CASE NO.:
Appeal (crl.) 541 of 1999

PETITIONER:
Subhash Shamrao Pachunde

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 08/12/2005

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
J U D G E M E N T

S.B. SINHA, J.

The sole appellant herein was prosecuted for commission of offences with five others under Sections 147, 148, 302 read with Section 149 323, 324 and 149 of the Indian Penal Code.

Shamrao, father of the Appellant, was accused no. 1. The accused nos. 3 and 4 Ganpati and Tanaji were his brothers whereas accused no. 5 Vijay Dattatray Salunke was his nephew. The accused no. 6 Vijay Gangaram Patel was a close family friend.

By reason of its judgment dated 08.11.1989 the learned trial Judge while convicting the Appellant under Section 302 of the IPC and sentencing him to undergo imprisonment for life and pay a fine of Rs.10,000/- or in default thereof to undergo rigorous imprisonment for three years, and the accused nos. 1 and 4 under Section 324 of the IPC; acquitted the others of all charges. The High Court in the appeals preferred by the appellant therein affirmed the judgment passed by the learned trial Court but modified the sentence in respect of accused nos. 1 and 4 to the period already undergone.

This appeal was admitted on a limited question, i.e., as regard nature of offence.

Before adverting to the contentions raised in the appeal we may notice the fact of the matter in brief. The parties were members of a joint family. Shamrao, accused no. 1 and Prahlad were two brothers. Whereas accused Nos. 2 to 5 belong to the branch of Shamrao; the deceased and the complainant were sons of Prahlad. A partition took place between the said brothers in 1984; whereby the northern portion of the open plot by the side of Haripur Road was allotted to the share of Prahlad and the southern one to Shamrao. The northern and southern portion of the plot is divided by a 15 ft. wide road. Indisputably the relationships between the parties were strained. All accused except accused no. 6 and the deceased as also the complainant, sons of Prahlad, are thus closely related. It is not in dispute that the complainant and his brothers had been bearing grudge against Shamrao and his sons inter alia on the ground of inequitable division of the joint family properties. Their residential houses of both parties were side by side .

On the day of occurrence an almond tree was being planted in their side of open plot by the accused. Rajendra, PW8 and his brother

Nandkumar, deceased were standing in their portion of the open plot allegedly waiting for their friends for going to participate in a game of Kabaddi to which accused nos. 2 and 3 asked them as to what they had been watching. They replied that they were standing on their own plot belonging to their father. The accused on that rushed towards them with weapons. accused no. 1 had an iron-rod, accused no. 2 had a knife, accused no. 3 was carrying a Pick-axe and accused no. 4 a shovel in their hand. Seeing accused persons advancing towards them the complainant and the deceased started retreading southwards, i.e., towards plot of the accused. They fell in a gutter. Shamrao and Tanaji allegedly assaulted Rajendra whereas Nandkumar was assaulted by the appellant and Ganpati, accused no. 4 with the weapons in their hands. Rajendra tried to evade the assault on him by Shamrao with iron-rod as a result whereof he received injury on his back. A spade blow was given by Tanaji on his right foot. The appellant is said to have inflicted knife blows on Nandkumar, one on the chest below the left nipple and the other on the side near the arm-pit; whereas Ganpati is said to have inflicted blow on his stomach on the left side above hip bone by using pick-axe. The said incident is said to have been witnessed by Raju, P.W. 9 and Shrirang Jadhav, P.W. 10 who are friends of Rajendra and who were coming back from a temple. The accused thereafter ran away.

Whereas the deceased was shifted to hospital in a Rickshaw, the complainant went to the Police Station alone in another Rickshaw It is not in dispute that Baburao Thorat P.W. 16, the P.S.O. received a phone call from Dr. Aphale informing that Nandkumar had been admitted to the hospital by his brother Arvind.

The first information report lodged by Rajendra was recorded at 8.15 p.m. by Shri Thorat against the accused for commission of offences under Section 307 read with Section 34 of the I.P.C. Shri Thorat again received a call soon thereafter from Dr. Aphale informing him that Nandkumar had died in the meanwhile.

The learned Sessions Judge did not believe a part of the prosecution story, viz., that the complainant and the deceased fell into the gutter because of the mischievous acts of tripping of their legs by the appellant and Ganpati. He was also of the opinion that the accused nos. 5 and 6 had no role to play in the incident. He furthermore held that the incident having taken place at the spur of moment, no case of formation of common object or common intention had been made out and consequently held that they were guilty of commission of offences having regard to their individual acts.

