

**(1995) 03 BOM CK 0083**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 89 of 1990**

Shiodas and Another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

**Date of Decision :** 06-03-1995

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Evidence Act, 1872 — Section 27  
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304, 323

**Citation :** (1995) CriLJ 2854 : (1995) 2 MhLj 36

**Hon'ble Judges :** M.B. Ghodeswar, J; L. Manoharan, J

**Bench :** Division Bench

**Advocate :** M.R. Daga, for the Appellant; K.G. Pande, Assistant Public Prosecutor, for the Respondent

## Judgement

L. Manoharan, J.—In this Appeal, accused Nos. 1 and 2 in Sessions Trial No. 23 of 1988 of the Court of Sessions Judge, Bhandara, Challenge their conviction u/s 302 read with Section 34 of Indian Penal Code and the sentence of imprisonment for life awarded to them. Though there was also a charge against accused No. 1 for the offence punishable u/s 323 of Indian Penal Code for causing hurt to Saibai (PW5) the mother of deceased - he was acquitted of the said charge.

2. Prosecution case as revealed, in brief, is that on 26-1-1988, at about 9.00 p.m., when the deceased Vasanta was at dinner he picked up a quarrel with his wife Prabhawati and started abusing her. At that time accused No. 2, wife of 1st accused, came to the house of the deceased and asked him as to why he was abusing her, to which the deceased stated that it was not she whom he was abusing but he was abusing only his wife. Not satisfied with the said answer, the 2nd accused pulled Vasanta to the Court-yard and by that time the 1st accused, husband of 2nd accused, also reached there. A scuffle took place and the 1st accused required the 2nd accused to bring an axe - Article 4 - from their house with which the 1st accused dealt a blow with the blade portion of the axe on the head of Vasanta. On receiving the same Vasanta fell. He was removed to the

hospital; from there PW5 Saibai proceeded to the police station and tendered Ex. 43 on the basis of which a crime was registered u/s 324 of Indian Penal Code. Vasanta expired on the next day. On receipt of said information, Section 324 was altered into Section 302 of Indian Penal Code.

3. On committal, the learned Sessions Judge, framed the charge u/s 302 read with Section 34 of Indian Penal Code against both the accused and also u/s 323 of Indian Penal Code against accused No. 1. The prosecution mainly relied on the evidence of occurrence witnesses, namely PW1, PW2 PW4, PW5 and PW7, to bring home guilt to the accused persons. The prosecution also relied on the confession of 1st accused (Ex. 48) pursuant to which Article 3 was recovered as per Ex. 49.

4. The fact that Vasanta met with homicidal death is beyond doubt, particularly in view of the evidence of Dr. Sushilkumar Choudhary (PW 10) and the post mortem report Ex. 64. In Ex. 64 Dr. Choudhary (PW 10) has noted an incised wound over right parietal region of head of 2 1/2" in length, 4 m.m. in width and 1 1/4" in depth. On internal examination he found a big hematoma around of 3 1/2" x 4". He also found fracture of skull on parietal region of the size of 2" x 3". The brain was found to be highly congested, coverings were full with clots of blood over the brain. The cause of death, according to Dr. Choudhary (PW 10), was due to neurogenic shock due to head injury. PW10 also stated that the injury could be caused with a weapon like Article 4. Thus the evidence of PW10 along with the Ex. 64 would clearly show that Vasanta died a homicidal death.

