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BUDDU KHAN

v.

STATE OF UTTARAKHAND
(Criminal Appeal No. 39 of 2009)

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JANUARY 12, 2009

**[DR. ARIJIT PASAYAT AND ASOK KUMAR
GANGULY, JJ.]**

Penal Code, 1860:

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ss. 304 (Part I), 300, exception 4 and s. 302 – Murder or Culpable Homicide not amounting to murder – Applicability of Exception 4 to s.300 – Sudden quarrel between parties over a minor issue – Accused hitting the deceased resulting in his death – Incident witnessed by prosecution witnesses – Conviction u/s. 302 by courts below – Justification of – Held: On facts, exception 4 to s. 300 applicable – Conviction altered to s.304 (Part I) with custodial sentence of 10 years – Evidence.

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s.300, Exceptions 1 and 4 – Distinction between – Explained.

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Words and phrases: 'Fight', 'sudden fight' and 'undue advantage' – Meaning of – In the context of Exception 4 to s.300, IPC.

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According to the prosecution case, the deceased bit the appellant on his cheek in presence of appellant's wife. The appellant protested the same and hit the deceased on his head with a brick. The deceased succumbed to his injuries. PW 1 and 5 witnessed the incident. Trial court convicted the appellant u/s.302 IPC. High Court upheld the order. Hence the present appeal.

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Partly allowing the appeal, the Court

HELD: 1.1 Exception 4 to s. 300 IPC can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acting 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 7] [183-A-B]

1.2. The 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. [Para 7] [183-B-E]

1.3. Considering the background facts of the case, Exception 4 to Section 300 applies to the facts of the case. The appropriate conviction would be under Section 304 Part I IPC. Custodial sentence of 10 years would meet the ends of justice. [Para 8] [183-G]

Dhirajbhai Gorakhbhai Nayak v State of Gujrat (2003) 5 Supreme 223; Prakash Chand v State of H.P. (2004) 11 SCC 381 and Byvarapu Raju v. State of A.P. and Anr. (2007) 11 SCC 218, Relied on.

A Case Law Reference:

(2003) 5 Supreme 223 Relied on. Para 8

(2004) 11 SCC 381 Relied on. Para 8

(2007) 11 SCC 218 Relied on. Para 8

**B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 39 of 2009.**

From the final Judgment and Order dated 18.3.2008 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 1973 of 2001.

C Rachana Joshi Issar, Shailendra Kumar and Nidhi Tewari for the Appellant.

Abhishek Atrey and Jatinder Kumar Bhati for the Respondent.

D The Judgment of the Court was delivered by

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

E 2. Challenge in this appeal is to the judgment of a Division Bench of the Uttarakhand High Court upholding the conviction of the appellant for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC').

3. Background facts in a nutshell are as follows:

F On 18.9.1993 at about 8.00 p.m. in Village Fauji Math Kota within the limits of P.S. Rudrapur (now part of District Udham Singh Nagar) accused appellant Buddu Khan and deceased Dinesh Oli were sitting together on a cot. Girish Chandra Chaturvedi (PW-1) was also present there. In his presence

G Buddu Khan protested to the deceased as to why did he bite on his cheek in the presence of his wife. Thereafter, Girish Chandra Chaturvedi had left the place. When PW-1 along with Tejpal (PW-5) and Jai Prakash again came towards near the office of Co-operative Society where earlier aforesaid incident

H had taken place, they saw Buddu Khan hitting with a brick on

the head of Dinesh Oli and was saying that he will give the deceased taste of biting the cheek. The three eye witnesses rushed and caught hold of appellant. However, he escaped after freeing himself. The report of the incident was lodged by Tejpal Singh (PW-5) with P.S. Rudrapur on the very day i.e. on 18.9.1993 at about 9.30 p.m. after getting it scribed from one Dharampal. Constable Ved Pal (PW-3) who received the First Information Report prepared check report and made necessary entry in the general diary, a copy of which is Ext.A-7. The crime was initially investigated by Sub-Inspector Surendra Singh Dagri (PW-7). He went to the spot and got prepared inquest report on 19.9.1993 at 2.00 a.m. after taking the dead body of the deceased in his possession. He also prepared site plan. The police also got prepared other necessary papers, sketch of the dead body, police form No.13 and letter to the Chief Medical Officer, requesting him for getting the autopsy done. Constable Pramod Kumar (PW-4) took the dead body in a sealed condition for post mortem examination to Soban Singh Jina Hospital, Haldwani and handed it over for the purpose. Dr. A.S. Singh (PW-2) conducted the post mortem examination on 19.9.1993 at about 1.00 p.m. on the dead body of deceased and prepared report. He opined that cause of death was ante mortem injuries on the skull bone and effusion of blood into the brain matter. Subsequently, investigation was taken over by Prem Singh Ahlawat (PW-6), Inspector who after interrogation of the witnesses and completing the investigation submitted charge sheet to the Magistrate concerned. Case was committed to the Court of Sessions.

The trial Court placed reliance on the evidence of the eye witnesses PWs 1 and 5. In appeal, the stand was that there was no pre-meditation. On the contrary, because the deceased had bitten on the cheek of appellant in the presence of his wife, there was a quarrel and in course of which the appellant picked up a brick and hit it on the head and one blow was given. The High Court did not find substance in the plea that Section 302 has no application

A 4. In support of the appeal, learned counsel for the appellant submitted that the background facts clearly established that Section 302 has no application.

B 5. Learned counsel for the respondent-State on the other hand supported the judgment.

C 6. 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.

D 7. The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the

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serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acting in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. These aspects have been highlighted in *Dhirajbhai Gorakhbhai Nayak v. State of Gujrat* (2003 (5) Supreme 223), *Parkash Chand v. State of H.P.* (2004 (11) SCC 381) and *Byvarapu Raju v. State of A.P. and Anr.* (2007 (11) SCC 218)

8. Considering the background facts of the case we are of the view that Exception 4 to Section 300 applies to the facts of the case. The appropriate conviction would be under Section 304 Part I IPC. Custodial sentence of 10 years would meet the ends of justice.

9. The appeal is allowed to the aforesaid extent.

N.J.

Appeal partly allowed.