

AHMED SHAH & ANR.

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1889 of 2008)

JANUARY 09, 2015

[T.S. THAKUR, ADARSH KUMAR GOEL AND
R. BANUMATHI, JJ.]

Penal Code, 1860 – s. 304 Part I – Punishment for culpable homicide not amounting to murder – Complainant party went to take forcible possession of the land from appellants-accused and ‘SB’ was armed with weapon – In the course of sudden scuffle between the parties, appellants inflicted fatal injuries on SB and other accused on RK and PW 8, eye witness – Appellants tried to grapple gun from SB – Conviction and sentence of all the accused persons u/ss. 148, 307/149 and 302/149 by the trial court – High Court convicting appellants-GS and AS u/s. 302/34, accused SS and RS u/s. 307/149 and acquitting all other accused of the charges u/s 302/149 and convicted u/s. 148 and sentenced them to the period already undergone – On appeal, held: There was no previous deliberation or pre-meditation and the incident is a result of sudden fight – Since appellants inflicted injuries on the neck and scalp of SB with the intention of causing death, act of the appellants is punishable u/s. 304 Part I – Conviction is modified accordingly with the reduction of the substantive sentence to the period already undergone – As regards remaining accused, their order of acquittal recorded by High Court, does not call for interference.

Partly allowing the appeal filed by the accused-appellants and dismissing the appeal filed by the State, the Court

HELD: 1.1 The concurrent views of the courts below

A regarding their overt acts is concurred with as the same is proved by the version of eye witnesses particularly PW-8 who was consistent in her deposition regarding the participation and fatal injuries inflicted by the two appellants. But their conviction under Sections 302/34 IPC

B by the High Court it is not concurred with. There seems to be mutual provocation and aggravation as the complainant party went to take possession of the land from the accused, there appears to be scuffle between the parties. There was no previous deliberation or pre-

C meditation and the incident is a result of sudden fight. Considering the facts and circumstances of the case, the instant case cannot be said to be a case punishable under Section 302 IPC but a case falling under Exception 4 to Section 300 IPC. Since the appellants inflicted injuries on

D the neck and scalp of SB with the intention of causing death and the act of the accused-appellants is punishable under Section 304 Part I IPC. The conviction of the appellants under Sections 302/34 IPC is modified as conviction under Section 304 Part I-IPC and the substantive sentence of life imprisonment is reduced to

E the period of sentence already undergone by them. [Para 17, 20, 21, 24] [372-B, C; 375-B, C; 374-F-G; 375-G-H]

Satish Narayan Sawant vs. State of Goa 2009 (14) SCR 464:(2009) 17 SCC 724 – referred to.

F 1.2. Insofar as the appeal against acquittal filed by the State, upon consideration of evidence and having regard to the nature of injuries and cause of death, the High Court modified the conviction of SS and RS as one under

G Section 307 IPC and reduced the substantive sentence to the period already undergone. High Court analyzed the evidence and observed that the evidence is omnibus and generalized and that no specific overt act is attributed to the remaining accused. Names of only seven persons are mentioned in the first information

H report. In the facts and circumstances of the case, the

High Court cannot be said to have misdirected itself in acquitting other accused. There is no substantial ground to interfere with the order of acquittal recorded by the High Court. [Para 22,23] [375-C-F] A

Case Law Reference: B

2009 (14) SCR 464 Referred to Para 19

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1889 of 2008.

From the Judgment and Order dated 20.08.2007 of the High Court of Rajasthan at Jodhpur in DBCRA No. 704 of 2005. C

With

Crl. Appeal No. 1904 & 1938 of 2008 and 17 of 2009. D

Doongar Singh, V.J. Francis, Harikumar V., Jenis V. Francis, Ram Naresh Yadav, Milind Kumar for the Appearing Parties.