5. The learned counsel for the appellants Mr. Daga, maintained that there is no acceptable evidence to prove that Vasanta sustained the injury in the manner alleged by the prosecution. It was maintained by the learned counsel that there was hardly any light at the time of occurrence and the witnesses were exaggerating when they said that they saw the occurrence. It is true that the occurrence took place at 9.00 p.m. The house of deceased was situated 20 ft. away from the scene of occurrence and that of the accused is situated on 18 ft. of the scene of occurrence. A reading of the evidence of occurrence witnesses, PW1, PW2 and PW5, would show that they reside within 200 ft. of the scene of occurrence. PW1, PW2 and PW4 would say that at the time of occurrence they were sitting on a platform adjacent to Gram Panchayat Office. The Gram Panchayat Office is adjacent to the house of PW 1. Shankar. The evidence would show that the witnesses PW1, PW2 and PW4 were attracted to the scene of offence by the quarrel and the commotion in front of the house of the deceased. It is true that PW1 said that there was darkness; but in the cross-examination PW2 has stated that a kerosene lamp was burning in the house of the deceased. It is in evidence that the 2nd accused after exchange of words with deceased on her entry into the house of the deceased pulled him out to the Court-yard. This makes it clear, at the time of occurrence the exit of the house of deceased was open. The light in house certainly would spill in the Court-yard. Therefore it is not possible to maintain that there was no light as from the kerosene lamp the light

could be easily available at the scene. It could not be forgotten that the scene of occurrence was the Court-yard of the house of the deceased. There can be no mistake in identifying the accused as the witnesses are close neighbours. With due regard to the said aspect we are unable to agree with the learned counsel for the appellants when it was argued that the claim of the witnesses that they witness the incident is not true since there was no light. PW. 5 is the mother of the deceased and admittedly she was in the house when the quarrel took place in the house. Though it could be said that she is interested in the prosecution as she is mother of the deceased, interestedness by itself is no ground to reject evidence of a witness provided there is satisfactory evidence to prove the presence of the witness at the time of occurrence. Being the mother of the deceased and that the occurrence took place when they were taking food, the probability of presence of PW5 at the time of occurrence cannot be doubted. Thus the evidence of PW 5 is reliable and acceptable. This is particularly so as she gets enough corroboration from the evidence of PW1, PW4 and PW7, who are independent witnesses.

6. The learned Additional Public Prosecutor sought to make reliance on Exs. 48, 49 and 50. Ex. 48 contains the statement made by the 1st accused which is claimed to have led to the discovery of Articles 3 and 4. Though the claim made is that pursuant to the statement by the 1st accused Article 3 stick and Article 4 axe were discovered, admittedly no axe was discovered pursuant to the confession. Even according to the prosecution Article 4 axe was produced by PW4 as having found abandoned near his house. A statement of the accused to be admissible u/s 27 of Evidence Act should be such that the same should function as the cause and the discovery the effect. If there is no discovery pursuant to the statement it ceases to be one admissible u/s 27 of Evidence Act. As regards the recovery of stick, the witnesses PW1, PW2, PW4 and PW5 do not make any reference at all of the stick having been used by the 1st accused during the transaction. The said part of prosecution case that the 1st accused used a stick to beat the deceased cannot be accepted merely on the basis of what PW7 has stated in that regard. Though the stick was discovered pursuant to Ex. 48 and even assuming that part of the statement in relation to discovery of stick is admissible in the context of the evidence, we do not consider that the same can lend support to the said part of the prosecution case. The evidence of discovery u/s 27 cannot by itself be the basis for conviction. But as has already noticed, the evidence of PW5 gets enough corroboration from other occurrence witnesses with respect to the blow inflicted by the 1st accused with article 4 axe. All the occurrence witnesses swear to the fact that the 1st accused inflicted the blow on the head of the deceased with the axe. The finding of the learned Sessions Judge that it was the 1st accused who caused the head injury to the deceased with Article 4 axe has to be accepted.

7. The learned counsel, Shri Daga, then contended that the accused is entitled to the benefit of the first exception to Section 300 of Indian Penal Code. The point urged by the learned counsel is that when the sequence of events which resulted

in infliction of the said injury is taken into account it can be seen that the said infliction was on account of grave and sudden provocation. The point argued by the learned counsel is that there having been a scuffle between the 2nd accused and the deceased which was preceded by a quarrel, the 1st accused was victim of sudden provocation and he inflicted the injury on the head of the deceased.

