

DATTU SHAMRAO VALKE AND ANR.

v.

STATE OF MAHARASHTRA

APRIL 15, 2005

[P. VENKATARAMA REDDI AND P.P. NAOLEKAR, JJ.]

Penal Code, 1860 :

Sections 96 to 99—Right of private defence—Deceased and family including lady members on their way to the fields for weeding operation—Carrying axe, sticks which are ordinarily carried in villages while going to fields—Fight ensued resulting in death of two—Plea of self defence by accused—Held: Plea of self defence by the accused is wrongly accepted by High Court as arrival of deceased at the place of occurrence cannot be said to be for initiating fight against the accused.

Section 300 Exception 4—Quarrel between accused and deceased—Two persons died and accused also sustained serious injuries, which were not explained by prosecution witnesses—No evidence to say with certainty as to which party provoked the other and initiated the fight—Accused who had fire arm also did not use it against deceased—Held: It is a case to apply Exception 4 of Section 300 as there was sudden quarrel and free fight between the party and attack was not pre-meditated affair.

Section 304 Part I—Accused gave axe blows to deceased on vital part with an excessive force which resulted in his death—Held: He is to be convicted under Part I of Section 304 because having regard to the gravity of the injuries caused with a dangerous weapon, each one of which was fatal, the other accused must be imputed with the intention to cause such bodily injury as was likely to cause death, if not the intention of causing death.

Section 304 Part II—Accused had a fire arm but did not shoot—However he picked up axe from the spot and gave a blow on deceased aged 75 years—Held: Is guilty under Section 304 Part II as the conduct and the manner in which he attacked an old person shows that by causing the injury with axe on the neck of the deceased, he was having knowledge that the said act was likely to cause death, but he had no intention to cause death or such bodily injury as was likely to cause death.

A According to prosecution, quarrel took place between the accused and the deceased. Next day, the two deceased, Krishna and his son Bajirao along with PW 10 and his brother and 2 ladies went to village Walkewadi for the purpose of carrying on weeding operations in the land belonging to PW-6 who is daughter of deceased Krishna. They were armed with axe and sticks.

B When they came near the house of one Hindurao, which was close to the house of the accused, the accused armed with gun, axes and sticks attacked the prosecution party. The accused No. 1 was having a double-barrel gun which he fired in the air in the first instance. Accused No. 3 inflicted injuries with axe on the head and neck of Bajirao as a result of which he fell down and later succumbed to the injuries. After Bajirao fell down, accused No. 1 took

C out the axe which Bajirao was having and then attacked Krishna and as a result of the injuries caused to him, Krishna died the next day in the hospital. Accused No. 2 is alleged to have given a stick blow on the head and the back of PW10. As regards accused No.4, it is alleged that he was about to attack PW1 with axe and when PW10 raised his right hand to ward off the attack, the injury was caused to his index finger.

D Sessions Judge convicted appellants and other accused under Section 302 read with Section 34 IPC. Appellants (accused no.1 and no.3) and accused no.2 and 4 preferred appeal before the High Court. High Court convicted appellant no.2 (accused no.3) under Section 302 IPC and appellants no.1

E (accused no.1) under Section 304 Part 1 IPC particularly after recording a finding that the complainant's party were aggressor and appellants had sufficiently discharged the burden cast on the defence to prove their case of the right of private defence; that persons from the party of the accused including appellants sustained serious injuries including some of them of a life threatening nature and the prosecution witnesses had failed to explain

F those injuries. The present appeal is filed by accused no.1 and accused no.3.

Partly allowing the appeal, the Court

G HELD : 1. The view taken by the High Court on the aspect of self-defence is not a reasonably possible view. [643-D]

2. The evidence reveals that the incident did not happen within the premises of the accused or even in front of it. The incident happened in the lane in front of the house of one Hindurao. It may be that the place of occurrence is not too far from the house of the accused but the fact remains that the incident took place in a public street outside the houses of the accused.

