



*principle – 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 & 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 – Exception 4 deals with cases where – in whatever way the quarrel may have originated – yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. (Para 6.10)*

*(G) Interpretation of Expression – Sudden fight – A "sudden fight" implies mutual provocation and blows on each side. (Para 6.10)*

*(H) Sudden fight – Ambit – 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. (Para 6.10)*

*(I) Indian Penal Code, 1860 – Section 300 Exception 4 – Invoking of – Mode of proof – The help of Exception 4 can be invoked if death is caused – (a) without premeditation – (b) in a sudden fight – (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner – (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. (Para 6.10)*

*(J) Evidence Act – S 3 – Relevant Fact – Heat of passion – the parties had worked themselves into a fury on account of the verbal altercation in the beginning – Sudden fight. (Para 6.10)*

*(K) Indian Penal Code, 1860 – Section 300 Exception 4 – Word 'Fight' – Interpretation of – "fight" occurring in Exception 4 is not defined in IPC – It takes two to make a fight – A fight is a combat between two and more persons whether with or without weapons. (Para 6.10)*

*(L) Indian Penal Code, 1860 – Section 300 Exception 4 – Word 'undue advantage' – Interpretation of – The expression "undue advantage" as used in the provision means "unfair advantage".(Para 6.10)*

**Facts:-** *It was alleged that on account of stealing the mobile of the deceased by the appellant the deceased had slapped the appellant on his face and therefore, the appellant got provoked and in the heat of moment, hit one blow with a wooden log on the head of the deceased. The deceased succumbed to the*

a injuries. The appellant herein with the aid of the accused No.2 threw away the dead-body of the deceased somewhere at the outskirts of the village. The complainant found the dead-body of the deceased and he informed the police.

b The accused persons were convicted for the offence punishable u/ss 302 r/w 201, IPC and u/s 135 of Gujarat Police Act. In the present appeal before the High Court of Gujarat the conviction was altered to Ss. 304 Part-II and 201, IPC and u/s 135 of Gujarat Police Act and the sentence was reduced to the period already undergone.

**Law of relief:-** A "sudden fight" implies mutual provocation and blows on each side.

c **Held :-** Considering the overall evidence on record, the prosecution has established that there was altercation between the deceased and the accused No.1 about the mobile phone of the deceased and in the heat of moment, the accused No.1 hit one blow  
d with a wooden log on the head of the deceased. The deceased died at the spot. (Para-6.6)

e However, considering the overall evidence on record, we are of the opinion that there is substance in the submission of the learned counsel for the appellants that at the best it is a case of culpable homicide not amounting to murder. In a sudden quarrel which had taken place, one blow with wooden log was hit on the head of the deceased, which proved to be fatal. Even if the evidence of the prosecution witnesses is accepted as it is, than also, the same do not  
f establish and prove the intention of the accused to kill the deceased. There is absence of premeditation and intention to kill the deceased. Medical evidence indicates single penetration wound on the head of the deceased. Thus this is a case of one blow by a wooden log in a sudden quarrel and the intention to kill the deceased is absent. The  
g law on this aspect is required to be referred to. (Para-6.7)

h Section 299 of the IPC explains culpable homicide as causing 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 the act complained of is likely to cause death. The first two categories require the intention to cause death or the likelihood of causing death while the third category confines itself to the knowledge that the act complained of is likely to cause death. On the facts of this case, the offence of culpable homicide is clearly made out. (Para-6.8)

Section 300 of the IPC explains what is murder and it provides that culpable homicide is murder if the act by which the death is caused is done with the intention of causing death or the act complained of is so imminently dangerous that it must in all probability cause death or "such bodily injury as is likely to cause death." There are some exceptions when culpable homicide is not murder and we are concerned with Exception 4 which reads:

"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 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." (Para-6.9)

Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation 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 an 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 could in such cases 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

a 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 offenders 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 had 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 "undue advantage" as used in the provision means "unfair advantage". (Para-6.10)

f **Counsel:-** For Appellant(s): Mr. MA Kharadi, Mr Umarfaruk M Kharadi, Advs.

For Respondent(s): Mr. Ronak Raval, Adv.

