SALIM SAHAB

v.

STATE OF MADHYA PRADESH

DECEMBER 5, 2006

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Penal Code, 1860; Ss. 302 and 324:

Murder—Accused assaulted a relative with sharp edged scissors—Victim succumbed to the injuries—Trial Court found accused guilty of offences under Section 324 IPC and sentenced him accordingly—On appeal, High Court held him guilty of commission of offence u/s. 302 and sentenced him to life imprisonment—On appeal, Held: Relationship is not a fact to affect credibility of witness—Though accused attacked deceased with a sharp edged weapon but it was not a very big size weapon—Hence, in the facts and circumstances of the case, Section 304 Part II and not Section 302 IPC would be applicable—conviction altered accordingly.

Exception 1 and 4 to Section 300—Distinction between—Applicability of—Discussed.

Evidence Act, 1872:

Evidentiary value of relative witness—Discussed.

Accused-appellant harassed his wife, therefore, his father-in-law took her with him. On the date of the incident, the accused had visited the house of his father-in-law (PW-1) and asked him to send his wife back and then started quarreling with other family members. On seeing it, his wife resented the conduct of the accused-husband and turned him out of the house. The accused objected and took out a pair of scissors and assaulted her in abdomen and chest with the result she fell down unconscious, and there was profuse bleeding from the wounds. When she was taken to the Hospital, on the way, she succumbed to the injuries. Accused tried to run away from the place of incident, but was caught by PW-2. Accused assaulted him also and extricated himself. An F.I.R. was lodged. The matter was investigated by the Police and charge-sheet submitted. Trial Court found accused guilty of commission of

A offence in terms of Section 324 IPC and sentenced him accordingly. On appeal, High court held the appellant guilty of the offence punishable under Section 302 IPC and sentenced him to life imprisonment. Hence the present appeal.

Allowing the appeal, the Court

B HELD: 1.1. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. [55-G, H; 56-A]

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Dalip Singh and Ors. v. *The State of Punjab,* AIR (1953) SC 364; *Guli Chand and Ors.* v. *State of Rajasthan,* [1974] 3 SCC 698 and *Vadivelu Thevar* v. *State of Madras,* AIR (1957) SC 614, relied on.

D 1.2. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. [56-E]

Dalip Singh and Ors. v. *The State of Punjab,* AIR (1953) SC 364; *Masalti and Ors.* v. *State of U.P.,* AIR (1965) SC 202; *State of Punjab* v. *Jagir Singh,* AIR (1973) SC 2407; *Lehna* v. *State of Haryana,* [2002] 3 SCC 76 and E *Gangadhar Behera and Ors.* v. *State of Orissa,* [2002] 8 SCC 381, relied on.

2.1. 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 F 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. [57-E, F]

2.2. There is provocation in Exception 4 as in Exception 1; but the injury G 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 H 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. [57-F, G, H] A

2.3. 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. [58-A, B] B

2.4. 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'. [58-C, D] C

2.5. Where the offender takes undue advantage or has acted in a 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. If the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage. [58-E, F] D E

Kikar Singh v. *State of Rajasthan.* AIR (1993) SC 2426 and *Babulal Bhagwan Khandare and Anr.* v. *State of Maharashtra,* [2005] 10 SCC 404, relied on. F

3. The factual scenario shows that during a quarrel between the deceased and the accused, they were grappling and during that quarrel, accused attacked the deceased with a pair of scissors. It was not a very big sized weapon though it was certainly having a sharp edged point. In view of the factual position, the applicable provision would be Section 304 part II IPC and not Section 302 IPC. The conviction is accordingly altered. Custodial sentence of seven years rigorous imprisonment would suffice. G

[58-G-H; 59-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1269 of 2006. H

A From the final Judgment and Order dated 16-3-2005 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 438 of 2000.

Javed Mahmud Rao for the Appellant.

Dr. N.M. Ghatate, Merusagar samantaray, M.K. Singh and C.D. Singh for
B the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. Leave granted.

C Challenge in this appeal is to the judgment rendered by a Division Bench of the Madhya Pradesh High Court at Jabalpur holding the appellant guilty of the offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC'). The appellant was sentenced to undergo imprisonment for life and to pay a fine of Rs.50,000/- with default stipulation. It was directed that if the deposit is made, same shall be paid to the legal heirs of the
D deceased. Though the trial court had convicted the appellant in terms of Section 324 IPC and imposed sentence of five years rigorous imprisonment and a fine of Rs.1,000/- with default stipulations, the same was set aside by the High Court.