H This finding of the trial Court based on thorough analysis of the evidence

has not been upset by the High Court. Yet, the High Court came to the conclusion that the members of the prosecution party were aggressors. There is no evidence to show that PW10 was carrying the motor cycle chain. The suggestion put to him was denied. PW9 denied having made the statement that the deceased Krishna and his three sons were hurling abuses in loud tone against the accused for the previous night's assault on A1. The High Court made use of the statements under Section 161 Cr.P.C. to record its findings on these two aspects. It may be that PW9 is an untruthful witness but the omissions and contradictions cannot be treated as evidence of the alleged facts. There is every possibility that the offensive article like cycle chain could have been picked on the spot by a member of the prosecution party.

[644-C, G-H; 646-A-B]

3. There is nothing unnatural or improbable in the version given by PW6. The omission to spell out 'special reason' for requesting her parents and brothers to help her in agricultural operations is no ground to disbelieve her evidence, especially in view of the evidence on record that her kith and kin from the parents' side were looking after some of her lands in view of the mental incapacity of her husband. Moreover, the fact that the lady members of the family were accompanying them coupled with the fact that there were only three able-bodied males in the prosecution party (Krishna being a very old man) and the further fact that the weapons they were carrying (axe and sticks) were such as are ordinarily carried in villages while going to fields, would probablize the fact that that their arrival in the village of Walkewadi was for some reason other than initiating a fight against the accused. For the aforesaid reasons, the plea of self-defence advanced by the accused is discarded which has been accepted by the High Court without evidentiary basis and without considering the clear finding of the trial Court in regard to the scene of offence. [645-G-H; 646-A-B]

4. There was no explanation for the injuries received by the accused and some others in the course of the same incident. In fact, the incident as such has not been denied by either of the parties. It is not possible to say with reasonable certainty as to which party provoked the other and how the fight was initiated. In the circumstances, a reasonable inference based on a high degree of probability could be drawn that there was a sudden quarrel and free fight between the parties. The attack by the appellants on the prosecution party in the course of this fight cannot be said to be a *premeditated affair*. It is not the prosecution case that the accused anticipated the arrival of the prosecution party and they were lying in wait to cause harm to the deceased.

A Though A1 had a fire arm, he did not use it against the deceased. He fired a shot or two in the air. After that there is nothing to show that he tried to reload and use it against the deceased. In fact initially only one accused was having an axe. It is only later on that accused No.4 is alleged to have joined the fight armed with an axe which is also indicative of the fact that there was no pre-concert amongst the accused to attack the members of the prosecution party. Though he is alleged to have attacked PW10 with an axe, no severe injury was inflicted on PW10. Above all, the incident was of a short duration and the accused fled from the scene immediately after the fight. These events could probablize the fact that there was no premeditation and the attack was in the course of free fight. There is therefore a case to apply Exception 4 to Section 300 provided the ingredients of the last clause, that is to say, "without the offender having taken undue advantage or acted in a cruel or unusual manner" are satisfied. There is no difficulty in holding that the offenders have not taken undue advantage of the situation. Both parties, who were armed, engaged themselves in a fight and both inflicted injuries against the other.

[646-D-H; 647-A]

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5. A3 (2nd appellant), in spite of having an axe with him, had suffered quite a severe injury viz., contusion of 8"x1" over chest which could have been caused, according to the Doctor, by an object like cycle chain. It is not possible to say at what stage A3 had received such injury. At any rate, there was no clarification bearing on this aspect from the prosecution side. The deceased Bajirao was wielding an axe. The 2nd appellant, probably already injured, might have become apprehensive that he would be attacked by Bajirao with the axe. Though three injuries were noted, they are all on the left parietal region causing the fracture of skull bone. Looking at the nature of injuries, it is quite possible to say that all the injuries would have been caused by one or two axe blows, but not necessarily three. In fact, PW6 states in the cross examination that she had seen one axe blow being given by accused No.3 on the neck of Bajirao. No doubt he had used excessive force against Bajirao by causing injury with the axe on a vital part, may be more than once. However, taking an overall picture, it cannot be said beyond doubt that the 2nd appellant acted in a cruel or atrocious manner by attacking the deceased with the axe once or twice. The 2nd appellant is entitled to the benefit of Exception No.4. At the same time, it would be appropriate to convict him under Part I of Section 304 IPC because having regard to the gravity of the injuries caused with a dangerous weapon, each one of which was fatal, the 2nd appellant must be imputed with the intention to cause such bodily injury as was likely to cause death, if not the intention of causing death. Accordingly