**Cases Referred:-**

- g 1. *A.P. Versus Rayavarapu Punnayya and another*, (1976) 4 SCC 382 : (AIR 1977 SC 45), (Para-6.12)
2. *Budhi Singh Versus State of Himachal Pradesh*, (2012) 13 SCC 663 : 2013 AIR SCW 457, (Para-6.13)
- h 3. *Kikar Singh v. State of Rajasthan*, (1993) 4 SCC 238 : AIR 1993 SC 2426, (Para-6.14)
4. *Singh v. State of Punjab*, (2017) 5 SCC 796 : (AIR 2017 SC 1904), (Para-6.15)
5. *Talaram Versus State of Madhya Pradesh*, AIR 2018 S.C. 2146, (Para-6.17)
6. *Pawan Kumar v. State of Haryana*, (2003) 11 SCC 241 : 2004 SCC (Cri) 109, (Para-6.20)
7. *Harbans Singh v. State of U.P.*, (Para-6.20)

8. *Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra*, (Para-6.20)
9. *Anil Rai v. State of Bihar*, (Para-6.20) a
10. *Raja Ram v. State of M.P.*, (Para-6.20)
11. *Chellappan Mohandas v. State of Kerala*, (Para-6.20)
12. *Dandu Lakshmi Reddy v. State of A.P.*, (Para-6.20)
13. *Bijoy Singh v. State of Bihar*, (Para-6.20)
14. *Gurucharan Kumar v. State of Rajasthan* (Para-6.20) b
15. *Suresh Chaudhary v. State of Bihar*, (Para-6.20)
16. *Bijoy Singh Versus State of Bihar*, 2002(8) SCC 147, (Para-6.21)
17. *Suresh Chaudhary Versus State of Bihar*, 2003(4) SCC 28, (Para-6.21)
18. *Pawan Kumar Versus State of Haryana*, 2003(11) SCC 241, (Para-6.21) c
19. *Mohinder Singh and another Versus State of Punjab*, 2004(12) SCC 311, (Para-6.21)

### JUDGMENT

**A.C. RAO, J.:** - 1. The appellant - original accused No.1 has preferred this Criminal Appeal under section 374 of the Code of Criminal Procedure challenging the judgement and order of conviction and sentence passed by the 6th (Ad-hoc) Additional Sessions Judge, Panchmahals at Godhara in Sessions Case No.59 of 2016 dated 16/11/2018, by which the Sessions Judge convicted the appellant - original accused No.1 for the offence punishable under sections 302 read with section 201 of Indian Penal Code, 1860 and under section 135 of Gujarat Police Act. d

While convicting the appellant accused No.1, the trial court imposed the following sentence :- f

For the offence punishable under section 302 of Indian Penal Code, the Sessions Judge sentenced the appellant - accused No.1 to undergo life imprisonment with fine of Rs.5,000/- and in default to make payment of fine, directed to undergo further rigorous imprisonment for a period of one year. g

For the offence punishable under section 201 of Indian Penal Code, the Sessions Judge sentenced the appellant - accused No.1 to undergo imprisonment for a period of five years with fine of Rs.2,000/- and in default to make payment of fine, directed to undergo further rigorous imprisonment for a period of six months. h

For the offence punishable under section 135 of Gujarat Police Act, the Sessions Judge sentenced the appellant - accused No.1 to

a undergo imprisonment for a period of two years with fine of Rs.500/- and in default to make payment of fine, directed to undergo further rigorous imprisonment for a period of two months.

The Sessions Judge also granted benefit of set off as per section 428 of the Code of Criminal Procedure.

b 2. Case of the prosecution :-

c The complainant found the dead-body of the deceased - his brother lying in the field near an electric poll at the outskirts of the village. He accordingly informed the police. The postmortem revealed that the deceased died due to internal head injury. It is pertinent to note that before the incident, the deceased had informed the complainant - his brother that his mobile was missing. On inquiry, the appellant is alleged to have confessed before the complainant that he had an altercation with the deceased as regards mobile. The deceased d had slapped the appellant on his face and therefore, the appellant got provoked and in the heat of moment, hit one blow with a wooden log on the head of the deceased. The deceased succumbed to the injuries. The appellant herein with the aid of the accused No.2 threw away the dead-body of the deceased somewhere at the outskirts of the village. The FIR being CR No.90 of 2016 came to be registered with the e Morvah(H) Police Station for the offence punishable under section 302 read with section 114 of the Indian Penal Code and under section 135 of Gujarat Police Act.