Mr. V.A. Mohta, learned senior counsel appearing for the appellant despite limited leave having been granted sought to argue the appeal on merit which was not permitted. The learned counsel took us through the judgments of both the courts below as also the evidence of P.W. 8 Rajendra, P.W. 9 Raju and P.W. 10 Shrirrang. It was contended that the findings of the Courts below holding the appellant guilty of commission of an offence under Section 302 I.P.C. must be considered by us in the context that the prosecution story was partly disbelieved. It was urged that admittedly the incident occurred on the plot owned by his father and in that view of the matter it cannot be said to be a case where the appellant had any intention or motive to cause the death of the deceased and the accused nos. 1 and 4 to cause injuries on P.W. 8. Learned Counsel further urged that Exhibit 31, the knife, having not been found to be blood-stained, the purported recovery thereof was irrelevant. It was further submitted that as both the Courts below have concurrently found that the incident occurred at the spur of the moment without there being premeditation and meeting of mind, the appellant at best can be said to have committed an offence under Part II of Sec. 304 of the Indian Penal Code. Our attention was also drawn to the fact that weapons held by all the accused were available at the spot having been carried by them for planting the almond tree. Mr. Mohta further submitted that in a case of this nature the fourth Exception appended to Section 300 of the I.P.C. would be attracted. Reliance in this behalf has been placed in the case of Khanjan Pal v. State of U.P. (1990) 4 SCC 53 and Bhojappa

Hanumanthappa Choudannavar and ors. vs. State of Karnataka (2004) 2 SCC(Cri.) 1783.

Mr. Adsure, learned counsel appearing on behalf of the State, on the other hand, submitted that the prosecution case has not only been supported by the complainant but also by the independent eyewitnesses and having regard to the fact that the appellant herein has inflicted two knife injuries on the vital part of the body of the deceased, it is not a case where fourth Exception to Section 300 of the I.P.C. shall apply.

Having regard to the fact that limited leave was granted in the matter, namely, on the question of nature of offence, we are only called upon to determine the question as to whether the offence of causing the death of Nandkumar at the hands of the Appellant would come within the purview of the fourth Exception to Section 300 I.P.C. or not.

The genesis of the occurrence is not in dispute. The complainant and the deceased were watching plantation of an almond tree in their premises by the accused from their own land. They cannot be said to have caused any annoyance to them. It is the appellant and his brother who started exchange of words by asking as to what they had been seeing. The answer by the complainant to the effect that they had been standing on their own land cannot be said to be a cause for the accused being greatly provoked so as to cause bodily injuries on the deceased and the complainant. The appellant and his companions who were armed with weapons assaulted the deceased and the complainant who were unarmed and must have been taken by surprise. Conceivably appellant nos. 1, 3 and 4 were carrying iron rod, pick-axe and shovel respectively for the purpose of the plantation of the tree, but the knife, which was the weapon of offence and was being carried by the appellant herein, was not required for the said purpose. Why he was carrying such a big knife remains unexplained.
Accused no. 1 and 4 as well as the appellant advanced towards the deceased and the complainant as a result whereof they went near the gutter which was just by the side of the land of the accused. It may or may not be that both the deceased and the complainant were tripped into the gutter by the mischievous acts on the part of the appellant and his brother Ganpati, but the fact remains that they fell therein. The learned trial Judge in his judgment found that while retreading, they fell into the gutter themselves. The complainant and the deceased were assaulted in the gutter itself. They were not carrying any weapon whereas the accused were carrying deadly weapons. The effect of assault with deadly weapons on the vital part of the body of the deceased by the appellant must be considered in the aforementioned factual background. The learned trial judge and consequently the High Court arrived at a finding of fact that the complainant and the deceased fell into the gutter. The garments put on by the deceased and the complainant as also the appellant were seized. The learned trial Judge held that:

"\005It is also not in dispute that the none of the accused has sustained any injury and, therefore, the fact that arrest panchanama is not prepared, does not show that there is manipulation on the part of the I.O. clothes, of these accused are attached under panchanama Ex 44. This panchanama is duly proved by P.W. 6 Chandrakant Babar. Panchanama shows that Dhoti and Shirt of Shamrao were stained with blood. There were blood stains on the waist-band and pant of accused No. 2 Subhash, and the Bandi and under-pant of accused No. 3 Ganpati were soiled with silt. There were blood stains on the pant of Tanaji. I have seen these garments at the time of arguments. It is found that silt was on the sleeve of shirt near the cuff, of accused No. 2 Subhash. These stains are not mentioned in the panchanama. There was silt on all the garments of accused No. 3 Ganapati. There were mud stains on the pant, art. No. 22, of accused No.

4 Tanaji. It is pertinent to note here that according to accused No. 3 he had also fallen in the gutter and, therefore, the fact that all his clothes are covered with silt, is explained. These facts establish beyond doubt credibility of testimony of complainant and eye-witnesses, P.W. 9 Raju Bavadekar and P.W. 10 Shrirang @ Ranga Jadhav that the complainant and his brother Nandkumar had fallen in the gutter and they were assaulted in the gutter."

