A SAMSUDDHIN SHEIKH

v.

STATE OF GOA

(Criminal Appeal No. 1875 of 2008)

NOVEMBER 26, 2008

B

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860:

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s.300 Exception 4, s.302 r.w. s.34 and s.304 Part I – Sudden fight between accused and deceased – Accused stabbed deceased with a knife – Courts below held accused guilty under s.302 r.w. s.34 – Held: Considering factual background, appropriate conviction would be under s.304 Part-I and not under s.302 – Conviction altered accordingly.

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Prosecution case was that the appellant accused and co-accused were pick pocketers. On the day of incident, deceased slapped one of them because of which they threatened the deceased with dire consequences. On the same day in the evening when deceased was sitting in the market, he heard shouts of 'chor chor' from nearby huts. The deceased rushed towards that direction with another person. On reaching the fields, there was exchange of hot words between the deceased and the accused and the appellant accused and co-accused assaulted him. Appellant took out a knife and stabbed deceased on the chest. The deceased collapsed on the ground. The appellant accused and the co-accused tried to run away from the scene of offence. But they were accosted and assaulted by the public with rods and kicks. In the meantime, police arrived at the spot and took away deceased as well as both the accused persons to the hospital. On the way deceased died.

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The Trial Court convicted appellant under s.302 r.w. s.34 IPC. The High Court affirmed the same. Hence the instant appeal. A

Partly allowing the appeal, the Court

HELD: 1.1. 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 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. [Paras 4 and 5] [691-A-D] B C D E

1.2. 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 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 F G H

A 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 acted in a cruel or unusual manner; and (d) the fight must have B 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 C 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 D 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 E 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'. Where the offender takes undue advantage or has acted in a F cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. [Paras 5 and G 6] [691-B-H; 692-A-E]

Kikar Singh v. State of Rajasthan AIR (1993) SC 2426, relied on.

2. In the background facts and the legal principles, the H

inevitable conclusion is that the appellant is to be convicted under s.304 Part I, IPC. Custodial sentence of 10 years would meet the ends of justice. [Para 7] [692-F-H] A

Case Law Reference:

AIR (1993) SC 2426 relied on Para 6 B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1875 of 2008.

From the Judgment and final Order dated 20.11.2006 of the High Court of Bombay, Bench at Goa in Criminal Appeal C No. 15 of 2005.

Bimal Roy Jad (A.C.) for the Appellant.

The Judgment of the Court was delivered by

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

2. Challenge in this appeal is to the judgment of a Division Bench of the Bombay High Court, Bench at Goa upholding the conviction of the appellant for offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in E short the 'IPC'). The appellant has faced trial alongwith Ashish Culaco and both were convicted in the aforesaid way. The accused persons were tried by learned Additional Sessions Judge, Margao on a charge of having committed murder of one Shashikant Kawade (hereinafter referred to as the 'deceased') F by stabbing him with a knife on his chest on 18.5.1998 in the night.

2. Prosecution version, in a nutshell, is as follows:

The appellant accused and his colleague Ashish Culaco G were pick pocketers and on 18.5.1998 the deceased Shashikant Kawade had slapped one of them because of which they had threatened the deceased Shashikant Kawade with dire consequences. On the same day at about 2.00 p.m. they had visited the room of Shashikant Kawade and in the H

A presence of his wife, they provoked him to come out of his house by abusing him but Shashikant Kawade was not permitted to go out of the house. The appellant and Ashish left the place. On the same day in the evening at about 8.15 p.m. when Shashikant Kawade was sitting outside 'Napolean Bar', B he heard shouts of 'chor chor' from the nearby huts on which Shashikant Kawade rushed towards that direction followed by Rafik Gondi and when he reached in the field, there was exchange of hot words in course of a quarrel and appellant accused and the co-accused assaulted him and the appellant C accused took out a knife and stabbed Shashikant Kawade on the chest because of which he collapsed on the ground. The appellant accused and the co-accused tried to run away from the scene of offence. But they were accosted and assaulted by the public with rods and kicks. In the meantime the police D arrived at the spot and took away injured Shashikant Kawade as well as both the accused persons to the hospital and on the way he died. After completing the investigation, charge sheet against the appellant accused and the co-accused was filed and the matter was committed by the Judicial Magistrate, First E Class; Margao to the Court of Session.

Since accused abjured guilt, trial was held. The trial Court relied on the evidence of the prosecution witnesses and recorded the conviction and imposed sentence as aforesaid.

F In appeal, the primary stand was that the occurrence took place in the course of sudden quarrel and, therefore, Section 302 IPC has no application. It is pointed out that the deceased had slapped the appellant. He was a pick- pocket and in the course of altercation fighting took place. The High Court did not G find any substance in the plea and dismissed the appeal.

The stand taken before the High Court was re-iterated in the present appeal.

3. Learned counsel for the respondent-State on the other H hand supported the judgment.

4. For the application of Exception 4 of 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.

5. 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 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 offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the

A 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 B 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 C 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 D in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

6. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot E be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In *Kikar Singh v. State of Rajasthan* (AIR 1993 SC 2426) it was held that if the accused used deadly weapons F against the unarmed man and struck a blow on the head it must be held that giving the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

7. In the background facts as stated in the backdrop of the legal principles set out above, the inevitable conclusion is that G the appellant is to be convicted under Section 304 Part I, IPC. Custodial sentence of 10 years would meet the ends of justice.

8. The appeal is allowed to the aforesaid extent.

D.G. Appeal partly allowed.

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