SACHCHEY LAL TIWARI

v.

STATE OF UTTAR PRADESH

OCTOBER 6, 2004

[ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Penal Code, 1860:

s.300, Exception 4—Applicability of—Held, for application of Exception 4, besides establishing that there was a sudden quarrel and there was no premeditation, it must be shown that offender has not taken undue advantage or acted in a cruel or unusual manner—On facts, the exception has no application to the case.

Criminal Law:

Appeal against acquittal—Held, principle to be followed in such cases is to interfere only when there are compelling and substantial reasons for doing so—On facts, the view taken by High Court in acquitting the accused is a possible view.

Evidence:

'Chance witness'—Evidence of—Held, merely by describing an independent witness as 'chance witness', it cannot be implied that his evidence is suspicious and his presence at the scene doubtful.

Words and Phrases: 'Undue advantage'—Meaning of—Explained.

Appellant in Criminal Appeal No. 270 of 2001(A-1) and respondent no.1 in Criminal Appeal No. 271 of 2001(A-2), the two brothers were prosecuted for murder of two sons of the complainant. The prosecution case was that on the date of occurrence, the two accused alongwith their sister's son 'P' were dismantling the demarcating line between their agricultural field and that of the complainant. When the latter alongwith his two sons reached there and asked the accused not to disturb the demarcation, 'P' took out a pistol and handed it over to A-1 and then 'P' and A-2 exhorted to kill the complainant party. Thereupon A-1 shot dead

A the two sons of the complainant. Besides the complainant (PW.1) and other villagers, the incident was witnessed by PW.2, an independent witness. The trial court convicted A-1 under s.302 IPC and sentenced him to death. A-2 was convicted under s.302 read with s.34 IPC and was awarded imprisonment for life. The High Court altered the sentence of A-1 to life
B imprisonment and acquitted A.2. Aggrieved, A-1 filed appeal against his conviction; whereas the State filed appeals challenging commutation of sentence of A.1 and acquittal of A-2. The Court dismissed State's appeal against commutation of sentence of A-1.

It was contended for A-1 *inter-alia* that PW.2 was a chance witness
C and as such, his testimony should not have been believed; and that, in any event, the prosecution case only indicated that the occurrence took place in the course of a sudden quarrel and in view of Exception 4 to s.300, the case was not covered under s.302 IPC.

As regards acquittal of A-2, the State contended that on the self-same
D evidence A-1 was found guilty and no plausible reason was indicated to discard the same for acquitting A-2.

Dismissing the appeals, the Court

HELD: 1. In a murder trial by describing an independent witness
E as 'chance witness' it cannot be implied that his evidence is suspicious and his presence at the scene doubtful. PW.2, who has been described by the accused to be a 'chance witness', was an independent witness and there was not even a suggestion to the witness that he had any animosity towards any of the accused. Besides, the expression 'chance witness' is quite
F unsuitable in our country. [112-B, C, D]

2. For bringing Exception 4 to Section 300 IPC in operation it has to be established that death is caused (a) without premeditation, (b) in a sudden fight in the heat of passion upon a sudden quarrel; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and
G (d) the fight must have been with the person killed. 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'. On facts, Exception 4 to s.300
H has no application to the instant case. [113-C, E, F]

Dhirajbhai Gorakhbhai Nayak **v.** *State of Gujarat,* **(2003) 5 Supreme 223, relied on.** A

3. As regards the appeal by State against acquittal of A.2, the principle to be followed in such cases is to interfere only when there are compelling and substantial reasons for doing so. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. In the instant case, the High Court analysed the evidence of PWs 1 and 2 to conclude against the prosecution case with regard to alleged exhortation by A-2. The view taken by the High Court is a possible view. [113-G, H; 114-A, E; 114-C] B C