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the 3rd accused (appellant No.2) is convicted under Section 304 Part I. A

[647-B-F]

6. A1, although having fire arm, did not shoot the deceased or any other member of the prosecution party. Other than the gun, he was not having any weapon in his hand. Instantaneously he picked up the axe that was in the hands of the injured Bajirao and dealt a blow with that axe on the neck of the deceased Krishna. Though another injury was found on the left parietal region, according to the Doctor PW5, it was injury No.1 that was serious. Krishna who, according to postmortem report, was aged about 75 years, succumbed to the injury the following day. It is reasonable to infer, from the conduct of the 1st appellant and the manner of attack on an old person, that appellant No.1, by causing the injury with axe on the neck of the deceased Krishna, was having knowledge that the said act was likely to cause death; but, he had no intention to cause death or such bodily injury as was likely to cause death. Therefore he is guilty under Section 304 Part II. B C

[647-G-H; 648-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 615 of 2004. D

From the Judgment and Order dated 24.3.2004 of the Bombay High Court in CrI.A. No. 564 of 1987.

Shekhar Nafde, Himanshu Gupta, Brijkishore Sah and Shivaji M. Jadhav with him for the Appellants. E

Ravindra Keshavrao Adsure for the Respondent.

The Judgment of the Court was delivered by

P. VENKATARAMA REDDI, J. Four persons including the two appellants herein faced the charges under Sections 302/34, 307/34 and Section 326 IPC and also under Section 25(1)(b) and Section 30 of the Arms Act for the fatal assault with deadly weapons on the two deceased persons namely Bajirao and Krishna (also referred to as 'Kishan' by some witnesses) on the forenoon of 18.8.1984 in the village of Walkewadi. On trial, the Additional Sessions Judge, Kolhapur convicted accused Nos. 1 to 4 under Section 302 read with Section 34. Accused Nos. 1 & 2 were alternatively convicted under Section 302 IPC individually. Accused Nos. 1 & 2 were also convicted for the offence under Section 25(1)(b) and Section 30 of the Arms Act respectively. A4 was also convicted under Section 324 IPC. Accused Nos. 1 to 4 were, however, acquitted of the offence under Section 307 IPC. All the accused F G H

A were sentenced to life imprisonment.

B On appeal, the High Court acquitted the accused Nos. 1 to 4 for the offences under Section 302 read with Section 34 and the High Court convicted the appellant No.2 (A-3) Tanaji Shamrao Valake under Section 302 IPC and the appellant No.1(A-1)Dattu Shamrao Valake under Section 304 Part I IPC and sentenced them to life imprisonment and rigorous imprisonment for a period of 10 years respectively. The conviction of accused No.1 (appellant No.1) under Section 25(1)(a) of the Arms Act was maintained. The fourth accused's conviction Under Section 324 was upheld. Aggrieved by their conviction and sentence, the two appellants who are accused Nos. 1 and 3 have filed the present appeal against the judgment of the High Court of Bombay.

C The case of the prosecution is as follows :-

D The deceased and the accused belonged to nearby villages, namely Varakatwadi and Walkewadi respectively. There was a quarrel on the intervening night of 18th/19th of August, 1984 in connection with the grazing of cattle of accused No.1 on the pasture land situate at the adjacent village Awali said to be in the possession of the deceased and his sons. In the course of scuffle, it is alleged that the accused No.1 was assaulted by Ananda, the brother of PW10 with a stick. PW10 drove away the cattle. On the very next day at about 10 a.m. the two deceased persons, namely Krishna and his son Bajirao along with PW10 and his brother Ananda and the ladies (Suseela-PW7 and Kamal-PW8) went to the village Walkewadi for the purpose of carrying on weeding operations in the land belonging to PW6—Akkatai who is the daughter of the deceased Krishna and the sister of deceased Bajirao.