8. It is true that an accused who pleads the benefit of an exception need discharge the burden by preponderance of probability, and for establishing his claim it is not necessary that he must make a specific plea for the same nor it is necessary that he should adduce independent evidence in support of the same. He can prove same even by relying on the very prosecution evidence. According to the learned counsel when the evidence of P.W. 1, P.W. 2, P.W. 4, P.W. 5 and P.W. 7 is analysed it will be clear that a person like accused who is placed in the said situation would get provoked. What is necessary to be proved is, the death was caused while the accused was deprived of self-control by grave and sudden provocation. Clearly, therefore, it should be proved that the offender caused the death while he was deprived of self-control as a result of grave and sudden provocation. The provocation should be simultaneously grave and sudden. The beginning of the occurrence must be kept in view in evaluating the argument of the learned counsel. The whole occurrence started on the 2nd accused rushing to the house of the deceased and picking up a quarrel. As per evidence, it was the 2nd accused who rushed to the house of the deceased, pulled him to the court yard; then the 1st accused reached there and participated in the occurrence. As per the first proviso to exception one to S. 300, the 1st accused cannot plead that the offence punishable is only under S. 304, Indian Penal Code, as in the circumstance the provocation was invited by the accused. Apart from the same, even the statement of 1st accused under S. 313 of Code of Criminal Procedure, does not lend any support to the plea of the accused now raised that he was a victim of grave and sudden provocation. Alternatively, it must be shown that he was deprived of power of self-control. As per the explanation to the first exception, whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. With due regard to the sequence of events and the nature of transaction, we are not satisfied that the 1st accused was a victim of sudden and grave provocation and he committed the offence when he lost his self-control. The said argument, therefore, is not acceptable.

9. The learned counsel maintains that the 1st accused is entitled to the benefit of exception 4 to Section 300, as, according to him, the offence was committed without premeditation in a sudden fight in the heat of passion. Reliance was made by the learned counsel again to the evidence of occurrence witnesses to contend that there was a scuffle between the deceased on one hand and the accused on the other. There is no substantive evidence to the effect that there was exchange of blow so as to constitute fight, yet in this regard reliance was made by the learned counsel on Ex. 66, a report to the Medical Officer for examination of the 1st accused wherein mention is made that Vasanta assaulted

accused Shiodas with a stick. The point raised by the learned counsel is that at the earliest point of time the accused claimed that he was beaten with a stick by the deceased; but the wound certificate (Ex. 67) does not support the claim of the accused. Ex. 67 reveals an abrasion 1/4 cm. x 1/4 cm. in between right thumb and index finger, and an abrasion 1/2 cm. x 1/2 cm. on left forearm vita (sic) aspect. These injuries do not support the claim of the accused. No suggestion at all was made to any of the witnesses that in fact the deceased had dealt blows with article 3 on the person of the 1st accused. There is nothing on record to support the claim made by the learned counsel that the 1st accused was assaulted with article 3. When the said claim is not supported by evidence there can hardly be a case of fight. Mere verbal exchange of words cannot constitute a fight. Even assuming that there was a scuffle, the other conditions in exception four has to be satisfied. It should be in a sudden fight without premeditation. As noticed, the 2nd accused rushed to the house of the deceased and picked up a quarrel. It is also necessary that when the other conditions in exception four are satisfied, it must be shown that the accused has not taken undue advantage or acted in a cruel or in an unusual manner. The unarmed Vasanta was in the court-yard. The nature of the weapon used by the accused and the place where the injury was inflicted are necessary factors to be taken into account to see whether the accused has taken undue advantage or acted in a cruel or in an unusual manner. After considering the totality of the circumstances to which reference has already been made it is not possible to agree with the learned counsel Mr. Daga that the accused is entitled to benefit of exception 4 to S. 300.