Bhagwan Singh and Ors. **v.** *State of Madhya Pradesh,* **(2002) 2 Supreme 567;** *Shivaji Sahabrao Bobade and Anr.* **v.** *State of Maharashtra,* **AIR (1973) SC 2622;** *Ramesh Babulal Doshi* **v.** *State of Gujarat,* **(1996) 4 Supreme 167;** *Jaswant Singh* **v.** *State of Haryana,* **(2000) 3 Supreme 320;** *Raj Kishore Jha* **v.** *State of Bihar and Ors.,* **(2003) 7 Supreme 152;** *State of Punjab* **v.** *Karnail Singh,* **(2003) 5 Supreme 508;** *State of Punjab* **v.** *Pohla Singh and Anr.,* **(2003) 7 Supreme 17 and** *Suchand Pal* **v.** *Phani Pal and Anr.,* **JT (2003) (9) SC 17, relied on.** D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 270 of 2001. E

From the Judgment and Order dated 27.9.2000 of the Allahabad High Court in Crl.A.No. 621 of 1999.

WITH F

Crl. A. No. 271/2001.

Shiva Pujan Singh, for the Appellant in Crl. A.No. 270/2001 and Respondent in Crl. A.No. 271/2001.

G

R.K. Singh and Jitendra Kumar Bhatia for the Respondents.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. These two appeals are interlinked having their foundation on a judgment of the Allahabad High Court. Appellant Sachchey H

A Lal Tiwari (in criminal appeal no. 270 of 2001) and Bachchey Lal Tiwari (respondent no.1 in criminal appeal no.271 of 2001 filed by the State of Uttar Pradesh) faced trial for alleged commission of offences punishable under Section 302 and Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). Both were found guilty and accordingly convicted while death sentence was imposed on the former, life sentence was imposed B on the latter. Reference was made to the High Court for confirmation of the death sentence and appeals were filed by the accused persons. By the impugned judgment High Court altered the sentence to life sentence for the former and directed acquittal of the latter.

C Facts giving rise to the prosecution of the two accused are that the complainant Achhaiber Misra (PW-I) and both the accused are residents of Village Ledupur within the circle of police station Sarnath district Varanasi in Uttar Pradesh. The agricultural fields of the two sides also adjoin each other near the old brick kiln towards east and south of the village. The ground level of the field of complainant Achhaiber Misra is slightly higher D than the level of the plots of the appellants. On 3.11.1995 at about 6.45 A.M., the accused persons Sachchey Lal Tiwari and Bachchey Lal Tiwari sons of Mahajan Tiwari and Pintoo grand- son of Mahajan Tiwari were dismantling the demarcating line (Mend) between the fields of the complainant Achhaiber Misra and the accused. The complainant Achhaiber Misra witnessed it and he E along with his sons Vijai Shanker Misra and Surender Nath Misra (hereinafter referred to as 'deceased' by their respective names) reached near the field and asked the accused not to dismantle the demarcating line of the field. There was exchange of hot words between the two sides. Pintoo grandson of Mahajan Tiwari took out a pistol and handed it over to the accused Sachchey Lal Tiwari and then Pintoo and Bachchey Lal Tiwari exhorted by saying that F the complainant side should be killed. On it Sachchey Lal Tiwari, accused fired with the pistol at deceased Vijai Misra and deceased Surender, as a result of which both sustained fire arm injuries and died instantaneously on the spot. The occurrence was witnessed by Prem Nath Misra, Rama Kant Misra (PW-2) and other village persons and thereafter the two accused and G Pintoo ran away from the scene of occurrence, leaving behind the dead bodies. Complainant Achhaiber Misra went to the police station Sarnath in district Varanasi and lodged a written report (Ex. Ka-1) there at about 8.15 A.M. On it G.D. entry was made at the police station and a case against the appellants was registered. The Investigating Officer, S.I. Sri Sita Ram Chaudhary (PW-6) reached the scene of occurrence. He inspected the site H and prepared the site plan Ex. Ka-6. Thereafter he recorded the statements of

the witnesses and took the sample and blood stained earth from the scene of occurrence and also prepared the Panchayatnamas of the dead bodies. The dead bodies were sent to District Hospital, Varanasi where post mortem examination was conducted on 4.11.1995 vide post mortem reports Ext. Ka-17 and Ka-18. After completing necessary formalities of investigation, charge-sheet was submitted against the appellants who pleaded not guilty to the charges and claimed to be tried. The defence of the accused was that they have been falsely implicated in this case due to previous enmity and ill-will.