f 2.1. Thereafter, during the course of the investigation, the investigating officer arrested the accused, recorded statements of the witnesses, prepared inquest punchnama, got postmortem report of the deceased, prepared panchnama of the place of offence and carried out other investigation. After completion of investigation, the g investigating officer filed chargesheet under section 173 of the Code of Criminal Procedure in the competent court of the learned Judicial Magistrate, First Class Morvah(H) for the offence punishable under sections 302, 201 read with section 114 of IPC and under section 135 of the Gujarat Police Act, and the case was registered as Criminal Case h No.134 of 2016.

2.2. Since the case was triable by the Court of Sessions, the Judicial Magistrate after providing copies of the Chargesheet papers to the accused, committed the case to the Sessions Court under section 209 of the Cr.P.C. and the case was re-registered as Sessions Case No.59 of 2016 in the Court of Sessions Judge Panchmahals at Godhara.

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2.3. The Sessions Court framed Charge against the accused. Plea of all the accused Nos.1 and 2 were recorded. The accused pleaded not guilty and prayed for trial. The Sessions Case No.59 of 2016 was assigned to the 6th (Ad-hoc) Additional Sessions Court, Panchmahals at Godhara, who conducted the trial in accordance with law. a

2.4. The prosecution produced the following oral as well as documentary evidence : b

**: ORAL EVIDENCE :**

PW No.	Ex.No.	Particulars	Remarks	c
1	12	Arunkumar Kantibhai Patel	Panch witness	
2	15	Bhavsingbhai Gemabhai Patel	Panch witness	
3	17	Kantibhai Virabhai Patel	Panch witness	d
4	21	Jasvantsinh Bhavsinh Patel	Panch witness	
5	23	Virsingbhai Mangalabhai Patel	Panch witness	
6	25	Dr.Vinaykumar Birendrar-Prasad Sing	Doctor	e
7	31	Arvindhbhai Kalubhai Patel	Brother of the deceased	
8	36	Jentaben Prabhatbhai alias Sureshbhai Patel	Wife of the deceased	f
9	45	Gulabsinh Ratansinh Patel	Independent witness	
10	47	Gopalsinh Ratansinh Patel	Independent witness	g
11	49	Pahadsinh Pratapsinh Damor	PSO	
12	53	Abhesinh Balvantsinh Bariya	Unarmed Head Constable	h
13	54	Dhiren Jayantilal Lariya	Nodal Officer	
14	73	Mulendrasinh Naransinh Chauhan	Investigating officer	

**: DOCUMENTARY EVIDENCE :**

a	Sr. No.	Ex. No.	Particulars
	1	13	Inquest Panchnama
b	2	14	Recovery Panchnama of recovery of Mobile.
	3	16	Panchnama of place of offence
	4	18	Panchnama under section 27 at the instance of the accused Arvindbhai
c	5	22	Arrest Panchnama of the accused
	6	24	Panchnama of recovery of wooden log and mobile
d	7	26	Yadi sent to Medical Officer for obtaining death certificate of the deceased Prabhatbhai
	8	27	Police Report for investigation after death
	9	28	Postmortem Report
e	10	29	Cause of Death Certificate
	11	32	Complaint of the complainant
	12	33	Complaint of Accidental Death Case No.39 of 2015
f	13	50	Letter deputing inquiry officer for accidental death case
	14	51	Yadi sent to the Executive Magistrate for inquest
g	15	52	Yadi sent to JMFC Morvah(H) for recording statement of the witness under section 164 of CrPC
	16	59	Print out of call details report of Mobile No.9825508405
h	17	60	Certificate as per section 65(B)(4)(C) in connection with mobile call details
	18	74	Preliminary Report of FSL (Mobile) Dahod
	19	75, 76, 77, 78 & 79	Five letters written to DSP Panchmahals with regard to call for CDR of Mobile numbers.

