**SUPREME COURT OF INDIA**

Shaikh Azim @ Vakil @ Kuku

Vs.

State of Maharashtra

Crl.A.No.868 of 2007

(Dr. Arijit Pasayat and P. Sathasivam JJ.)

14.07.2008

**JUDGMENT**

**Dr. Arijit Pasayat, J.**

1. Challenge in this appeal is to the judgment of the Division Bench of the Bombay High Court, Nagpur Bench, upholding conviction of the appellant for offence punishable under Sections 302 of the *Indian Penal Code, 1860* (in short the `IPC') as was awarded by the 9th Additional Sessions Judge, Nagpur. Three persons faced trial. They are Sk. Rahim(A-1), Sk. Azim (A-2) and Sk Ibrahim (A-3). A-1 was acquitted and A-3 was convicted for offence punishable under Section 325 IPC.

2. Background facts in a nutshell are as follows:

> "The house of Abdul Jabbar Qureshi (hereinafter referred to as the `deceased') was adjacent to the house of the appellant/accused in Nava Nakasha, Lashkaribagh, Nagpur. At the relevant time, the appellant along with his two brother i.e. Sk. Rahim and Sk. Ibrahim as well as his parents and grand father were residing in the same house. According to the prosecution, about four months prior to the incident in question, the relations between the family of the deceased and the accused were strained, since the family members of the deceased allegedly threw filth from their side of the house into the courtyard of the house of the accused The family members of the deceased questioned the conduct of the family members of the accused. However, the appellant and his family members did not pay heed to this aspect.
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> The incident in question took place on 8.8.1986 at about12.00 noon. The deceased and his son Abdul Khaliq were present in their house along with other family members. At that time they noticed that some filth has been thrown by somebody in the backyard of their house from the side of the house of the accused. The deceased and his family members, therefore, got angry and expressed their displeasure in loud and strong words. The family members of the accused heard the words used by the family members of the deceased and, therefore, the lady members of the family of the

accused started abusing the deceased and his family members in filthy language. Then the deceased and his son Abdul Khaliq came out of their house. The accused persons along with their grand father Shaikh Ahmed also came out of their house. Accused Sk. Azim (appellant) was holing a Stick, accused Sk. Ibrahim was holding an iron rod and accused Sk. Rahim was also holding a stick in his hand. Accused Azim gave a stick blow on the head of the deceased due to which he received bleeding injury. Abdul Khaliq, son of the deceased, rushed to rescue his father. All the accused attacked him and beat him with iron rod and stick on his head and abdomen. Abdul Khaliq received injuries on his person. The persons from the locality gathered and rescued them from the accused. The deceased had become unconscious because of the blow which was given by accused no.2, the appellant on the head of the deceased. His condition was serious. Therefore, he was sent to Mayo hospital. The deceased succumbed to the injuries on the next day i.e. on 9.3.1986 at about 3.30 p.m. The dead body of the deceased was referred to the doctor for post mortem examination. Dr. Deuskar (PW4) conducted the post mortem examination and opined that the injury on the head of the deceased was sufficient in the ordinary course of nature to cause death and also opined that the said injury is possible by the weapon like stick (lathi).''

3. The conviction was challenged before the High Court, which as noted above, dismissed the same. The present appeal has been filed by A2.

4. Learned counsel for the appellant in support of the appeal submitted that the prosecution version is not cogent. The evidence of PWs. 3 and 6 should not have been relied upon though they claim to have witnessed the incident. In any event, it is submitted that the offence is not covered by Section 302 IPC. The occurrence took place during the course of a sudden quarrel.

5. Learned counsel for the respondent-State supported the judgment of the courts below.

6. So far as evidence of eye witnesses is concerned, PWs. 1 and 3 were the witnesses of the occurrence. So far as PW6 is concerned, he has stated about the hot exchange of words which were going on. All the witnesses have stated that A-2 had assaulted the deceased. Their evidence does not suffer from any infirmity.

7. In essence the stand of learned counsel for the appellant is that Exception IV to Section 300 IPC would apply to the facts of the case.

8. 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.

9. 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 "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused ( a ) without premeditation; ( b ) in a sudden fight; ( c ) without the offender 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" ccurring in Exception 4 to Section 300 IPC is not defined in0 IPC. It takes two to make a fight. Heat of passion requires tha 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 or 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 that 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".”

10. The above position is highlighted in *Sandhya Jadhav v. State of Maharashtra*[1].

11. When the factual scenario is considered in the background of legal principles set out above, the inevitable conclusion is that the appropriate conviction would be under Section 304 Part I IPC. Custodial sentence of 10 years should meet the ends of justice.

12. Appeal is allowed to the aforesaid extent.

[1]*(2006) 4 SCC 653)*