and considered the findings recorded by the learned Trial Court as well as the High Court.

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- A 8.1 At the outset, it is required to be noted that the learned Trial Court convicted respondent No. 2 herein – original accused No. 1 for the offence punishable under Section 302 IPC. By the impugned judgment and order, the High Court converted the conviction for the offence punishable under Section 302 IPC to that of Section 304 Part I IPC on the grounds that:
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- (i) it was not a planned crime;
  - (ii) there was no prior intention; and
  - (iii) it took place in the heat of passion on the spur of moment.
- C Therefore, as per the High Court, the case would fall under Exception 4 to Section 300 IPC. However, considering the material/evidence on record and considering the deposition of the original complainant and considering the case of the prosecution proved, the incident in question that took place half an hour after there was abusive language used by the cousin of original accused No. 1 – Ravinder with the deceased. That, thereafter, respondent No. 2 herein – original accused No. 1 came with others with a country-made firearm and at that time the deceased made a grievance with respect to the abusive language used by Vishun Kumar (cousin of original accused No. 1) and, at that time, respondent No. 2 – original accused No. 1 started abusing.
- D At that time, the deceased and others told them not to use abusive words in future and told them to go away. At that time, respondent No. 2 – original accused No. 1 told the deceased and others not to challenge him and he told that “Do you not know that I have been convicted, now I do not have any kind of fear”. Thereafter, Ravinder – respondent No. 2 – original accused No. 1 fired from the close range. None of the persons from the complainant side, including the deceased, was having any weapon. There was no further grave and sudden provocation by the deceased which led to the accused to fire on the deceased and, that too, from a very close range.
- G 8.2 As observed by this Court in the case of *Shivshankar* (supra), intention is a matter of inference and when death is as a result of intentional firing, intention to cause death is patent unless the case falls under any of the exceptions. It is further observed and held that Exception 4 to Section 300 IPC is attracted only when there is a fight or quarrel which requires mutual provocation and blows by both sides H in which the offender does not take undue advantage.

8.3 In the case of *Bhagwan Munjaji Pawade v. State of Maharashtra* (1978) 3 SCC 330, in paragraph 6, this Court has observed and held as under:

“6..... It is true that some of the conditions for the applicability of Exception 4 to Section 300 exist here, but not all. The quarrel had broken out suddenly, but there was no sudden fight between the deceased and the appellant. ‘Fight’ postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than three fatal injuries were inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. Appellant is therefore, not entitled to the benefit of Exception 4, either.”

8.4 The above observations fully support the view that the present case falls under Section 302 IPC.

8.5 Therefore, in the facts and circumstances of the case, the High Court has materially erred in applying Exception 4 to Section 300 IPC by holding that it was not a planned crime and there was no prior intention and it took place in the heat of passion on the spur of moment.

8.6 Considering the material/evidence on record discussed hereinabove, we are of the firm opinion that the case falls under Clause fourthly to Section 300 IPC and, therefore, the Trial Court was right in convicting the accused for the offence punishable under Section 302 IPC, more particularly, when the accused fired from a country-made firearm on the deceased from a close range. By the accused firing from a close range, the accused was supposed to know that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death.

9. Now, so far as the submission on behalf of the accused relying upon some of the observations made by the Trial Court while acquitting the other three accused is concerned, it is required to be noted that those observations were made by the learned Trial Court while considering the common intention of the other accused and therefore benefit of such observations would not be available to original accused No. 1 when it has come on record and it has been proved that it was the original accused No. 1 who fired at the deceased and, that too, from a very close range.

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- A        10. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court modifying the conviction for the offence punishable under Section 302 IPC to that of Section 304 Part I IPC is hereby quashed and set aside. The judgment passed by the learned Trial Court convicting the respondent No. 2 – original accused No. 1 for the offence punishable under Section 302 IPC is hereby restored. Now, respondent No. 2 – original accused No. 1 to surrender before the concerned Court to undergo the sentence as imposed by the learned Trial Court, within a period of three months from today.

Devika Gujral

Appeal allowed.