E Accusations which led to the trial of the accused are as follows:

Farzana Bi (PW-4) was married to the appellant, but after about a year of their marriage, the appellant started drinking liquor and harassing her with the result her father Sheikh Qadir (PW-1) fetched her back and sent her to the house of his brother-in-law at Bhusaval. The appellant, therefore, tried to
F bring back Farzana Bi (PW-4), but Sheikh Qadir (PW-1) refused to send her and stated that if the accused quits drinking, he will send his wife. On the date of the incident i.e. 8.2.1999, the accused had visited the house of Sheikh Qadir (PW-1) and asked his wife Ruksana as to why they had refused to send his wife and quarrel with Sheikh Qadir (PW-1) and Ruksana.

G On the same day at about 8.30 PM, while Sheikh Qadir (PW-1) and his brother-in-law Saleem (hereinafter referred to as the 'deceased') were in their house, the accused approached and started abusing and threatening them. The deceased resented the conduct of the accused and turned him out of the house. The accused objected to the intervention by the deceased and started grappling with him. While grappling with deceased Saleem, accused took out
H a pair of scissors, with which he assaulted the deceased in his abdomen and

chest with the result the deceased fell down unconscious, and there was profuse bleeding from his wounds. The incident was also witnessed by Gopichand. Accused Salim after assaulting the deceased, tried to run away from the place of the incident, but was caught by Pyara Saheb (PW-2). Accused assaulted Pyara Saheb also, and extricated himself. Deceased was taken to the Hospital for treatment, but on way he succumbed to his injuries.

Report of the incident was lodged by Sheikh Qadir (PW-1). The inquest report was prepared and Pyara Saheb (PW-2) was sent for medical examination. After completion of the investigation, including seizure of the weapon of offence *vide* seizure-memo (Ex.P/9) and referring the seized articles to Forensic Science Laboratory, Sagar, the charge-sheet was filed and the accused was prosecuted.

Accused pleaded innocence and false implication. The trial court on consideration of the materials on record more particularly the version of the eye witnesses (PWs. 1, 2, 3 & 5) held the appellant guilty and convicted and sentenced him aforesaid.

Before the High Court it was the appellant's stand that the evidence is primarily of interested witnesses and in any event offence under Section 302 IPC is not made out. It was also submitted that the occurrence admittedly took place in the course of sudden quarrel and therefore, Section 302 IPC has no application. The High Court did not accept the plea and dismiss the appeal.

Learned counsel for the appellant reiterated the stands taken by the High Court.

Learned counsel for the State on the other hand supported the judgment stating that PW 5, the neighbour of PW-1 is an independent witness and he had no reason to falsely implicate the accused.

The plea relating to interested witness is a regular feature in almost every criminal trial.

We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out

A whether it is cogent and credible.

In *Dalip Singh and Ors.* v. *The State of Punjab,* AIR (1953) SC 364 it has been laid down as under:-

> "A witness is normally to be considered independent unless he or she
> B springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal
> C cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only
> D made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The above decision has since been followed in *Guli Chand and Ors.* v. *State of Rajasthan,* [1974] 3 SCC 698 in which *Vadivelu Thevar* v. *State of*
E *Madras,* AIR (1957) SC 614 was also relied upon.

We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh's* case (supra) in which surprise was expressed over the
F impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

> "We are unable to agree with the learned Judges of the High Court
> G that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which
> H another Bench of this Court endeavoured to dispel in *'Rameshwar* v.

State of Rajasthan' AIR (1952) SC 54 at p.59. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel." A

Again in *Masalti and Ors.* v. *State of U.P.,* AIR (1965) SC 202 this Court observed: (pp. 209-210 para 14):

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> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct." C

To the same effect is the decision in *State of Punjab* v. *Jagir Singh,* AIR (1973) SC 2407, *Lehna* v. *State of Haryana,* [2002] 3 SCC 76 and *Gangadhar Behera and Ors.* v. *State of Orissa,* [2002] 8 SCC 381. In the present case apart from the evidence of PW-1, the evidence of PW-5, who has no axe to grind, is there. So, the plea regarding interested witnesses is without substance. D

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 E F G H

A appropriately applicable would be Exception 1.

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 B 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 C 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 D 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'.

Where the offender takes undue advantage or has acted in a cruel or E 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. In *Kikar Singh* v. *State of Rajasthan,* AIR (1993) SC 2426 it was held that if the accused used deadly weapons against the F unarmed man and struck a blow on the head it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

The above position was highlighted in *Babulal Bhagwan Khandare and Anr.* v. *State of Maharashtra,* [2005] 10 SCC 404.

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The factual scenario shows that during a quarrel between the deceased and the accused, they were grappling and during that quarrel, accused attacked the deceased with a pair of scissors. It was not a very big sized weapon though it was certainly having a sharp edged point.

H In view of the factual position as noted above the applicable provision

would be Section 304 part II IPC and not Section 302 IPC. The conviction is accordingly altered. Custodial sentence of seven years rigorous imprisonment would suffice. A

The appeal is allowed to the aforesaid extent.

S.K.S. Appeal allowed. B