Sr. No.	Ex. No.	Particulars	
20	80	Report for addition of section 201 of IPC	a
21	81	Yadi sent for registration of FIR	
22	82	Acknowledgment for taking custody of the dead-body	b
23	83	Acknowledgment for handing over custody of dead-body	
24	84	Letter written by Medical Officer to PSI for blood samples	c
25	85	Printout of mobile call details page nos. to 28	

2.5. At the conclusion of the trial, the 6th (Ad-hoc) Additional Sessions Judge, Panchmahals at Godhara convicted both the accused including the present appellant - original accused No.1 for the offence punishable under sections 302 and 201 of IPC and also under section 135 of the Gujarat Police Act and imposed the sentence as aforesaid. d

3. Mr. M.A. Kharadi, the learned counsel appearing for the appellant - original accused No.1 has vehemently submitted that the Sessions Court erred in convicting the appellant for the offence punishable under section 302 read with section 201 of IPC and under section 135 of GP Act and imposing the sentence of life imprisonment for the offence u/ss.302 read with section 201 and imposing sentence of RI for five years for the offence punishable under section 201 of IPC and imposing sentence of two years for the offence punishable under section 135 of GP Act. He submitted that the conviction is against the evidence on record, against the provision of law and against settled legal position. He submitted that the trial court failed to appreciate that the case against the appellants is not proved beyond reasonable doubt. e  
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3.1. Mr. Kharadi, the learned counsel appearing for the appellant - original accused No.1 further submitted that this is a case of circumstantial evidence and there is no eye witness to the incident and hence in absence of any eye witness, the trial court ought not to have come to the conclusion that the appellant has committed the murder of the deceased. He submitted that nobody has seen that who h

caused injury to the deceased and it is possible that somebody might have committed the murder of the deceased.

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3.2. Mr. Kharadi, further submitted that the Sessions Judge relied upon the witnesses of the prosecution, who are relatives of the deceased and highly interested witnesses. The trial court overlooked loopholes which are quite apparent and relying upon such hearsay evidence, convicted the appellant.

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3.3. Mr. Kharadi, further submitted that the Sessions Judge erred in not properly appreciating the evidence of PW No.10 - uncle of the deceased and alleged to be eye witness. The said witness has deposed, when he was going from his old house to his new house, he saw appellant, deceased and there was altercation between the appellant and deceased about phone. The appellant in sudden provocation picked up wooden log and inflicted one blow on the head of the deceased due to which he fell down. He deposed that the appellant spotted this witness and threatened him to dire consequences if he informs others about the incident. He further deposed that in the next morning, he came to know about the death of Prabhatbhai but as he was scared of appellant, he did not disclose the fact to anyone till the FIR was lodged. It is contended that the said witness though alleged to be uncle of the deceased, he had not come forward to inform about the incident or giving any treatment to the deceased and neither he informed the family members of the deceased about what he had witnessed and remained silent until the FIR came to be lodged. It is contended that therefore, credibility and geniuses of this witness is doubtful. It is contended that the Sessions Court erred in relying on the deposition of this witness.

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3.4. Mr. Kharadi, further submitted that the Sessions Judge erred in not properly appreciating the evidence of PW No.9 - uncle of the deceased and alleged to be eye witness. The said witness has deposed that he is residing adjacent to the appellant's godown and as there was intense altercation between appellant and deceased, he saw from the back-door of this house and saw that there was intense scuffle between appellant and deceased and after sometime, lights of the godown were switched off and appellant has inflicted one blow of wooden cudgel to the deceased. He deposed that in the morning this witness came to know about the death of Prabhatbhai but as he was scared of appellant, he did not disclose these facts to anyone till the FIR. Though the said witness alleged to be uncle of the deceased, he

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had not come forward to inform about the incident or giving any treatment to the deceased, neither this witness informed the family members of the deceased about what he had witnessed and remained silent until the FIR came to be lodged after a month. It is contended that the credibility and genuineness of the said witness is doubtful. However, Sessions Court, erred in relying upon the said witness. a