10. Yet another contention raised by Mr. Daga is that on the face of evidence, the accused is protected by right of private defence. The learned counsel maintains that according to the sequence of events the 1st accused used the axe at a time when they were locked in a scuffle where his wife was also involved. It is also maintained by him that since he was manhandled by the deceased with Art. 3 he was within his right to defend not only himself but also his wife and, therefore, infliction of injury on deceased can only be said to be in defence and hence that would constitute no offence. We have already pointed out that the case of the defence that the deceased dealt blows on the 1st accused with Art. 3 is not acceptable. No suggestion is made to any of the occurrence witnesses that the accused had to hit the deceased when he was at the receiving end. No circumstance is brought on record to support the plea of private defence. As noticed, the occurrence started at the instance of the 2nd accused and in that the 1st accused, husband of 2nd accused, participated and ultimately Vasanta died because of the blow inflicted by the 1st accused on the head of Vasanta. With due regard to the commencement of occurrence and also its progress, it is impossible to accept the contention that the 1st accused is entitled to the right of private defence.

11. Lastly the learned counsel maintained that since there was only one injury, at any rate the offence would be punishable only u/s 304 of Indian Penal Code. In

other words, it is maintained by the learned counsel that the offence is only culpable homicide not amounting to murder as defined u/s 299, Indian Penal Code. The learned counsel strongly maintained that with due regard to the nature of occurrence it could be seen that there was no premeditation for the 1st accused to commit the offence. It was maintained that the occurrence was the outcome of an excitement resulting from quarrel and scuffle. It was urged by the learned counsel that the fact that the 1st accused did not inflict any more injury, though he had occasion to do so, is an indication to show that he had no intention to cause the death of Vasanta, neither could he be attributed with the intention of causing an injury which in the ordinary course of nature could have caused death. In support of the said argument, the learned counsel made reliance on the decision in the case of Jagrup Singh Vs. State of Haryana, . This decision is distinguishable as in that case the accused gave a blow on deceased with the blunt side of gandhasa. We have already noticed that here the injury was inflicted with the blade portion of the axe and that too on the head of the deceased. Therefore, the case relied on by the learned counsel, Mr. Daga, is of no avail. The learned counsel then relied on the decision in the case of Randhir Singh alias Dhire Vs. State of Punjab, . Reading of this decision would show that a variety of factors weighed with the Court in altering the conviction into Section 304 Part II where the accused was a young college going boy; and Their Lordships have pointed out that the totality of the circumstances inclusive of the fact that there was only one injury would show that the offence is u/s 304 Part II. This decision also cannot have any avail to the accused with due regard to the facts and circumstances of the case in hand. Reliance was also placed on the decision in the case of Kulwant Rai Vs. State of Punjab, . This decision too is distinguishable as Their Lordships describes the occurrence, "it was something like hit and run." Such is not the case in the instant case as can be seen from the evidence. The learned defence counsel also brought to our notice the decision in the case of AIR 1983 185 (SC) . The very facts of the case would show that the same is distinguishable wherein it is noted that the accused seized a jelly and thrust it into the chest of the deceased and it was preceded by his remark that the deceased must be beaten to make him behave and only one blow was struck by the accused at the deceased. Therefore, it will be seen that the said statement of the accused itself would show that his object was only to make him behave. The other decision relied on is in the case of Jawahar Lal and Another Vs. State of Punjab, . In this case the accused was only 19 years of age and he had no malice. On the facts of the case it was found that he had no intention to cause that particular injury which turned out to be fatal. The facts of the case relied on are quite distinguishable from the case in hand. The learned counsel further relied on the decision in the case of Jagpati Vs. State of Madhya Pradesh, . There the weapon used was not a deadly weapon; though there was a single blow two injuries were caused - one swelling and one skin deep injury. The nature of the injuries and other factors make the case distinguishable from the case in hand. Further reliance was placed on the decision in the case of Pularu Vs. State of Madhya Pradesh, of the decision would show that the said case is