F They were armed with axe and sticks. When they came near the house of one Hindurao Valake, which is close to the house of the accused, the accused armed with gun, axes and sticks attacked the prosecution party. The accused No.1 was having a double-barrel gun which he fired in the air in the first instance. When he was aiming the gun at Ananda, his brother (PW10) gave a hit on the gun with a stick under the impact of which the gun fell down and there was accidental shot which, however, did not injure anybody. Then, accused No.3 inflicted injuries with axe on the head and neck of Bajirao as a result of which he fell down and succumbed to the injuries after a gap of about a month. It is alleged that after Bajirao fell down, the second appellant *i.e.* accused No.1 took out the axe which Bajirao was having and then attacked Krishna and as a result of the injuries caused to him, Krishna died the next

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day in the hospital. Accused No.2 is alleged to have given a stick blow on the head and the back of PW10. As regards accused No.4, it is alleged that he was about to attack PW1 with axe and when PW10 raised his right hand to ward off the attack, the injury was caused to his index finger.

There were three head injuries on the deceased Bajirao which are attributed to the attack by accused No.3. These injuries were inflicted on the left parietal region causing the fracture of skull bone and the brain matter protruding out. The deceased Krishna had two injuries one incised wound on the nape of neck 4" x 2" x 1½", spine deep exposing the bleeding spine and the second incised wound was on the left parietal region, scalp deep. The first wound, according to the opinion of the Medical Officer, was the fatal wound.

The accused too did suffer injuries as noted by the High Court in paragraph 9. The details of such injuries are as follows:

- (1) Accused No. 2 - Shamrao, had suffered incised wound obliquely on the right parietal region of his head, 2" x ¼", contusion 1" x 1" over left wrist and multiple abrasion over the right scapula region.
- (2) Accused No. 1 - Dattu Shamrao, had suffered contusion over left forearm, 2"x1" reddish in colour.
- (3) Accused No. 3 - Tanaji had suffered contusion 8"x1" over chest from mid sternum extending obliquely to left anterior axillary line (which injury according to the Doctor could be caused by the motor cycle chain) and two other contusions over left deltoid region (2"x1") and left inguinal region (3"x1").

Four others (other than the accused) were also injured.

PW12—Head Constable of Lakshimpuri police station was on duty in CPR hospital, Kolhapur on the date of the incident. Having come to know that three injured persons were admitted in the hospital, at about 3.00 p.m., he went and saw the patients namely Krishna, Bajirao and Sambaji in the ward and he recorded the statement of Sambaji—PW10 who was able to speak. The first information based on the said statement was recorded and the case was transferred to Kodoli police station which had jurisdiction over the place of offence. Initially some investigation was done by the Head Constable of Kodoli P.S.—PW14 who went to the village and drew up the panchnama of the scene of occurrence. PW17—the Sub-Inspector incharge of Kodoli

A police station, continued the investigation from 20.8.1984 onwards. He seized the gun and axe from the houses of the accused and recorded the statements of the witnesses and after investigation filed charge-sheet on 31.12.1984. While so, on the date of the incident itself, the second accused Shamrao lodged a complaint with Kodoli police station alleging that he and other accused were assaulted by the two deceased PW10 and his brother with axes, sticks and cycle chain. After investigation by PW 17, a charge-sheet was filed implicating PW10 and his brother Ananda for the offence under Section 307 IPC. That case was also tried along with the present case and by the judgment of the same date, the learned Sessions Judge acquitted them of the charges.

C At the time of examination under Section 313 Cr.P.C., the appellants filed a written statement in which they took the plea of private defence. While admitting the incident, they stated that the deceased Krishna and his three sons entered the house of the accused armed with axe, cycle chain and stick and one of them (Ananda) assaulted Tanaji—A3 with the cycle chain as a result of which he fell down and became unconscious. Then the prosecution party started beating the other accused. Accused No.1 therefore went inside and brought a gun and fired two shots in the air with the idea of scaring them away. However, the prosecution party continued to beat the accused and cause injuries to them. The names of seven persons including the three accused were mentioned as the recipients of injuries. They denied the presence of lady witnesses—PWs 6, 7 and 8 at the scene of occurrence. They referred to the complaint filed by them against the prosecution party.