3.5. Mr. Kharadi, further submitted that the Sessions Judge erred in not properly appreciating the evidence of PW No.12 - nodal officer of the Vodaphone. The said witness has given mere information about the sim card used in the stolen phone of the deceased but has not given any information about the location of the appellant to prove his presence at the scene of offence. It is contended that the evidence of this witness is limited to prove that the appellant was having deceased stolen phone, but does not constitute the evidence to implicate appellant with the murder of the deceased. b c

3.6. Mr. Kharadi, further submitted that the Sessions Judge erred in not properly appreciating the fact that the appellant had inflicted single blow of cudgel to the deceased in sudden provocation in the spur of the moment and neither the appellant was intending to kill him nor he knew that such blow could lead to the death of person. It is contended that the Sessions Court erred in not considering the case under section 304 Part-II of IPC. d e

3.7. Mr. Kharadi, further submitted that the Sessions Judge erred in not properly appreciating the fact that no independent witness and none of the persons from the neighborhood of the appellant's go-down or PW No.9 has been examined though it was the evidence of PW No.9 that due to intense altercation he came to the back door of the house and witnessed the incident and several other residential houses are also located there. It is contended that relying upon relatives and highly interested witnesses, such harsh sentence ought not to have been imposed. f g

3.8. Mr. Kharadi, further submitted that the Sessions Judge erred in not properly appreciating the major contradictions in the complaint and deposition of the complainant about the revelation of the alleged incident to him. In the FIR the complainant says that the appellant revealed about the said incident to him and in his examination in chief he names one Kantubhai Galabhai who has informed complainant about the incident occurred in the night falling between 18 and 19 November, 2015. h

a 3.9. Mr. Kharadi, further submitted that the Sessions Judge erred in not appreciating the fact that the prosecution has not proved the case beyond reasonable doubt and erred in convicting the appellant for the offence punishable under sections 302 read with section 201 of IPC and under section 135 of Gujarat Police Act.

b 4. Present appeal is opposed by Mr. Ronak Raval, the learned APP appearing for the State. He submitted that the prosecution has successfully proved the case beyond reasonable doubt. He further submitted that the witnesses have supported the case of the prosecution. He submitted that the judgement and order of conviction and sentence passed by the trial court is on appreciation of evidence and same is not perverse. He submitted that no error has been committed by the trial court in convicting and sentencing the accused and therefore, the impugned judgement and order of conviction is not required to be interfered with at the hands of this Court. He prayed that the appeal be dismissed.

c 5. Heard Mr. Kharadi, the learned counsel for the appellant and Mr. Ronak Raval, the learned APP appearing for the State at length. Perused the impugned judgement and order of conviction. Re-appreciated the evidence on record.

d 6. On consideration of the evidence on record, the following facts are emerge :-

e 6.1. That the accused No.1 made an extra-judicial confession before the PW No.10.

f 6.2. The wife of the complainant found the dead-body of the deceased lying at the place of the incident and there was bleeding from the ears of the victim.

g 6.3. As per the deposition of PW No.9, he had witnessed altercation in words through the back-door of his house between the accused No.1 and the victim at about 8.30 p.m. to 9.00 pm. on the date of the incident and the accused No.1 had inflicted wooden log on the head of the victim.

h 6.4. Deposition of PW No.10 is also in consonance with the deposition of PW No.9.

6.5. PW No.10 was threatened by the accused No.1 that if he would tell anything about the incident, he would kill him.

6.6. Considering the overall evidence on record, the prosecution has established that there was altercation between the deceased and the accused No.1 about the mobile phone of the deceased and in the heat of moment, the accused No.1 hit one blow with a wooden log on the head of the deceased. The deceased died at the spot. a

6.7. However, considering the overall evidence on record, we are of the opinion that there is substance in the submission of the learned counsel for the appellants that at the best it is a case of culpable homicide not amounting to murder. In a sudden quarrel which had taken place, one blow with wooden log was hit on the head of the deceased, which proved to be fatal. Even if the evidence of the prosecution witnesses is accepted as it is, than also, the same do not establish and prove the intention of the accused to kill the deceased. There is absence of premeditation and intention to kill the deceased. Medical evidence indicates single penetration wound on the head of the deceased. Thus this is a case of one blow by a wooden log in a sudden quarrel and the intention to kill the deceased is absent. The law on this aspect is required to be referred to. b c d

