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Vinod Vs. State

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Court : Delhi

Decided On : Feb-08-2016

Judge : Pradeep Nandrajog &Amp; the Honourable Ms. Justice Mukta Gupta

Appeal No. : CRL.A. 316 of 2000

Appellant : Vinod

Respondent : State

Judgement :

Mukta Gupta, J.

1. Vinod @ Ganja was convicted for offence punishable under Sections 302/34 IPC and 307/34 IPC along with one Aman Verma vide the impugned judgment dated March 21, 2000 and directed to undergo life imprisonment for offence punishable under Sections 302/34 IPC and rigorous imprisonment for a period of seven years and fine of `2,000/- for offence punishable under Sections 307/34 IPC. During the pendency of the appeal Aman Verma passed away and thus the appeal filed by him being Crl.Appeal No.402/2000 stood abated vide order dated March 12, 2010.

2. Pursuant to DD No.16A received on the intervening night of February 15/16, 1992 from Burari Road near RBTB Hospital, Sabzi Market by the PCR van, the police officials of PS Mukherjee Nagar reached the spot. In the meantime, PCR van had already taken Rajender Kalra and his wife Rashmi Kalra to Hindu Rao

Hospital where Rajender Kalra was declared brought dead. At the spot Inspector Ramesh along with the police officers found Maruti Car bearing No.DNH-2854 with gunshot marks on the window pane and blood inside and outside the car. On reaching Hindu Rao Hospital, MLC of Rajender Kalra declaring him brought dead was collected however, no statement of Rashmi Kalra his wife could be recorded as she was crying bitterly and was not in a position to get her statement recorded. The investigating officer also received an information that one more injured in the incident, Tanender Tandon was admitted in Sunder Lal Jain Hospital, thus they went to Sunder Lal Jain Hospital where initially though Tanender Tandon was declared unfit for statement but subsequently on being declared fit for statement, his statement was recorded on the basis of which FIR No.40/1992 under Sections 302/307/34 IPC and Section 27 Arms Act was registered. From the spot three cartridge cases, blood and blood stained earth etc. were collected.

3. Tanender Tandon stated that he was working as a transporter and staying in Faridabad. On February 15, 1992 he had come to attend the reception of his relative Kawal @ Sheru organised near Kawal's House No.57, Bhai Parmanand Colony, Delhi along with his wife Dazy Tandon, his brother-in-law Rajender Kalra and his wife Rashmi Kalra and their two children Punit Kalra and Nishu Kalra from Faridabad in their Maruti Car No.DNH-2854. They had parked their Maruti Car outside the reception gate in the parking lot. When they came out after attending the reception at about 11.30 PM accompanied by one Pankaj, they found that another car had been parked in front of their car. On their asking to remove the car, an altercation took place with a boy aged 27/28 years. Many persons reached there, intervened and pacified the matter. Thereafter the accused persons removed their car and Rajender Kalra who was driving the car along with the family and Pankaj proceeded towards Faridabad. They had hardly travelled a distance of 1/1 kms from the place of reception and reached near RBTB Hospital, Kingsway Camp when gunshot was fired from behind and thereafter a car came parallel to their car on the right side from which car one person fired. Rajender received a gunshot injury on his head whereas Tanender received it on his right shoulder. While firing the two boys proceeded towards Azadpur. He stated that the two boys in the car were the same with whom they had altercation outside the reception at the parking, one of whom was driving the car and the other had fired

gunshots and he could identify them on seeing. Rajender Kalra was taken by the PCR van and he was admitted in Sunder Lal Jain Hospital by his relative Gopal Kishan.

4. Statements of Dazy Tandon and Rashmi Kalra were also recorded on February 16, 1992 itself who spoke in line with the version of Tanender Tandon and stated that when there was a quarrel outside the reception, Kawal @ Sheru came out and stated to one of the boys that Vinod do not quarrel, these are our relatives and he took Vinod on one side. However, that boy continued saying that he would see them. They also informed that after one fire Rashmi Kalra opened the glass window of the rear side of the car and found that they were the same people in the car with whom they had altercation. Statement of Pankaj was also recorded on the same day who also stated the same facts. Pankaj also informed that the car was of Punjab bearing number 136.