F The High Court was of the view that the evidence on record probalised the plea of private defence taken by the accused. The High Court found substance in the contention of the accused that the deceased and their associates were the aggressors. At the same time, as far as the third accused-second appellant is concerned, the High Court felt that there was really no justification for causing three injuries with a deadly weapon because by the time he mounted the attack, the threat from the side of the deceased and his companions had abated and moreover, by the very first injury, the deceased would have been incapacitated. The High Court was therefore of the view that A3 intended to cause more harm than was necessary for the purpose of self defence. The High Court therefore convicted the second appellant (A3) for the offence under Section 302 IPC for his individual act of fatally attacking Bajirao. As regards the 1st appellant, the High Court gave the benefit of Exception 3 to Section 300 and convicted him for the offence under Section 304 Part I and

sentenced him to ten years rigorous imprisonment.

Accused Nos. 2 and 4 were acquitted by the High Court on the ground that they did not play active part, that the injury alleged to have been caused by accused No.2 was not proved by medical evidence and that accused No.4 arrived at the scene of offence much later as per the version in the FIR. In spite of the finding that the right of private defence was available to the accused and that the accused No.4 entered the scene later on, curiously the High Court upheld his conviction under Section 324 for causing the injury to PW10. However, that is not the subject matter of the present appeal.

There were five eye-witnesses to the offence. The first one is PW6—Akkatai (daughter of the deceased Krishna) whose name was referred to in the F.I.R. itself. The other eye-witnesses are PW7—daughter-in-law of the deceased Krishna, PW10—his son, PW8—the wife of deceased Bajirao and PW9—one Shivaram. None of them explained as to how the accused received injuries. The trial Court expressed doubt regarding the presence of PW8.

In our view, the view taken by the High Court on the aspect of self-defence is not a reasonably possible view. We do not think that the evidence on record justifies the inference that the appellants acted in self-defence. Three reasons weighed with the High Court in giving credence to the plea of private defence. The following passage at para 10 of the judgment summarizes these reasons.

“...In our view, the material mentioned above thus lends support to the defence contention that the complainants party had also come armed with the weapons such as axe, motor cycle chain and sticks. Material further indicates that the complainants party were also abusing the accused persons. The aforesaid facts coupled with the fact that three of the accused alongwith four other from their party did in fact suffer injuries, which are not explained by the prosecution witnesses in our view, indicates that the complainants party had come prepared for aggression and did commit overt acts against the accused and others.....”

Then, the High Court examined the overt acts committed by the appellants and held that the appellant No.2—Tanaji intended to cause more harm than necessary for the purpose of self-defence and therefore the Exception 3 cannot come into play in his case. However, the Exception was applied to the case of first appellant and he was convicted under Section 304 Part I. On

A a scrutiny of the evidence on record and the clear finding of the trial court in regard to the scene of offence, we are of the view that the High Court was not justified in reaching the conclusion that the accused had the right of private defence against the deceased and their companions who, according to the High Court, were the aggressors. In this context, we remind ourselves of the case set up by the accused in their police report and in their written statement in response to Section 313 examination according to which the deceased Krishna and his three sons entered the house of the accused armed with axe etc., challenged the accused to come out and attacked one of them (2nd appellant) with cycle chain and at that juncture A1 brought gun and fired in the air. Yet, according to the accused, the attack continued. However,

B this version cannot be true as the evidence unmistakably reveals that the incident did not happen within the premises of the accused or even in front of it. The incident happened in the lane in front of the house of one Hindurao Walake. It may be that the place of occurrence is not too far from the house of the accused but the fact remains that the incident took place in a public street outside the houses of the accused. The houses of the accused are towards the east of the place of offence separated by two or three houses. The trial Court discussed this aspect in detail. The learned Sessions Judge referred to the map (Ext. 53), the scene of offence (Ext. 21), the evidence of panch witness—Vasant Sawant (Ext. 20), the lack of blood-stains at the alleged place of incident pointed out by Tutala Bai—the wife of A2 to the I.O., the presence of blood on the earth recovered from the actual spot and the evidence of I.O. The trial Court concluded as follows :

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“Thus it is clear that as the place of offence is near the house of Hindurao Walake, it falsifies the version of the accused that the incident took place in front of their house as contended by them in their written statement under Section 313 Cr.P.C.”