6.8. Section 299 of the IPC explains culpable homicide as causing 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 the act complained of is likely to cause death. The first two categories require the intention to cause death or the likelihood of causing death while the third category confines itself to the knowledge that the act complained of is likely to cause death. On the facts of this case, the offence of culpable homicide is clearly made out. e f

6.9. Section 300 of the IPC explains what is murder and it provides that culpable homicide is murder if the act by which the death is caused is done with the intention of causing death or the act complained of is so imminently dangerous that it must in all probability cause death or "such bodily injury as is likely to cause death." There are some exceptions when culpable homicide is not murder and we are concerned with Exception 4 which reads: g h

"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 having taken undue advantage or acted in a cruel or unusual manner."

a Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault."

b 6.10. Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation 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 c 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, d 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 an equal footing. A "sudden fight" implies mutual e provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases 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 f 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 g 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 offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) h 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 had 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 "undue advantage" as used in the provision means "unfair advantage".

6.11. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code.

6.12. In *State of A.P. Versus Rayavarapu Punnayya and another*, reported in (1976) 4 SCC 382 : (AIR 1977 SC 45), the Supreme Court, while drawing a distinction between Section 302 and Section 304, held as under:-

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is

a "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, b "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third c degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of d Section 304."

6.13. In the case of *Budhi Singh Versus State of Himachal Pradesh*, reported in (2012) 13 SCC 663 : 2013 AIR SCW 457, the Supreme Court has held as under:-

e "18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine f from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from g grave and sudden provocation would normally mean that a person placed in such circumstances could lose self- control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of h injury.

Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of

self- control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder....." a

6.14. In the case of *Kikar Singh v. State of Rajasthan*, reported in (1993) 4 SCC 238 : AIR 1993 SC 2426, the Supreme Court held as under:- b

"8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder. c  
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a 9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has

b inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not

c all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4...."

d 6.15. The Supreme Court, in the case of *Singh v. State of Punjab*, reported in (2017) 5 SCC 796 : (AIR 2017 SC 1904), has observed that:

e "The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders 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

f that the "fight" occurring in Exception 4 to Section 300, IPC is not defined in IPC..... 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

g 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

h further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

6.16. Section 304 of the IPC provides the punishment for culpable homicide not amounting to murder. Part I of this Section

provides that if the act by which death is caused is done with the intention of causing death or causing such bodily injury as is likely to cause death then the punishment may extend up to imprisonment for life. On the other hand, Part II of Section 304 provides that if the offending act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death then the punishment may extend to imprisonment for 10 years.

6.17. As held by the Apex Court in the case of *Talaram Versus State of Madhya Pradesh*, reported in *AIR 2018 S.C. 2146*, the intention to cause death must not be readily inferred though the accused may be attributed with the knowledge that the injury is likely to cause death. The Apex Court in the said case, in the absence of any premeditation, altered the conviction from section 302 of IPC to the second part of the section 304 of the IPC. The court below assumed that the accused had intended to cause death of the deceased. There is nothing on record to suggest such an intention and none of the witnesses have given any indication of the intention of the appellant to cause death of the deceased. The appellant caused injury by wooden log on the head of the deceased but the intention of the accused to kill the deceased is not apparent. In view of the evidence on record, we are satisfied that the ingredients of murder as explained in Section 300 of the IPC are missing in this case.

6.18. Thus, considering the factual scenario of the case on hand in its entirety, the legal evidence on record and in the background of the legal principles laid down by this Court in the cases referred to supra, the inevitable conclusion is that the scuffle took place in the heat of passion. The fight was sudden and not premeditated. Such being the position, it cannot be held that the accused had the intention to kill the deceased or to cause such bodily injury as is likely to cause death. In the facts of the case on hand, all the requirements under Section 300 Exception 4 of the IPC have been satisfied. Therefore, the benefit of Exception 4 under Section 300 IPC is attracted to the fact situations and the appellant-accused is entitled to this benefit.