5. On further investigation it was revealed that the car PCV-136 belonged to Aman Verma and when the police reached the house of Aman Verma at Jallandhar on February 17, 1992 he was not found there however, it was revealed that he had licence of a pistol which he had purchased from Nanda Arms Company, Jallandhar. On contacting the owner of Nanda Arms he gave the copy of the arms licence of Aman Verma and got recorded his statement. The pistol and the vehicle PCV-136 were seized.

6. The post-mortem Doctor PW-20 Dr.L.T.Ramani who conducted the post-mortem on the body of Rajender Kalra found the following injuries:

External injuries

1. One round punctured wound of 0.5 cm diameter with bruising around (upto 1 cm all around), present on the top of the Rt. shoulder. There is a collar of abr. 2 mm vide on outer margin of the wound. Skin edges were inverted, no evidence of blackening or tattooing seen.

2. Tearing laceration 1 cm x 0.5 cm on Lt. side front of neck middle part with everted skin margins.

3. Laceration over terminal phalynx of Lt. middle finger with evulsion of nail and fracture of the distal phalynx.

4. Punctured laceration on the left palm between thenar and hypophener eminances 1 cm 0.5 cm size.

On exploring a bullet is found lodged on the muscles of left palm (The bullet is disfigured at the tip. 1.5 cm long and has 0.70 cm diameter at the base and cupro nickle jacketed.

5. Grazed superficial laceration on outer surface of Rt little finger 2 cm x 0.5 cm.

Internal examination

Neck tissue: There is massive blood clot in superficial and deeper neck layers on of neck on both sides by No.1 on exploring is found continuing middially and to the left through the trachea below the level of thyroid cartilage. Rt. common corroted artery is involved in the track of the wound, the track communicates on Lt.side of external injury No.2 (Exit wound). Trachea contains clotted blood. Thyroid bone is intact. ?

7. PW-20 opined that the injuries were ante mortem and caused by firearm projectile fired from distant range. Injury No.1 was entry wound of the firearm. Firearm injury to the neck structure caused was sufficient in the ordinary course of nature to cause death. Death was due to shock and haemorrhage. Clothes, bullets and sample of blood were sealed and handed over to the police along with sample seal.

8. As per the report of the ballistic expert Ex.PX, the pistol marked 7.65 mm bearing No.354993 was in working order, the three cartridges recovered from the spot and the bullet recovered from the deceased had been fired from the said pistol. The corresponding holes on the Jercy and Bush-shirt of parcels No.4and5 of the injured could be caused by one 7.65 mm bullet. The hole on the roof of the Maruti car No.PCV-136 could have been caused by firing of one 7.65 mm bullet from inside the car. As per the serological report of the CFSL Ex.PY and PZ, blood of Bgroup which was of the deceased was found on his clothes as well as the

bullet recovered from his palm.

9. Learned counsel for the appellant challenging the conviction and sentence states that the witnesses did not know Vinod prior to the incident and Kawal who named Vinod has turned hostile. Though the name of Aman was revealed because of the ownership of the vehicle and the pistol, however there is no material to connect Vinod with the alleged offence. Further it was a case of fleeting glimpse as even as per the case of prosecution the windows of the Maruti car in which the deceased and his family were sitting were rolled up and only after the first gun shoot was fired from the back side, wife of the deceased rolled down the window glass. When the car is speeding away nobody can identify the assailants inside. Test identification of Vinod was essential which was not got conducted. The identification of Vinod for the first time in the Court cannot be relied upon. Pankaj has been deliberately introduced as a witness. He is neither named in the rukka nor in the statement nor examination-in-chief of Tanender Tandon. Further it was impossible for Rajender Kalra, Tanender Tandon and Pankaj to be sitting on the front bucket seats of a Maruti car. Conduct of Tanender Tandon and Dazy Tandon was highly unnatural for they could not have left the injured brother Rajender Kalra along with his wife at the spot, for going back to the place of reception. Moreover Dazy Tandon could not have seen the two assailants since she was sitting on the left rear side of the Maruti car with two children and Rashmi Kalra on her right. As regards the previous altercation except Kawal who has turned hostile no other witness has been examined though it is claimed that there were number of witnesses. Though it is the case of the prosecution that clothes of Pankaj were blood stained however they were not seized and sent to forensic examination. There are contradictions in the testimonies of the alleged eye-witnesses in relation to the body parts where the bullets have hit the deceased and the injured and the position of the assailants while firing the bullets. The witnesses have admitted that there was no electricity at the place of incident, thus it was impossible for them to have identified the assailants, especially when the glasses of Maruti car were tinted. In the alternative it is submitted that even if accepting the prosecution version since the incident took place in a sudden heat on a trivial issue of parking, offence punishable under Section 304 IPC is only attracted and the appellant having undergone seven and a half years of imprisonment, he be released on the