The deceased and the complainant thus having fallen into the gutter were not in a position to defend themselves.

At this juncture, we may notice the ante mortem injuries found on the body of the deceased Nandkumar. The doctor who examined the deceased stated:

"When I examined the patient, I found that the patient was conscious. His general condition was poor. There was severe pallor. Pulse 110 per minute. Respiratory rate 40 per minute. B.P. 80 to 60 Hg. Patient gave history of assault at 7 p.m. with knife."

The post mortem was also conducted by him. The doctor further opined:
"\005At the time of post-mortem, I observed that the clothes of the deceased were wet with dirty water. I have described external injuries in column No. 17. I have also observed at the time of post-mortem that there was mark of blood over chest, abdomen, legs hands mixed with dirty water stains. These observations are mentioned in column No. 14 of post-mortem notes."

He further stated that :

"\005Contents of the post-mortem notes are correct. Post mortem notes are marked as Exh. 67. All these injuries were ante-mortem. Injury No. 1 in col. No. 17 corresponds to finding in col. No. 29(e) i.e. injury to left lung. Injury No. 4 is surgical. Injury No. 2 corresponds to internal injury described in col. No. 21 showing that large intestine was punctured. The blood seen in the peritoneam might on account of injury No.3 described in column No. 17. Standing of pleura with blood is on account injury No. 1. Inj. Nos. 1 to 3 and 5 can be caused by hard and sharp weapon. Art. No. 31-knife shown to witness. Injury No. 1, 2 and 5 can be caused by this knife. Injury No. 5 can be caused while making efforts to ward off the blow. Pick-axe (Art. No. 5) shown to witness. Injury No. 3 can be caused by pointed end of the pick-axe."

In his opinion, the injury No. 1 by itself was sufficient in the ordinary course of nature to cause death. Injury No. 2 and 3 can also cause death but in that case the death will not be immediate. Those injuries however would not be sufficient in the ordinary course of nature to cause death as there could be chances of survival as well as of death. It was explained by him that in his injury report he opined that injury no. 2 was muscle deep; at that time he did not probe the injury. In his cross-examination, the doctor further stated that:

"The direction of injury No. 1 is medial upto the thylum of lung (root of lung). Direction of injury no. 2 is downwards. Direction of injury no. 3 is medial. It is correct to say that would cause by pick-axe (Article No. 5) will have lacerations on the edges of the wound. I have not noted these lacerations while describing injury No.3. It is correct to say that the weapon must enter upto intestine for 6 inches for causing a puncture The depth of this injury no. 3 is about 6 inches. Now says, I cannot definitely say that inj. No. 3 can be caused by Article No. 5. Considering the fact that the weapons pierced the body of 6 inches. It is a fact that I have described inj. No. 2 in M.L.C. register as muscle deep. This is so because at that time I did not probe the injury."

The injury no. 1 therefore went right upto the right of the lung. The appellant herein did not restrain himself after inflicting one injury. He inflicted other and further injury also. The injuries, in view of the post mortem report, admittedly were more than one.

It is, thus, not a case where only one injury was inflicted by the accused on sudden provocation.
Section 299 I.P.C. reads as under:

"299. Culpable homicide. \026 Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide"

Section 300 I.P.C. reads as under:

"300. Murder. \026 Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-
Secondly,- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-
Thirdly,- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-
Fourthly,- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

Exception 2 to the said Rule postulates that "when culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the persons who gave the provocation or causes the death of any other person by mistake or accident."
Exception 4 to the said Rule reads thus:
"Exception 4. \026 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."

In this case Exception 2 has no application as the Appellant cannot be

said to have committed offence whilst deprived with the power of self-control by grave and sudden provocation, as has been noticed hereinbefore, that in the facts and circumstances of the case the deceased and the complainant cannot be said to have caused any provocation to the Appellant.

The distinction between the offences of culpable homicide and murder is the presence of special mens rea which consists of four mental attitudes in the presence of any of which the lesser offence becomes greater. These attitudes are stated in Section 300 IPC as distinguishing murder from culpable homicide not amounting to murder.

The ingredients of the said Exception 4 are (i) there must be a sudden fight; (ii) there was no pre-meditation; (iii) the act was committed in a heat of passion and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

In the event the said ingredients are present, the cause of quarrel would not be material as to who offered the provocation or started assault. Indisputably, however, the occurrence must be sudden and not pre-meditated and the offender must have acted in a fits of anger.