The Judgment of the Court was delivered by E

R. BANUMATHI, J. 1. These appeals arise out of the judgment dated 20.08.2007 passed in Criminal Appeal No.704 of 2005 in which Jodhpur Bench of Rajasthan High Court confirmed the conviction of the appellants under Section 302 and also the sentence of life imprisonment imposed on them with a fine of Rs.1,000/-. The High Court acquitted eighteen other accused of the charges under Section 302 IPC read with Section 149 IPC and convicted them under Section 148 IPC and sentenced those eighteen accused persons to the period already undergone by them. F G

2. Case of the prosecution is that, on 29.4.1996 at about 3.30 P.M. when complainant - Rakhu Shah was at the field of his brother-in-law Abdul Shah along with his sister Rakhia (PW-8), nephew Hasan Ali and Sabbir Shah, the appellants and H

A nineteen other accused along with others forming themselves
 into an unlawful assembly came to the field. Appellants Ahmed
 Shah, Gurmukh Singh and Rasool Shah were armed with
 weapons namely spears and Lathis. Rasool Shah inflicted
 injuries to complainant-Rakhu Shah. The accused persons
 B assaulted complainant's sister Rakhia (PW-8). Ahmed Shah
 and Gurmukh Singh attacked Sabbir Shah. Gurmukh Singh
 inflicted injuries on the neck of Sabbir Shah with spear as a
 result of which his neck was cut and he started bleeding
 profusely and appellant-Ahmed Shah inflicted injuries with spear
 C on the scalp of Sabbir Shah and Sabbir Shah died on the spot.

3. Rakhu Shah was admitted in the hospital on 29.4.1996.
 After obtaining opinion of the doctor that Rakhu Shah was in a
 fit state of mind to make the statement, PW-21 Mangu Singh,
 Investigating Officer recorded the statement of Rakhu Shah.
 D Based on the said statement, a case was registered in F.I.R.
 No. 68/1996 under Sections 302, 307, 323, 147, 148 and 149
 IPC. PW-21 Mangu Singh Investigating Officer had taken up
 the investigation and prepared the site plan and recovered the
 articles from the place of incident and recorded statement of
 E witnesses.

4. PW-13, Dr.P.S. Mathur had conducted post-mortem on
 the dead body of Sabbir Shah and Ext P.46 is the post-mortem
 report and opined that death was due to multiple injuries
 sustained by him. PW-8 Rakhia was admitted in the hospital
 F for treatment of injuries sustained by her. PW-13-Dr. P.S. Mathur
 had noted the injuries sustained by Rakhia and issued Ext P.44
 injury report. Rakhu Shah was admitted in the hospital and
 treated in the emergency ward. Rakhu Shah succumbed to
 injuries on 4.5.1996-12.10 hrs in the night. PW-9 Dr. Rajkumar
 G Dargar conducted post-mortem examination on the dead body
 of Rakhu Shah and Ext P.28 is the post-mortem report. PW-9
 opined that the cause of death was fat embolism due to multiple
 injuries which is the consequence of all the injuries.

H 5. To prove the charges against the accused, prosecution

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has examined four eye witnesses (PW-3 Rau Ram, PW-4 Darey Shah, PW-7 Hasan Shah and PW-8 Rakhia) and other witnesses and exhibited several documents and material objects. The accused were questioned under Section 313 Cr.P.C. about the incriminating evidence and circumstances and the accused denied all of them. Some of the accused stated that the date of incident was Eid and that they were celebrating Eid and they were not present at the scene of occurrence.

6. The appellant Ahmed Shah came with a specific case that in the year 1987, he had purchased a piece of land from Abdul Shah for a consideration of Rs.75,000/- and that he was in possession of the same through his cultivator Roopa Ram Bajigar. The appellant Ahmed Shah further pleaded that Sabbir Shah, Rakhu Shah and Rakhia and the complainant party came to his field to forcibly occupy the same and Sabbir Shah fired the gun and then he ran away. Accused thus pleaded that the deceased were the aggressors. The accused persons exhibited 35 documents in their defence.