period already undergone. Reliance is placed on (2006) 11 SCC 444 Pulicherla Nagaraju @ Nagaraja Reddy vs. State of A.P.

10. Learned APP on the other hand contends that the conduct of the witnesses in going from the place of incident to the reception was not at all unnatural as they were residents of Faridabad and with two small children the only help available to them was that of their relatives at the reception area, the era being when mobile phones were not available. The testimony of the injured witness duly corroborated by other witnesses whose presence at the spot cannot be doubted is sufficient to prove the offences committed beyond reasonable doubt. Even if Kawal has turned hostile his testimony to the extent it supports the prosecution case can be relied upon. The conduct of absconsion of the accused is a material conduct and he has no reasonable excuse for being away from his place of residence. The incident took place on the intervening night of February 15 and 16, 1992 whereas both Aman Verma and Vinod Kumar could not be arrested and were declared proclaimed offenders. Reliance is placed on the decisions reported as 2013 (6) SCC 417 Lahu Kamlakar Patil and Anr. vs. State of Maharashtra, 2010 (10) SCC 259 Abdul Sayeed vs. State of Madhya Pradesh, 2012 (7) SCC 646 Shyamal Ghosh vs. State of West Bengal, AIR 1981 SC 897 State of U.P. vs. Shanker and AIR 2013 SC 3344 Pramod Kumar vs. State of (GNCT) of Delhi.

11. The case of the prosecution is based on the testimony of an injured eye-witness besides three other eye witnesses. Injured eye-witness Tanender Tandon PW-4 is the maker of the FIR and we note the portion of his examination-in-chief with regard to the incident of shooting-

As soon as our car reached near T.B. Hospital, Kingsway Camp, the car being driven by accused Aman Verma came from behind and accused Vinod present in the court was sitting with him in that car. The number of that car was PCV-136. The accused came from our right side and they fired one bullet but I do not know where that bullet had hit but accused persons then again came parallel to our car and accused Vinod in the court fired one bullet from the pistol which he was holding and the said bullet hit my brother-in-law Rajinder Kalra on his head. After he was hit with the bullet, my brother-in-law Rajinder Kalra slowed down the car.

Accused Vinod present in the court then came in front to our car and again fired 3/4 bullets from his pistol. One of the bullets hit me on the back side of my right shoulder. Two bullets hit the roof of our car. In fact, bullet had hit me when I took turn in order to evade and took the turn towards left side. My brother-in-law Rajinder Kalra got down from his car and he fell down on the ground. One TSR driver took me to Parmanand Colony. My wife Daizy Tandon was also accompanied me in that TSR scooter. From Parmanand Colony, I was removed to Sunder Lal Jain Hospital in some maruti van.

12. The presence of this witness at the spot when the incident took place has not been challenged. What has been suggested to him is that his wife did not accompany him from Faridabad to attend the reception. Even in his cross-examination, he reiterates his version in the examination-in-chief. We note the relevant portion of the cross-examination of Tanender Tandon:-

First bullet was fired from the back side which had broken the winds screen/glasses of back side of the car. That bullet did not hit me. I cannot say where that bullet had gone after hitting the winds screen from back side. After the first bullet was fired, my brother Rajinder Kalra had slowed down the car but he did not stop. There might be a gap of 1/2 seconds between the first bullet and the second bullet fired. It is correct that after the first bullet was fired, 3/4 bullets were fired simultaneously by the accused persons from the driver seat glasses and front side glasses of our car. I cannot say the bullet which had hit me was fired from the side of our car or from the front side of our car. As soon as my brother-in-law Rajinder Kalra who was driving the car was hit with the bullet, he stopped the car and came out from the car and sat down on the ground after catching hold of his head. My brother-in-law Rajinder Kalra had stopped the car immediately after he was struck with the bullet. ?