6.19. Under the circumstances, on perusal of the evidence on record, we are of the opinion that the conviction of any of the accused was not possible, consequently, impugned judgement and order of conviction convicting the appellant herein for the offence punishable under sections 302 r.w.s. 120(B) and 114 of IPC and imposing sentence

a of life imprisonment cannot sustain and we are of the view that if the punishment of the appellant - accused No.1 of life imprisonment is reduced to the period already undergone, ends of justice would be met.

b 6.20. It is pertinent to note that the trial court has also convicted the original accused No.2 for the offence punishable under section 201 of IPC and sentenced him to undergo rigorous imprisonment for a period of five years with fine of Rs.2000/- and in default, to undergo rigorous imprisonment for a period of six months. However, the accused No.2 is not before this Court. We are of the opinion that though the original accused No.2 is not before this Court, c when we reached at the conclusion that no conviction of accused was possible under section 302 of the IPC, the benefit of that decision must be extended to the similarly situated co- accused, even though he has not challenged the judgement and order of conviction and sentence by way of an appeal.

d In this regard we would like to refer the judgement of the Apex Court in the case of *Pawan Kumar v. State of Haryana*, reported in (2003) 11 SCC 241 : 2004 SCC (Cri) 109, at page 248, wherein it is held as under :-

e "11. It may be stated that accused Balwinder Singh alias Binder whose conviction was also upheld by the High Court did not prefer any appeal to this Court, as such the same attained finality. We find that cases of both the accused stand on the same footing. Question arises whether powers conferred upon this Court under Article 136 of the Constitution can be exercised suo motu to meet the ends of justice in favour of the non- appealing accused as he is entitled to be granted relief in this appeal. This question is no longer res integra as the same has been answered by this Court in a catena of decisions. A Constitution Bench in the case of Durga Shankar Mehta v. Raghuraj Singh<sup>1</sup> laid down the scope of powers of this Court under Article 136 of the Constitution wherein Bijan Kumar Mukherjea, J., speaking for the Court, with whom Mahajan, C.J., Bose, Bhagwati and Venkatarama Ayyar, JJ. concurred, observed that:

h "The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the

Supreme Court of the land. The article itself is worded in the widest terms possible. ... The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way. ... a

This overriding power, which has been vested in the Supreme Court under Article 136 of the Constitution, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England." b

12. The course which we propose to adopt is supported by a three-Judge Bench presided over by the then Chief Justice of India Shri Y.V. Chandrachud in the case of *Harbans Singh v. State of U.P.* wherein death penalty of one of the accused was confirmed by the High Court as well as by this Court by dismissal of the special leave petition as also the review petition and his petition for clemency was also rejected by the President. When the other accused whose sentence of death was also confirmed by the High Court moved this Court, his sentence of death was commuted to life imprisonment. Question had arisen before this Court as to whether in these circumstances the same benefit could be extended to the accused whose death sentence was confirmed by this Court by dismissal of the special leave petition as also the review petition and this Court answered the same in the affirmative but it was of the view that in the interest of comity between the powers of this Court and the powers of the President of India, it will be more in the fitness of things if the Court were to recommend that the President may be so good as to exercise his power under Article 72 of the Constitution to commute the death sentence imposed upon the accused into life imprisonment as he had already considered the mercy petition of that particular accused once and rejected the same. This Court, accordingly, made the recommendations. But, while doing so, in relation to the powers of this Court it was observed thus in paragraphs 19 and 20 of the judgment: c  
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"19. In the circumstances hereinabove stated, I am of the opinion that it will be manifestly unjust to allow the death sentence imposed on the petitioner to be executed. The question that, however, troubles me is whether this Court

a retains any power and jurisdiction to entertain and pass any appropriate orders on the question of sentence imposed on the petitioner in view of the fact that not only his special leave petition and review petition have been dismissed by this Court but also the further fact that his petition for clemency has also been rejected by the President.

b 20. Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Articles 32 and 136 of the Constitution, I am of the opinion that this Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice. Having regard to the facts and circumstances of this case, I am of the opinion that this is a fit case where this Court should entertain the present petition of Harbans Singh and this Court should interfere."