In Rajendra Singh & Ors. v. State of Bihar (2000) 4 SCC 298 at p. 307 this Court held:

"So far as the third contention of Mr. Mishra is concerned, the question for consideration would be as to whether the ingredients of Exception 4 to Section 300 of the Indian Penal Code can be said to have been satisfied. The necessary ingredients of Exception 4 to Section 300 are:

(a) a sudden fight;
(b) absence of premeditation;
(c) no undue advantage or cruelty.

but the occasion must be sudden and not as a cloak for pre-existing malice. It is only an unpremeditated assault committed in the heat of passion upon a sudden quarrel which would come within Exception 4 and it is necessary that all the three ingredients must be found. From the evidence on record it is established that while the prosecution party was on their land it is the accused who protested and prevented them from continuing with ploughing but when they did not stop the accused persons rushed to the nearby plot which is their land and got weapons in their hands and assaulted the prosecution party ultimately injuring several members of the prosecution party and causing the death of one of them while they were fully unarmed. In this view of the matter on scrutinizing the evidence of the four eyewitnesses PWs 2, 4, 7 and 8 who have depicted the entire scenario it is not possible for us to agree with the submission of Mr. Mishra, learned Senior Counsel appearing for the appellants that the case is one where Exception 4 to Section 300 would be applicable. We, therefore, reject the said submission of the learned counsel."

Even if it be assumed that responses to the questions put to the deceased or the complainant caused provocation, the same evidently was because of the pre-existing malice and the bias which the Appellant had against them. Moreover, the manner in which the deceased and the complainant were assaulted show that the assailants took undue advantage of the situation as they fell into the gutter and were, thus, in a helpless condition.

In Prabhu and ors. vs. State of M.P. [1991 Suppl. (2) SCC 725] a three Judge Bench of this Court rejected a similar contention in a case where the accused inflicted more than one injury stating :

"\005The evidence of PW 4, Dr. C.K. Dafal, however, shows that the deceased was belaboured mercilessly. There were innumerable contusions on the entire body of the deceased from head to toe. The wrist, humerus, etc. were fractured and the whole body was full of rod marks. There were several contused lacerated wounds on the entire face and the left eye was bleeding. The totality of the injuries caused to the victim clearly supports the finding of both the courts below that the appellants went on belabouring the deceased till he died on the spot.

In Thangaiya v. State of T.N. [(2005) 9 SCC 650], relying upon a celebrated decision of this Court in Virsa Singh v. State of Punjab [1958 SCR 1495], the Division Bench observed:

"17. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh case for the applicability of clause "thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause "thirdly" of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

18. Thus, according to the rule laid down in Virsa Singh case even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point."

Therein it was held that there is no fixed rule that whenever a single blow is inflicted Section 302 would not be attracted.

No hard and fast rule, however, can be laid down as different situations may arise having regard to the factual matrix involved therein.

Khanjan Pal v. State of U.P. [(1990) 4 SCC 53] relied upon by Mr. Mohta is distinguishable. In that case altercations between the deceased and the accused was admitted. A scuffle took place in course whereof the deceased received injuries. Evidence brought on records clearly established that the whole incident took place as a result of sudden development. The appellant therein was found to have acted at the spur of the moment and without any premeditation.

In this case, there was no provocation from the side of the deceased. He did not make even any causal remark which could provoke him nor the parties entered in altercations which culminated in the incident.

In Bhojappa Hanumanthappa (supra) whereupon again Mr. Mohta

placed reliance the fact of the matter was entirely different as would appear from the following :

"A commotion took place in front of the house of Bhimappa (PW1) during the night of 10-9-1984. The appellant and his co-accused were involved in assaulting Bhimappa and his brothers-in-law. While the brawl was in full swing PW 1's daughter Renu Kavva, a twelve year old little girl, rushed to the scene presumably to rescue her father whom she would have thought to be in a dangerous situation. The appellant herein then swished a wooden hammer he was then possessed with, which hit on the head of Renu Kavva, which unfortunately turned out to be fatal. Therefore, the High Court, on the appeal against acquittal, found that the appellant did not intend to inflict the injury which caused her death. We are in agreement with the finding of the High Court that the offence is only under Section 304 Part II IPC."

In the afore-mentioned situation, this Court opined that the appellant therein had no ire against the little girl either before or during the occurrence. It was an act done in a rash mood with no intention to cause even grievous hurt to her.

The case at hand stands absolutely on a different footing. The reported blows on the body of the deceased evidently were done with an intention to cause bodily injuries to him and such injuries were sufficient in the ordinary course of nature to cause death, the offence would come within the purview of culpable homicide amounting to murder as envisaged under Section 300 of the I.P.C.

Having regard to the facts and circumstances of the present case and for the reasons stated hereinbefore, we are of the opinion that it is not a fit case where a different opinion from that of the trial court as also the High Court can be arrived at. Both the courts, in our considered view had rightly convicted the appellant herein for commission of an offence under Section 302 of the I.P.C. The appeal being devoid of any merit is dismissed.