13. Thus in cross-examination this witness stuck to his stand as to how the incident took place and only clarified the facts which were asked in cross-examination. Though the MLC of this witness has not been exhibited and remained Mark Aas the doctors were not available however the fact that this witness had sustained bullet injury has not been challenged. Even in cross-

examination, he reiterated how he and his brother-in-law Rajender Kalra received bullet injuries. Blood stained clothes of this witness had been seized and sent to CFSL.

14. Learned counsel for Vinod has sought to discredit the testimony of Tanender Tandon and the other three eye-witnesses on the ground that there is discrepancy between the statements of Tanender Tandon and three other eye-witnesses Dazy Tandon, Rashmi Kalra and Pankaj.

15. Dazy Tandon PW-2 wife of Tanender Tandon in her testimony has deposed that when their car reached at Burari Road, Subzi Market near T.B. Hopsital they heard a bullet being fired from their back side. Her sister-in-law Rashmi Kalra opened right side glass of the window of rear seat and found that Aman Verma and Vinod were in the blue car and following them. Aman Verma was driving the car while Vinod was sitting beside him. Vinod was carrying pistol and firing. He fired at her brother who was driving the car. The first bullet which was fired hit her husband on his back side however the second bullet hit her brother on neck on the right side. The accused then drove away their car, took a turn and again fired. The bullet then hit her brother's finger. In cross-examination, she reiterates that first bullet was fired from back side which had broken back side glass of the car and hit her husband. She reiterates that two bullets were fired from driver side seat of their car of which one hit on the head of her brother Rajender Kalra and another did not hit anybody but the glass of the car. Thereafter the accused fired from front side of their car hitting the wind screen and hit her brother Rajender Kalra on his hand. In the meantime, the car was stopped and her brother got down. The clothes of her brother and husband were blood stained.

16. Similarly, Rashmi Kalra PW-11 stated that they had hardly travelled a distance of 1/1 km for proceeding towards Faridabad when she heard the noise of glass of the car being broken as if some bullet shot was fired. She opened the window glass of right side and found the same maruti car of blue colour was following them and two boys with whom her husband and brother-in-law had altercation were in the car. While the other boy was driving the maruti car, Vinod was sitting on his left side. They came side by side their car when her husband slowed down

his car. She heard bullet shots being fired from the said car which was running side by side and one bullet hit her husband near the right ear where after the blue colour maruti car came in front of their car and in the headlights of the car she could see the bullets being fired from the said car. Their car had stopped and one bullet hit one finger of right hand of her husband. Thereafter they all came out of the car and she found that that her brother-in-law also had bullet shot on his right shoulder.

17. Pankaj PW-12 stated that he heard the noise of the rear glass being broken. The car of the accused passed through their car and came in front. In the meantime, they opened the window glass and fired shot from the side of their car and thereafter from front side of their car. He also pointed out that Vinod was sitting on the left side of the car and was firing bullet whereas the car was being driven by Aman Verma. One bullet hit Mr. Kalra on his abdomen and he also received one more bullet injury, where after the accused escaped from the spot.

18. The presence of Rashmi Kalra at the spot is also not disputed because she is the one who accompanied her husband to the hospital and her name is mentioned in the MLC of her husband Ex.PW29/A. The sequence of events as described by all the four witnesses Dazy Tandon, Tanender Tandon, Rashmi Kalra and Pankaj are the same and minor variation in the testimony of Pankaj that the bullet hit the abdomen of Rajender Kalra instead of head could be for the reason his statement in the Court was recorded on January 17, 1998 i.e. nearly six years after the incident. Further this variation in the version of Pankaj would not destroy the testimonies of Tanender Tandon, Dazy Tandon and Rashmi Kalra which are duly corroborated by the post-mortem report of Rajender Kalra showing an entry wound on the right neck side and a bullet inside the palm.