7. Upon evaluation of the case of the prosecution, trial court convicted all the accused persons finding them guilty under Sections 148, 307/149 and 302/149 IPC and sentenced them to three years rigorous imprisonment, ten years rigorous imprisonment and life imprisonment respectively along with fine of Rs.1,000/- with default clause and all sentences were ordered to run concurrently. Aggrieved by the same, the accused preferred appeal before the High Court. The High Court held that the appellants Gurmukh Singh and Ahmed Shah were responsible for causing the death of Sabbir Shah and accordingly they were convicted under Sections 302/34 IPC. Accused Subhan Shah and Rasool Shah were convicted under Sections 307/149 IPC and their sentence was reduced to the period already undergone. Except above named accused persons, all other accused were acquitted of the charges under Sections 302/149 and 307/149 IPC and they were convicted

A under Section 148 IPC and the substantive sentence was reduced to the period already undergone. Aggrieved, the appellants have filed Criminal Appeal No.1889/2008. Challenging the acquittal of other accused persons, State has also preferred the appeals.

B 8. Learned counsel for the appellants stressed on the point that the F.I.R. mentioned names of only seven accused persons and only subsequently more names were added and there was gross over-implication of accused persons. It was submitted that it is evident from the statement of investigating officer and
C other witnesses that the possession of the land in dispute was with the accused and this fact alters the entire prosecution case. It was argued that the instant case was a one of free fight and since individual liability of the accused persons could not be ascertained and the appellants could not have been convicted
D under Sections 302/34 IPC and Sections 307/34 IPC.

9. Learned counsel for the respondent-State submitted that the appellants and other accused persons formed themselves into an unlawful assembly in furtherance of their common object
E caused murder of Sabbir Shah and Rakhu Shah while causing fatal injuries to Rakhia and the evidence of the eye-witnesses (PWs 3, 4, 7 & 8) clearly established the overt act of the accused persons. It was further contended that the land in dispute was in possession and ownership of Abdul Shah and
F the accused persons were aggressors and the accused had no right of defence in protection of their property. It was contended that since overt act of the individual accused has been clearly proved by the prosecution, the High Court ought not to have acquitted the other accused persons.

G 10. We have carefully considered the rival submissions of the parties and perused the evidence on record and the impugned judgment.

H 11. The dispute between the parties pertains to the land-

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14 bighas. The said land was sold by Abdul Shah to appellant- Ahmed Shah for a consideration of Rs.75,000/- and the possession of the field is said to have been handed over to Ahmed Shah. Ex D8 is the sale agreement dated 9.4.1987 executed by Abdul Shah in favour of Ahmed Shah. Regarding the land, there was a litigation then going on between the parties. Case of prosecution is that the accused party went to the field and attempted to dispossess Abdul Shah and Sabbir Shah and thereby alleged to have caused the death of Sabbir Shah and Rakhu Shah and also caused injuries to PW-8 Rakhia. By careful reading of evidence and materials on record, it is seen that the accused party was in actual possession of the land and the complainant's party had gone to the field to take forcible possession.

12. PW-8 Rakhia had admitted that about seven or eight days prior to the incident, her husband Abdul Shah and her elder son Hasan Shah had forcibly taken over possession of the field and Ahmed Shah and Rasool Shah thwarted the same. PW-8 had stated that Rafik Shah told them that he would arrange to put them in possession of the field and therefore on the said date the complainant party had gone to the field with him. She had also admitted that there was crop of Narma in the field. PW-8 had also stated that on the date of incident i.e. 29.4.1996, Rakhia, her brother Rakhu Shah, Hasan Shah, Sabbir Shah and few others went to take possession of the land and that Sabbir Shah was armed with gun. PW-8 being an injured witness, her evidence stands on higher footing and is entitled to greater weight. For proper appreciation of the case as to the genesis of the occurrence, we may usefully extract the evidence of PW-8 as elicited during her cross-examination which is as under:-

"...whether this land was sold by her husband to Ahmed Shah in April, 87 for a consideration of Rs.75,000/- and the documents were executed. Herself stated that this fact is known to maternal uncle and maternal nephew. It is true