In support of its case the prosecution examined seven witnesses in all. Achhaiber Misra (PW-1), Rama Kant Misra (PW-2) were claimed to be eye witnesses. The defence also examined Yagya Narain Misra (DW-1) and Prem Nath Misra (DW-2). The learned lower court scrutinized the entire evidence on record, believed the prosecution theory, convicted the accused and sentenced them as above. The High Court by the impugned judgment upheld conviction of Sachchey Lal Tiwari but was of the view that life sentence was the proper sentence. It held the evidence to be inadequate so far as accused Bachchey Lal is concerned, and accordingly directed acquittal.

Though the State of Uttar Pradesh had challenged alteration of sentence in respect of accused Sachchey Lal, the same was dismissed by this Court by order dated 19.2.2001. The appeal is limited to acquittal of Bachchey Lal.

Mr. Shiva Pujan Singh, learned counsel for the accused submitted that evidence of PWs 1 and 2 is unreliable. In any event, PW-2 is a chance witness whose evidence should not have been believed. Even if prosecution case is accepted in toto, it only shows that the occurrence took place in course of a sudden quarrel and, therefore, Section 302 IPC has no application.

In response learned counsel for the State submitted that the evidence of PWs 1 and 2 have described the incident in detail and same have been held to be cogent and credible. No infirmity has been noticed and the appellant has not been able to show any infirmity except describing PW-2 as a chance witness. The case is clearly covered under Section 302 IPC and Exception 4 to Section 300 IPC has no application. The cruel manner in which two persons have been brutally killed makes the said Exception non-applicable. In support of the appeal filed, it was submitted that on the selfsame evidence Sachchey Lal has been found guilty. No plausible reason has been indicated to discard it for acquitting Bachchey Lal. In response, Mr. Shiva Pujan Singh submitted that High Court has found evidence of PWs 1 and 2 to be unreliable. The

A judgment being one of acquittal and the view being a possible view, the appeal deserves to be dismissed.

Coming to the plea of the accused that PW-2 was 'chance witness' who has not explained how he happened to be at the alleged place of occurrence it has to be noted that the said witness was independent witness. There was B not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing an independent witness as 'chance witness' it cannot be implied thereby that his evidence is suspicious and his presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed C in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's D castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence. The courts below have scanned the evidence of PW-2 in great detail and found it to be reliable. We find no reason to differ.

For bringing in operation of Exception 4 to Section 300 IPC it has to E 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.

F 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 G 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 H 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 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 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 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. When the factual scenario is considered in the legal principles indicated above, the inevitable conclusion is that Exception 4 to Section 300 IPC has no application to the facts of the case. The appeal filed by Sachchey Lal is without merit. Now comes appeal filed by the State.

There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the

A guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where B the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [See *Bhagwan Singh and Ors.* v. *State of Madhya Pradesh,* (2002) 2 Supreme 567. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial C reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra,* AIR (1973) SC 2622, *Ramesh Babulal Doshi* v. *State of Gujarat,* (1996) 4 Supreme 167, *Jaswant Singh* v. *State of Haryana,* (2000) 3 Supreme D 320, *Raj Kishore Jha* v. *State of Bihar and Ors.,* (2003) 7 Supreme 152, *State of Punjab* v. *Karnail Singh,* (2003) 5 Supreme 508, *State of Punjab* v. *Pohla Singh and Anr.,* (2003) 7 Supreme 17 and *Suchand Pal* v. *Phani Pal and Anr.,* JT (2003) 9 SC 17.

E The High Court analysed the evidence of PWs 1 and 2 to conclude that it would not have been possible for PW-2 to hear the exhortation as he was at a distance. It is not the evidence that the exhortation was in a loud voice. Evidence of PW-1 was vague about the exhortation. The view taken by the High Court is a possible view.

F In that view of the matter we dismiss the State's appeal.

In the ultimate, both the appeals are dismissed.

R.P. Appeals dismissed.