distinguishable on the ground that the weapon used was a blunt agricultural equipment, which is not a deadly weapon. Though the decision reported in the case of Kanwarjeet Singh v. State of Punjab 1993 SCC (Cri) 248, was also relied on it would be seen that the same was a case of exceeding right of private defence. The other decision relied on is in the case of Bachan Singh and others Vs. State of Punjab, . This case has also no application to the case in hand as the same concerns exception two to Section 300. The learned Additional Public Prosecutor relied on the decision in the case of Kantibhai Dalsukhbai Patel v. State of Gujarat 1980 SCC (Cri) 314, in support of his contention that the offence is punishable u/s 302 of Indian Penal Code. In this case the accused gave a blow with the back side of phrase on the head of the deceased fracturing the skull and breaking the bone into four pieces causing death. Their Lordships did not accept the argument that the offence is punishable u/s 304 Part I but held, in the aforesaid circumstances, that the offence is one punishable u/s 302 of Indian Penal Code.

12. As is noticed, the evidence is to the effect that deceased was unarmed, the accused was armed with a dangerous weapon - an axe and he inflicted the injury with the blade portion of the axe on the head of the deceased, the said injury produced fracture of skull and also injury to the brain; and the victim died because of the said head injury. With due regard to the place where the injury was inflicted and the nature of the weapon used for inflicting the injury, it is not possible to conclude that the 1st accused did not intend to cause the said injury as normally every person must be presumed to have intended the natural consequences of his acts. Intention being a condition of mind, ordinarily is not capable of direct evidence; consequently the same necessarily is a matter for inference from the conduct of the person concerned and the attending circumstances. Merely because one injury alone was caused that by itself cannot make the offence one punishable u/s 304, Indian Penal Code. It is in that regard the fact that the weapon is a dangerous one and the place where injury was inflicted is a vital part of the body become relevant and vital in deciding as to whether the accused intended to cause the death or at least such injury which in the ordinary course of nature would cause death. With due regard to the evidence in this case particularly the medical evidence, we have no doubt in our mind that the 1st accused is liable to be convicted u/s 302 of Indian Penal Code as he has committed culpable homicide amounting to murder. Therefore, the Appeal with respect to 1st accused is liable to be dismissed.

13. The next question for consideration is as to the culpability of second accused. As noticed, the prosecution maintained that the 2nd accused, wife of 1st accused, is liable u/s 302 read with Section 34 of Indian Penal Code. The question for consideration is, whether there was common intention for the 2nd accused to commit murder of Vasanta. Some overt acts are attributed to the 2nd accused. It is submitted that the 2nd accused brought the axe article 4 from her house. The evidence on this point is inconsistent. PW1 does not state even presence of 2nd accused and PW4 would maintain that it was the 1st accused

who brought the axe. It is true that PW2, PW5 and PW7 have stated that the axe was brought by the second accused. The beginning of the occurrence in no way can support a conclusion that second accused had a common intention to cause the death of Vasanta. The fatal injury was inflicted by the first accused after deceased and the second accused came out to the court-yard. That would mean, even if there could be any common intention, that could have developed only during the course of the transaction. Unless there is clear and cogent evidence proving that the second accused brought Article 4 axe the case of common intention cannot survive. The only circumstance relied on by the prosecution is that she brought the axe Article 4 at the behest of the 1st accused with which he inflicted the fatal injury. When the evidence as regards that is inconsistent, certainly second accused shall be entitled to benefit of doubt. Therefore, the 2nd accused is not liable to be convicted for the offence punishable u/s 302 read with Section 34 of Indian Penal Code and she is entitled to be acquitted. We, therefore, find accused No. 2 not guilty and set aside her conviction and sentence.

14. In the result, this appeal is partly allowed. The conviction and sentence of first accused for the offence punishable u/s 302 of Indian Penal Code is hereby confirmed. The conviction and sentence awarded to second accused by the Sessions Judge is hereby set aside. She is acquitted of the charges levelled against her. The second accused is on bail, her bail bonds shall stand cancelled.

15. Appeal partly allowed.