19. Learned counsel for Vinod has argued that since one of the witnesses stated that there was no light, the witnesses even if present could not have seen the assailants. However, as clarified by Rashmi Kalra the headlight of two cars was there which was sufficient for them to see the faces. Moreover it is not the case that the witnesses had a fleeting glimpse of the accused for the reason, Vinod and Aman Verma were the two boys in the same car with whom an altercation took

place few minutes ago and when they heard the gun shot from the back side, all of them became alert and the rear window of the car was rolled down. While the two cars were moving together two bullets were shot when the witnesses could definitely identify the occupants of the car.

20. Learned counsel for Vinod has further laboured on the fact that Vinod was not known to the witnesses earlier and PW-1 Kawal Kumar to whom it is attributed that he took the name of Vinod to pacify the altercation at the reception gate has turned hostile. Even if Kawal Kumar has turned hostile, the testimony of Tanender Tandon and three other witnesses who heard Kawal Kumar addressing the appellant as Vinod can neither be discredited nor treated as hearsay evidence. It is in their presence, Kawal Kumar had addressed the appellant as Vinod and thus immediately after the FIR was registered, in the supplementary statements of Tanender Tandon and other witnesses recorded on February 16, 1992 itself, Vinod has been named. Since Vinod was named in the statements, there was no requirement of conducting his test identification.

21. Learned counsel for Vinod has further highlighted the unnatural conduct of Tanender Tandon, Dazy Tandon and Pankaj for the reason that they left behind Rajender Kalra in injured condition along with his wife at night and in the TSR went to the reception area. The conduct of the witnesses cannot be treated as unnatural because they were accompanied by two small children as well and the help available to them was at the reception area which was just 1/1 km away where their relatives were present and thus they went to that place. Even otherwise, accepting the contention of learned counsel that this conduct was unnatural, the same does not help the appellant in any manner for the reason it is not disputed that Rajender Kalra who suffered gunshot injury was taken in PCR van to the hospital by his wife and that Tanender Tandon was got admitted in Sunder Lal Jain Hospital by his relative Gopal who was taken from the reception area. Every person reacts differently in a given situation and the same cannot be generalized. It was a panic situation and if Tanender Tandon thought that he would leave his wife and the two children with the relatives and thereafter go to the hospital, there is nothing unnatural in the same.

22. The fact that name of Vinod and the car number of Aman Verma were immediately available to the police is further fortified by the fact that the incident took place on the intervening night of February 15 and 16, 1992, statements of witnesses were recorded on February 16, 1992 and February 17, 1992 itself, the car was traced to be belonging to Aman Verma and raids were conducted at his house and the house of Vinod. However, both Aman Verma and Vinod were not found and they were declared proclaimed offenders. The conduct of absconsion of Vinod is also incriminating qua him and is required to be taken into consideration.

23. In the alternative learned counsel for Vinod relying upon the decision reported as (2006) 11 SCC 444 Pulicherla Nagaraju Vs. State of A.P. contends that since there was no previous enmity and the offence took place in a sudden quarrel on a trivial issue of parking and weapon of offence was available, even if this Court holds that Vinod has committed the alleged offence, the same would at best fall within Section 304 IPC and since he has already undergone 7 imprisonment, he be released on the sentence already undergone.

24. In Pulicherla Nagaraju (supra) the Supreme noted that at times many petty or insignificant matters " plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance may lead to altercations and group clashes culminating in deaths. However, as noted above, in the present case, the altercation, if any, was settled at the spot but still Vinod exhorted whereafter Vinod and Aman Verma followed the deceased and his family in the car, overtook them while firing at a distance of 1/1 km. The said incident cannot be said to be on the spur of the moment or in sudden heat or passion. This was clearly a case where the persons inflicting injury were taking undue advantage and had acted in a cruel and unusual manner by firing number of gunshots.