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It was also observed :

“The version given by the prosecution and the complainant that on the date of incident at about 10 a.m. they were going to the land of Mali (owned by Akkatai) appears to be most natural and probable”.

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This finding of the trial Court based on thorough analysis of the evidence has not been upset by the High Court. Yet, the High Court came to the conclusion that the members of the prosecution party were aggressors. At least, two reasons that were taken into account by the High Court in reaching the conclusion cannot be sustained. There is no evidence to show that PW10

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was carrying the motor cycle chain. The suggestion put to him was denied. PW9 denied having made the statement before the police that PW10 was carrying cycle chain and the axe. So also he denied having made the statement that the deceased Krishna and his three sons were hurling abuses in loud tone against the accused for the previous night's assault on A1. The High Court made use of the statements under Section 161 Cr.P.C. to record its findings on these two aspects. It may be that PW9 is an untruthful witness but the omissions and contradictions cannot be treated as evidence of the alleged facts. There is every possibility that the offensive article like cycle chain could have been picked upon the spot by a member of the prosecution party.

As regards the injuries on the accused, we shall advert to that aspect a little later.

The learned counsel for the appellant tried to supplement the reasons given by the High Court by contending that in the background of the previous night's incident, the prosecution party would have thought of retaliation, as otherwise there was no acceptable reason for the deceased and their family members coming to the village of the accused on the very next day. It is commented that the explanation of PW6—Akkatai that they came to the village in order to attend to weeding operations in her lands is highly improbable. Attention is drawn to her statement that there was no 'special reason' for requesting her parents to attend to the work on her fields. We find it difficult to accept this contention. We have already extracted the finding of the trial Court and we agree with the trial Court that there is nothing unnatural or improbable in the version given by PW6. Too much cannot be read into the statement of PW6 that there was no 'special reason'. The omission to spell out 'special reason' for requesting her parents and brothers to help her in agricultural operations is no ground to disbelieve her evidence, especially in view of the evidence on record that her kith and kin from the parents' side were looking after some of her lands in view of the mental incapacity of her husband. Moreover, the fact that the lady members of the family were accompanying them coupled with the fact that there were only three able-bodied males in the prosecution party (Krishna being a very old man) and the further fact that the weapons they were carrying (axe and sticks) were such as are ordinarily carried in villages while going to fields, would probablize the fact that that their arrival in the village of Walkewadi was for some reason other than initiating a fight against the accused. The learned counsel for the appellant repeatedly stressed that the incident was only of a short duration—2 or 3 minutes according to PW8. But it has no bearing on the

A question whether the members of the prosecution party were the aggressors.

For the aforesaid reasons, we discard the plea of self-defence advanced by the accused which has been accepted by the High Court without evidentiary basis and without considering the clear finding of the trial Court in regard to the scene of offence. The High Court's finding on the aspect of private defence almost borders on perversity and cannot be sustained.

What remains is the fact that the injuries were caused to some of the accused which remained unexplained. Whereas the accused No.1 received a minor injury viz., contusion over left fore arm 2"x1", the injuries received by accused Nos. 2 and 3, though simple, are fairly severe. Accused No.2 had received an axe injury and accused No.3 had received an injury with some other dangerous object such as cycle chain. One person by name Sadashiv suffered a lacerated wound over occipital region, scalp deep with a fracture of skull. According to the appellants, he was their associate. He was examined by the Medical Officer—PW5. There was no explanation for these injuries received by the accused and some others in the course of the same incident. In fact, the incident as such has not been denied by either of the parties. It is not possible to say with reasonable certainty as to which party provoked the other and how the fight was initiated. In the circumstances, a reasonable inference based on a high degree of probability could be drawn that there was a sudden quarrel and free fight between the parties. The attack by the appellants on the prosecution party in the course of this fight cannot be said to be a premeditated affair. It is not the prosecution case that the accused anticipated the arrival of the prosecution party and they were lying in wait to cause harm to the deceased. Though A1 had a fire arm, he did not use it against the deceased. He fired a shot or two in the air. After that there is nothing to show that he tried to reload and use it against the deceased. In fact initially only one accused was having an axe. It is only later on that the accused No.4 is alleged to have joined the fight armed with an axe which is also indicative of the fact that there was no pre-concert amongst the accused to attack the members of the prosecution party. Though he is alleged to have attacked PW10 with an axe, no severe injury was inflicted on PW10. Above all, the incident was of a short duration and the accused fled from the scene immediately after the fight. These events could probablize the fact that there was no premeditation and the attack was in the course of free fight. There is therefore a case to apply Exception 4 to Section 300 provided the ingredients of the last clause, that is to say, "without the offender having taken undue advantage or acted in a cruel or unusual manner" are satisfied. There is no