e 13. In the case of *Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra*, a special leave petition filed by an accused, challenging his conviction upheld by the High Court, was dismissed by this Court and prayer for review refused, but when appeal was preferred by another accused, the Court altered his conviction from Section 302 of the Penal Code to Section 304 Part I of the Penal Code. The question had arisen whether the same benefit could be extended to the accused whose special leave petition as well as review petition had already been dismissed. Speaking for the Court, Thomas, J., while observing (at SCC p. 710, para 6) that "Article 21 of the Constitution would not permit us to deny the same benefit to the second accused, notwithstanding the fact that the SLP and the review application filed by him have been dismissed by this Court" extended the same benefit to the other accused.

h 14. Likewise in the case of *Anil Rai v. State of Bihar* while considering appeal of another accused, having altered his conviction and sentence, the Court extended the same benefit to the non-appealing accused whose case was identical in spite of the fact that his application for grant of special leave

to appeal was dismissed, though, not on merits but on account of his failure to produce the proof of surrender. a

15. In the case of *Raja Ram v. State of M.P.* while altering the conviction of an accused in appeal preferred by him, this Court extended the same benefit to the non-appealing accused whose conviction was upheld by the High Court and the same attained finality, no appeal having been preferred against the same. b

16. In the instant appeal, the case of non-appealing accused Balwinder Singh, who never moved this Court, stands on a much better footing than the cases of accused persons in the decisions referred to above whose applications for grant of special leave to appeal had been dismissed by this Court. In the case on hand, we have come to the conclusion that the prosecution failed to establish its case beyond reasonable doubt against both the accused persons, which means that conviction of none of the accused was possible. This Court has repeatedly observed that while hearing the appeal of other accused, in case the Court comes to the conclusion that no conviction of any accused is possible meaning thereby the non-appealing accused as well whose conviction had attained finality, no appeal having been preferred against the High Court judgment, the benefit of that decision must be extended to the non-appealing accused in spite of the fact that he has not challenged the judgment of the High Court upholding his conviction as this Court has set up a judicious precedent for the purpose of averting miscarriage of justice in similar situations. Reference in this connection may be made to the cases of *Chellappan Mohandas v. State of Kerala*, *Dandu Lakshmi Reddy v. State of A.P.*, *Bijoy Singh v. State of Bihar*, *Gurucharan Kumar v. State of Rajasthan* and *Suresh Chaudhary v. State of Bihar*, wherein while hearing appeal of another accused against the judgment of the High Court confirming the conviction, this Court set aside the same as it was found that the prosecution failed to prove its case against all the accused persons, including the non-appealing one, and directed that the same benefit shall be extended to the non-appealing accused also though he did not prefer any appeal before this Court against his conviction." c  
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a 6.21. Under the circumstances, and view of the decision of the Apex Court in the case of *Bijoy Singh Versus State of Bihar*, reported in 2002(8) SCC 147, in case of *Suresh Chaudhary Versus State of Bihar*, reported in 2003(4) SCC 28 and in the case of *Pawan Kumar Versus State of Haryana*, reported in 2003(11) SCC 241 and in the case of *Mohinder Singh and another Versus State of Punjab*, reported in b 2004(12) SCC 311, original accused No.2 is also entitled to same benefits of reduction of punishment from five years to the period already undergone by the accused No.2.

c 7. In the result, present appeal is partly allowed. The impugned judgment and order of conviction and sentence passed by passed by the 6th (Ad-hoc) Additional Sessions Judge, Panchmahals at Godhara in Sessions Case No.59 of 2016 dated 16/11/2018 is hereby modified qua appellant herein - original accused No.1 as well as original accused No.2 (who is a non-appealing accused).

d The conviction of the appellant herein - original accused No.1 for the offence punishable under Sections 302 read with section 201 of the IPC and under section 135 of Gujarat Police Act is altered to section 304 Part-II of the IPC and under section 201 of the IPC and under section 135 of Gujarat Police Act and the sentence of the e appellant No.1 is reduced to the period already undergone. The appellant - accused No.1 - Arvindbhai Kiranbhai Bariya is ordered to be released forthwith, if not required in any other case.

f On the same footing, even the sentence of the original accused No.2 (who is an non-appealing accused) for the offence punishable under section 201 of the IPC is also reduced to the period already undergone. The original accused No.2 - Rumalsinh Abhesinh Patel (who is not before this Court) is also ordered to be released forthwith, if not required in any other case.

g **Result:-** Appeal partly allowed.

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