

SHAIKH MAJID AND ANR.

v.

STATE OF MAHARASHTRA AND ORS.
(Criminal Appeal No. 132 of 2008)

JANUARY 21, 2008

[DR. ARIJIT PASAYAT AND AFTAB ALAM, JJ.]

Penal Code, 1860:

s.300, Exception 4, 304 (Part-1) – Sudden fight resulting in death of one and serious injuries to others – Deceased, PW-4 and other villagers performing pooja in temple – Accused persons and large number of persons from mosque adjacent to the temple started pelting stones exhorting them to leave the place immediately as they had to offer namaz – Accused persons assaulted PW-4 and others with knives – Causing serious injuries to many and death of one – Conviction by trial court under s.302 r.w. s.34 – Affirmed by High Court – On appeal, Held: Considering background facts and nature of weapon used i.e. small knife, the appropriate conviction would be under s.304 Part I and not s.302 – Accordingly conviction altered.

s.302 – Applicability of, when single blow given.

Criminal trial:

Non-explanation of injuries on accused – Effect on prosecution case.

Words and phrases:

‘fight’, ‘sudden fight’ and ‘undue advantage’ – Meaning of – In the context of s.300, Exception 4 IPC.

The prosecution case was that the first informant PW-4 and about 200 villagers were performing pooja in a temple on the event of Deshahra festival. After pooja, they

A entered the gate of village and went to the Ram and Maruti temples for offering their prayers. At that time, about 250-300 people from mosque, adjacent to Ram temple started pelting stones at them. While pelting stones they were exhorting that it was time for offering prayer and they should leave the place immediately. 32 accused persons along with 200-250 persons assaulted them with sticks, stones, knives etc. The assault was on the people belonging to Hindu religion. PW-4 was assaulted by accused no.1 and 26 with knives. Other persons also sustained serious injuries. One person died. A case was registered against accused persons under ss.307, 147, 148, 149 and 323 IPC. The trial court convicted appellants under s.302 r.w. s.34 IPC and also under s.324 IPC, which was affirmed by the High Court.

D In appeal to this Court, appellants contended that there were injuries on the accused which were not explained by the prosecution and in alternate, s.302 IPC would not attract to facts of the case and Exception 4 to s.300 IPC would apply as there was only one blow and that too in the course of sudden quarrel.

Partly allowing the appeal, the Court

F HELD: 1.1 Non-explanation of the injuries on the accused by the prosecution may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently, the whole case. Much depends on the facts and circumstances of each case. [Para 9] [972-F-H; 973-A]

H 1.2. Non-explanation of injuries by the prosecution will not affect the prosecution case where injuries

sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it does not become necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. [Para 10] [973-B, F-G]

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Ramlagan Singh v. State of Bihar (1973) 3 SCC 881; *Hare Krishna Singh v. State of Bihar* (1988) 2 SCC 98 – relied on.

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Mohar Rai v. State of Bihar AIR (1968) SC 1281; *Lakshmi Singh v. State of Bihar* (1976) 4 SCC 394; *Vijayee Singh v. State of U.P.* (1990) 3 SCC 190 – referred to.

2.1. Exception 4 to s.300 IPC 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 reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect

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A of guilt upon equal footing. [Para 14] [974-C-E]

2.2. 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
B 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
C 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
D premeditation;(b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. [Para 14]
E [974-E-H; 975-A-B]

2.3. The word “fight” occurring in Exception 4 to s.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
F worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or 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
G 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 that there was
H 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". [Para 14] [975-B-D] A

Sandhya Jadhav v. State of Maharashtra (2006) 4 SCC 653 – relied on. B

2.3. It cannot be said that whenever a single blow is given, that would not attract s.302 IPC. In the instant case considering the background facts and the nature of the weapon used i.e. small knife the appropriate conviction would be under s.304 Part I IPC and not s.302 IPC. Accordingly the conviction is altered. [Paras 16, 17] [975-E-F] C

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 132 of 2008. D

From the final Judgment and Order dated 24.01.2007 of the High Court of Bombay, Bench at Aurangabad in Criminal Appeal No. 314 of 1991. E

Shakil Ahmed Syed, Faiyz Ahmad Syed, Mohd. Yasir Abbasi and Firasat Ali Siddiqui for the Appellants. E

Ravindra Keshavrao Adsure for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted. F

2. Challenge in this appeal is to the judgment of the Division Bench of the Bombay High Court at Aurangabad, dismissing the appeal filed by the appellants. By a common judgment two appeals were disposed of. Both the appeals were directed against the judgment and order passed by learned Third Additional Sessions Judge, Aurangabad, in Sessions Case No. 39 of 1990. Originally there were 37 accused persons in the Sessions Case who faced trial for offences punishable under Sections 302, 307, 395, 436, 324, 323, 147, 148 and 149 of the Indian Penal Code, 1860 (in short the 'IPC'), Section 25 of H

A the Indian Telegraph Act, (in short the 'Telegraph Act') and
Section 3 of Prevention of Damage to Public Properties Act,
1984 (in short the 'Public Property Act') and Sections 3 and 4
of the Religious Institutions (Prevention of Misuse) Act, 1988 (in
short the 'Religious Institutions Act'). Learned Trial judge
B convicted the present appellants who were accused Nos.1 and
26 respectively for the offences punishable under Section 302
read with Section 34 and Section 324 read with Section 34
IPC. Imprisonment for life and fine of Rs.1,000/- with default
stipulations and three years imprisonment and fine of Rs.1,000/
C - with default stipulation were imposed. Appellant No. 2-Shaikh
Abbas was also convicted for offences punishable under Section
452 read with Section 149 IPC and was sentenced to five years'
rigorous imprisonment and fine of Rs.1000/- with default
stipulation. He was also convicted for offences punishable under
D Section 435 read with Section 149 IPC, and for offences
punishable under Section 323 read with Section 149 IPC. The
sentences were directed to run concurrently and it was further
directed that in case the fine amount was realized, part of it, i.e.
Rs.10,000/-, was to be paid to the widow of Jaynarayan
E (hereinafter referred to as the 'deceased'). Three prosecution
witnesses were also directed to be paid compensation of
Rs.1,000/-. Law was set into motion on the basis of the statement
given by the one Krishna (PW4), Sandu, Police Inspector (PW-
11), recorded the statement which was treated as the First
F Information Report (in short the 'FIR'). The information given by
him was to the following effect:

G "Krishna PW4 has alleged in the first information report
Exhibit 63 that the occurrence in the question took place
on 10.10.1989. On that day at about 4 P.M., he along with
about 200 villagers had been to a temple for darshana
and also for performing pooja on the even of Deshara
festival. All of them went to temple and Shami tree near
the cremation ground on the outskirts of village Balanagar,
Tq. Paithan. As usual, the villagers had been to the place
of pooja in a procession with drums etc. After pooja they
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entered the gate of village (Ves) and had been to the Ram and Maroti temples for offering their prayers. At this time, about 250-300 people from mosque, adjacent to Ram temple, had started pelting stones at them. While pelting stones they were exhorting that it was a time for offering prayer (Namaz) and therefore, these people should leave the place immediately. Krishna PW4, deceased Jaynarayan, Pandharinath, Babasaheb and other villagers have noted the presence of about 3-32 accused persons. According to them, these 32 accused persons along with 200-250 persons assaulted them with sticks, stones, knives etc. the assault was on the people belonging to Hindu religion. PW 4 Krishna had been assaulted by accused No. 1 Shaikh Majid and accused No.26 Shaikh Abbas with knives. Such assault was on his right hand and below shoulder, on right shoulder as well as in the stomach. He suffered wounds. Such stabbing is suffered by Ranganath, Laxman, Harichand, Gorakh, Hanuman, Uttarm, Bhausahab, Badri Narayan and Dr. Gopi Kisan as well as Laxman Shamrao. Other persons also sustained serious injuries.

3. As noted above, on the basis of information given by Krishna, (PW-4) case was registered under Sections 307,147, 148, 149 and 323 IPC. Investigation was undertaken and on completion thereof charge sheet was filed. At this juncture, it is to be noted that another FIR was lodged at about 6 p.m. by appellant –accused No.1 against Krishna (PW4) and others. Charge sheet thereafter was filed. Undisputedly, there was order of acquittal in the said case. The trial Court placing reliance on the evidence adduced, held present appellants guilty of offence committed punishable under Section 302 read with Section 34 IPC. They were also found guilty of having committed offence punishable under Section 324 in relation to the injury caused to Krishna PW4. As noted above, appellant-Shaikh Majid was also convicted under various other provisions. The stand of the appellants before the High Court was that the evidence of the so called eye witnesses PWs. 4, 5, 6 & 7 was not consistent.

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A Only one blow was given and that in course of a sudden quarrel, injuries were sustained by the accused persons. The prosecution has, therefore, suppressed the truth. The plea was not accepted and as noted above their appeal was dismissed.

B 4. The stand taken by the appellant before the High Court was reiterated.

5. Learned counsel for the State supported the judgment of the trial Court as affirmed by the High Court.

C 6. One of the pleas is that the prosecution has not explained the injuries on the accused. The issue is, if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where the prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. In *Mohar Rai v. State of Bihar (AIR 1968 SC 1281)* it was observed: (AIR p.1284, para 6)

E "In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probalilise the plea taken by the appellants."

F 7. In another important case *Lakshmi Singh v. State of Bihar (1976 (4) SCC 394)* after referring to the ratio laid down in *Mohar Rai case (supra)* this Court observed: (SCC p.401, para 12):

G "Where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probalilise the plea taken by the appellants."

8. It was further observed that: (SCC p. 401, para 12)

H "In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the

occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences: A

- (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version; B
- (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable; C
- (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case. D

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one." E

9. In *Mohar Rai case* it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate, not wholly true. Likewise in *Lakshmi Singh case*, it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently, the whole case. Much depends on the facts and circumstances of F G H

A each case. These aspects were highlighted by this Court in *Vijayee Singh v. State of U.P. (1990 (3) SCC 190)*.

B 10. Non-explanation of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries. As observed by this Court in *Ramlagan Singh v. State of Bihar (1973 (3) SCC 881)* the prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries on the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In *Hare Krishna Singh v. State of Bihar (1988 (2) SCC 98)*, it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the court in proof of guilt of the accused beyond reasonable doubt, question of obligation of the prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature.

G 11. The residual question is the applicability of Section 302 IPC. As noted above it was submitted that only one blow was given and that too in the course of a sudden quarrel.

H 12. In essence, the stand of learned counsel for the

appellant is that Exception IV to Section 300 IPC would apply to the facts of the case. A

13. 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. B

14. The Fourth Exception to 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 reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon 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 C
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A offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or 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 that there was no premeditation.

D 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".

E 15. The above position is highlighted in *Sandhya Jadhav v. State of Maharashtra* (2006) 4 SCC 653).

16. It cannot be said that whenever a single blow is given, that would not attract Section 302 IPC.

F 17. In the instant case considering the background facts and the nature of the weapon used i.e. small knife the appropriate conviction would be under Section 304 Part I IPC and not Section 302 IPC. Accordingly the conviction is altered, custodial sentence of ten years would suffice.

G 18. The appeal is allowed to the aforesaid extent.

D.G.

Appeal partly allowed.