difficulty in holding that the offenders have not taken undue advantage of the situation. Both parties, who were armed, engaged themselves in a fight and both inflicted injuries against the other. A

The only doubt that arises is whether A3, in causing three axe injuries to the deceased Bajirao, acted in a cruel manner? In examining this point, we have to take note of the fact that A3 (2nd appellant), in spite of having an axe with him, had suffered quite a severe injury viz., contusion of 8"x1" over chest which could have been caused, according to the Doctor, by an object like cycle chain. It is not possible to say at what stage A3 had received such injury. At any rate, there was no clarification bearing on this aspect from the prosecution side. The deceased Bajirao was wielding an axe. The 2nd appellant, probably already injured, might have become apprehensive that he would be attacked by Bajirao with the axe. Though three injuries were noted, they are all on the left parietal region causing the fracture of skull bone. Looking at the nature of injuries, it is quite possible to say that all the injuries would have been caused by one or two axe blows, but not necessarily three. In fact, PW6 states in cross examination that she had seen one axe blow being given by accused No.3 on the neck of Bajirao. No doubt he had used excessive force against Bajirao by causing injury with the axe on a vital part, may be more than once. However, taking an overall picture, we cannot say beyond doubt that the 2nd appellant acted in a cruel or atrocious manner by attacking the deceased with the axe once or twice. We are therefore not inclined to deprive the 2nd appellant of the benefit of Exception No.4. At the same time, we are of the view that it would be appropriate to convict him under Part I of Section 304 IPC because having regard to the gravity of the injuries caused with a dangerous weapon, each one of which was fatal, the 2nd appellant must be imputed with the intention to cause such bodily injury as was likely to cause death, if not the intention of causing death. Accordingly we convict the 3rd accused—appellant No.2 under Section 304 Part I and we are of the view that in the circumstances, a sentence of eight years R.I. and fine of Rs.1,000 would be sufficient. In default of payment of fine, appellant No.2 will suffer imprisonment for four months. B C D E F

The case of the accused No.1—1st appellant, undoubtedly falls under Section 304 Part II. As noticed supra, A1, although having fire arm, did not shoot the deceased or any other member of the prosecution party. Other than the gun, he was not having any weapon in his hand. Instantaneously he picked up the axe that was in the hands of the injured—Bajirao and dealt a blow with that axe on the neck of the deceased Krishna. Though another G H

- A injury was found on the left parietal region, according to the Doctor—PW5, it was injury No.1 that was serious. Krishna who, according to postmortem report, was aged about 75 years, succumbed to the injury the following day. It is reasonable to infer, from the conduct of the 1st appellant and the manner of attack on an old person, that the appellant No.1, by causing the injury with axe on the neck of the deceased Krishna, was having knowledge that the said act was likely to cause death; but, he had no intention to cause death or such bodily injury as was likely to cause death. We therefore find the 1st appellant—
- B A1 guilty under Section 304 Part II. As regards sentence, we feel that having regard to the facts and circumstances of the case, five years of imprisonment and fine of Rs.1,000 will be adequate and proper. Accordingly, he is convicted
- C and sentenced. In default of payment of fine, he will suffer further imprisonment of four months. The appellants will of course be given the benefit of set off of the period of detention already undergone.

Accordingly, the judgment of the High Court is *modified* and the appeal is partly allowed.

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Appeal partly allowed.