A that before 7-8 days of the incident her husband and her
 elder son had forcibly taken over the possession of the field
 and Ahmed Shah, Rasool Shah had put her husband, her
 son and her articles in a tractor and left the same near
 B Jalasar Railway line. It is also true that thereafter on the
 day of Eid, Rakhia, her brother Rakhu Shah , her son
 Hasan Shah, Sabbir Shah, Darey Shah, Moti Shah and
 Rauram went to take over the possession of the field and
 had sit down in the field. It is also true that on the day of
 C Eid due to the apprehension that Ahmed Shah would again
 dispel them from the field, therefore, Sabbir Shah had
 bring the gun of his brother and Rauram had bring crackers
 gun....”

Evidence of PW-8 that accused were actually in
 possession of the field and that her husband Abdul Shah,
 D Sabbir Shah and Rakhu Shah made an unsuccessful attempt
 to take forcible possession of the land few days before the
 incident is amply strengthened by the evidence of PW-21-the
 investigating officer.

E 13. In the cross-examination, PW-21 had clearly admitted
 that on the date of incident, Ahmed Shah and his party were
 holding the possession over the field and that the field was
 cultivated by Ahmed Shah through his Hadi Roopa Ram Bajigar
 and at the time of incident Narma crop had been raised in the
 F field by Roopa Ram Bajigar on behalf of Ahmed Shah. PW-21
 had also admitted that during the course of investigation it
 emerged that on 28.4.1996, the complainant party had made
 an unsuccessful attempt to take forcible possession of the land.
 PW-21 had clearly admitted that on the date of incident, the
 G accused party were holding the possession of the land in
 dispute.

14. From the evidence of PW-21 and from Ext D.35 it is
 seen that there was a counter case in F.I.R. No. 67/1996. The
 judgment of the said case is Ext D.35 which also indicates that

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the accused party was in possession of the land in dispute. Ext A
D.8 is the sale agreement dated 9.4.1987 executed by Abdul
Shah in favour of Ahmed Shah also indicates possession of
the land by the accused persons. The accused persons seems
to have produced Exts D.8, 9, 10, 28 and 35 to show that they
were in possession of the land in dispute as it emerges from B
the evidence that the possession of the land was with the
accused and that the complainant party armed with gun went
to the field to take forcible possession of the property raises
serious doubts about the genesis of occurrence as projected
by the prosecution. C

15. PW-7 Hasan Shah has stated that PW-8 Rakhia was
preparing the tea inside the hut and that the accused party
came in group and that the appellants inflicted injuries to
Sabbir Shah while he was sleeping in a cot nearby and that D
Subhan Shah inflicted axe blow on the right leg of Rakhu Shah.
PW-8 had also stated that she was preparing the tea inside
the hut on the stove of brick and tea was being prepared in a
topia and that after the incident the *topia* and stove were left
there in the hut. Ext P.14 is the site plan in which the hut and
the scene of occurrence is marked. When PW-21 investigating E
officer was confronted with the site plan Ext P.14, he stated that
he had not noted any stove in Ext P.14. PW-21 had also stated
that in the place of incident he had not seen any *topia* or utensil
for preparing the tea. On the other hand, PW-21 had stated that F
a broken wooden pestle of the air gun was found lying inside
the hut. As stated by PWs 7 and 8, if really tea was prepared
in the hut at the time of incident, in the melee, *topia*, stove and
utensils would have been scattered inside the hut. The fact that
neither stove nor utensils were found by PW-21 investigating G
officer also improbabilises the case as suggested by the
prosecution that the accused are the aggressors.

16. PWs 3, 4 and 7 have spoken about the overt act of
the appellants that appellant Gurmukh Singh inflicted blows with
gandasi on the neck of Sabbir Shah and Ahmed Shah inflicted H

A injuries with the spear on the scalp. PW-8 injured witness had also stated about the injuries being caused to Sabbir Shah by the appellants.