25. Supreme Court in the decision reported as (2014) 10 SCC 366 State of Madhya Pradesh Vs. Shiv Shankar noting the distinction between murder and culpable homicide not amounting to murder on a sudden quarrel held-

9. After due consideration of the rival submissions, we are of the view that the High Court has clearly erred in holding that the offence falls under Section 304 Part I IPC. It is clear from the case of the prosecution mentioned above that the

accused first slapped the complainant which was followed by verbal abuses and thereafter the accused brought the licensed gun and fired at the deceased, who died. It was, thus, a voluntary and intentional act of the accused which caused the death. Intention is a matter of inference and when death is as a result of intentional firing, intention to cause death is patent unless the case falls under any of the exceptions. We are unable to hold that the case falls under Exception 4 to Section 300 IPC as submitted by the learned counsel for the respondent. Exception 4 is attracted only when there is a fight or quarrel which requires mutual provocation and blows by both sides in which the offender does not take undue advantage. In the present case, there is no giving of any blow by the complainant side. The complainant side did not have any weapon. The accused went to his house and brought a gun. There is neither sudden fight nor a case where the accused has not taken undue advantage.

11. In Bhagwan Munjaji Pawade v. State of Maharashtra [(1978) 3 SCC 330 : 1978 SCC (Cri) 428] this Court held as under: (SCC pp. 331-32, para 6)

6. It is true that some of the conditions for the applicability of Exception 4 to Section 300 exist here, but not all. The quarrel had broken out suddenly, but there was no sudden fight between the deceased and the appellant. žFight Ÿ postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than three fatal injuries were inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. The appellant, is therefore, not entitled to the benefit of Exception 4, either. ?

(emphasis in original)

12. In Sridhar Bhuyan v. State of Orissa [(2004) 11 SCC 395 : 2004 SCC (Cri) Supp 98] this Court held as under: (SCC pp. 396-97, paras 7-8)

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.

8. The fourth exception to 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 žsudden fight Ÿ 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 žfight Ÿ 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 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 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 žundue advantage Ÿ as used in the provision means žunfair advantage Ÿ. ?

13. Similar observations were made in State of Orissa v. Khaga [(2013) 14 SCC 649 : (2014) 4 SCC (Cri) 316] , which reads as under: (SCC pp. 651-52, paras 8-9 and 11)

8. The rival submission necessitates examination of Exception 4 to Section 300 IPC, same reads as follows:

300. Murder. ”***

Exception 4. ”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's having taken undue advantage or acted in a cruel or unusual manner.

Explanation. ”It is immaterial in such cases which party offers the provocation or commits the first assault.'

From a plain reading of the aforesaid Exception it is evident that it shall be attracted only if the death is caused (i) without premeditation, (ii) in a sudden fight and (iii) in a heat of passion upon a sudden quarrel. If all these ingredients are satisfied, the Exception will come into play only when the court comes to the conclusion that the offender had not taken undue advantage or acted in a cruel or unusual manner. Above all, this section would be attracted when the fight had taken place with the person killed.

9. The aforesaid view finds support from a judgment of this Court in Pappu v.State of M.P. [(2006) 7 SCC 391 : (2006) 3 SCC (Cri) 283] in which it has been held as follows: (SCC pp. 394-95, para 13)

13. 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 žfight Ÿ 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 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.'

* * *

11. Then, can it be said that the crime has been committed in a heat of passion? If time is taken to cool down, then the crime cannot be said to have been committed in a heat of passion. It is the specific case of the prosecution, which in fact, has also been accepted by the High Court that žwhen her father Tikeswar abused them, the accused Khageswar being annoyed brought a budiafrom his house, which is nearby, and dealt blows to her father and the accused Dusasan brought a lathi and assaulted her father Ÿ. This clearly shows that both the convicts had sufficient time to cool down and therefore, it cannot be said that the crime was committed in a heat of passion. ?

14. The above observations fully support the view that the present case falls under Section 302 IPC. ?

26. In view of the unshaken testimony of Tanender Tandon and Rashmi Kalra whose presence at the spot is not disputed, duly corroborated by Dazy Tandon and Pankaj coupled with the report of the ballistic expert which opines that the bullet recovered from the palm of the deceased and cartridge cases found at the spot could be fired by 7.65 mm pistol bearing No.354993 of Aman Verma and the clothes of Tanender Tandon, Rajender Kalra being blood stained and the bullet recovered having the same blood group as of Rajender Kalra along with the conduct of absconsion of the accused, the prosecution has proved beyond doubt

the commission of offences punishable under Sections 302/34 IPC and 307/34 IPC by Vinod.

27. Consequently, the appeal is dismissed. Bail bond and surety bond of Vinod are cancelled. He would surrender to custody in jail.

28. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

29. TCR be returned.

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