B 17. We are in agreement with the concurrent views of the courts below regarding their overt acts as the same is proved by the version of eye witnesses particularly PW-8 who has been consistent in her deposition regarding the participation and fatal injuries inflicted by the two appellants. But as far as their conviction under Sections 302/34 IPC is concerned, in the facts and circumstances, we are unable to agree with the view taken C by the High Court.

D 18. As per Exception 4 to Section 300 IPC, culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. To invoke Exception 4 to Section 300 IPC, four requisites must be satisfied namely:- (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was committed in a heat of passion; and (iv) the assailant had not E taken any undue advantage or acted in a cruel manner.

19. This Court in *Sridhar Bhuyan vs. State of Orissa*, (2004) 11 SCC 395 held as under:-

F "7. 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.

G 8. 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 H 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 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

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- A 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.
- B 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 a cruel or unusual manner. The expression "undue advantage" as
- C used in the provision means "unfair advantage."

In *Satish Narayan Sawant vs. State of Goa*, (2009) 17 SCC 724, the same principle was reiterated.

20. As noticed earlier, Abdul Shah had sold the property
- D to Ahmed Shah in 1987 and that Ahmed Shah had been in possession of the land. On behalf of Ahmed Shah, Roopa Ram Bajigar had been cultivating the land. It is brought in evidence that on the date of the incident there was Narma crop standing in the field which was cultivated by the said Roopa Ram
- E Bajigar. As seen from the evidence of PW-8 the complainant's party namely, Rakhia, Rakhu Shah, Hasan Shah, Sabbir Shah, Darey Shah, Moti Shah and Rauram numbering seven had gone to take forcible possession. As seen from Ext P.65, accused were about seven in number viz., Rasool Shah,
- F Ahmed Shah, Amar Shah, Zakir, Subhan, Sheru and Gurmukh Singh were present. There seems to be mutual provocation and aggravation as the complainant party went to take possession of the land, there appears to be scuffle between the parties. There was no previous deliberation or pre-meditation and the
- G incident is a result of sudden fight.

21. As elaborated earlier, complainant party went to the field and Sabbir Shah was armed with gun. In the sudden fight, there was a scuffle. During the course of scuffle, the appellants inflicted injuries on the deceased Sabbir Shah. The accused
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tried to grapple the gun from Sabbir Shah. There was no premeditation and that the incident was the result of sudden fight. In the scuffle, other accused inflicted injuries on Rakhu Shah and PW-8 Rakhia. Considering the facts and circumstances of the case, in our view, the present case cannot be said to be a case punishable under Section 302 IPC but a case falling under Exception 4 to Section 300 IPC. Since the appellants inflicted injuries on the neck and scalp of Sabbir Shah with the intention of causing death and the act of the accused-appellants is punishable under Section 304 Part I IPC.

22. Insofar as the appeal against acquittal filed by the State, the High Court has recorded finding that accused Subhan Shah and Rasool Shah caused injuries to Rakhu Shah on the left leg and left shoulder. In spite of treatment, Rakhu Shah died due to fat embolism due to multiple injuries and due to injuries caused to the bones. Upon consideration of evidence and having regard to the nature of injuries and cause of death, the High Court modified the conviction of Subhan Shah and Rasool Shah as one under Section 307 IPC and reduced the substantive sentence to the period already undergone.

23. High Court has analyzed the evidence and observed that the evidence is omnibus and generalized and that no specific overt act is attributed to the remaining accused. As pointed out earlier, names of only seven persons are mentioned in the first information report. In the facts and circumstances of the case, the High Court cannot be said to have misdirected itself in acquitting other accused. In the facts and circumstances of the case, we do not find any substantial ground to interfere with the order of acquittal recorded by the High Court.

24. The conviction of the appellants Ahmed Shah and Gurmukh Singh under Sections 302/34 IPC is modified as conviction under Section 304 Part I IPC and the substantive sentence of life imprisonment is reduced to the period of sentence already undergone by them and the appeal preferred

A by the accused-appellants is partly allowed. The accused be set at liberty forthwith if not required in any other case. The appeals preferred by the State are dismissed.

Nidhi Jain

Appeals disposed of.