Abdul Majid S/O MukeemuddIn Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Apr-25-1963

Reported in : AIR1963MP364; 1963CriLJ631; 1963MPLJ592

Judge : T.P. Naik and ;Shiv Dayal JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 300

Appeal No. : Criminal Appeal No. 357 of 1962

Appellant : Abdul Majid S/O Mukeemuddin

Respondent : State of Madhya Pradesh

Advocate for Def. : Rama Gupta, Govt. Adv.

Advocate for Pet/Ap. : Rajendra Singh, Adv.

Judgement :

Naik, J.

1. This is an appeal by the accused-appellant Abdul Majid, who has been convicted by the Sessions Judge, Bhopal, under Section 302 of the Indian Penal Code for committing the murder of Murshad on 16-14962 in mohalla Ibrahimganj, Bhopal by strikng him once with a spear in the stomach and sentenced to imprisonment for life.

2. The prosecution case is that on 16-1-1962, at about 7.30 a.m., there was a quarrel between the accused-appellant and the deceased over the flowing of drain water into a gravevard. The graveyard was adjacent to the house of the accused-appellant, and a drain carrying the dirty household water from his house flowed into the graveyard. The deceased, who was a 'Fakir', objected to it; while the accused-appellant resented his intervention. During the course of the quarrel, the accused-appellant, feeling piqued, went home, brought out a spear and stabbed the deceased with it once in the stomach. The deceased succumbed to his injuries,

3. The post-mortem examination of the dead body or Murshad (the deceased) was performed by Dr. Sitaram Agarwal (P. W. 12). He found 'an incised penetrating wound, obliquely placed at the junction of the umbilical region and the left lumber region; dried blood stains over the abdomen and left thigh, and that through the wound loops small intestines were prolapsing'. In his opinion, the injury was ante-mortem, and the cause of death was shock and haemorrhage due to it.

4. During investgation, the pyjama (Article F) and the shirt (Article B) of the accused-

appellant, which were found to be stained with blood, were seized. They were sent to the Chemical Examiner and the Serologist, who opined that they were stained with human blood. The accused-appellant also made a statement (Ex. P-15) leading to the Discovery of the spear-head (Article A), which was seized vide seizure memorandum Ex, P-16. This was also found to be stained with human blood.

5. The accused-appellant abjured his guilt and pleaded that he had been falsely implicated. He, however, examined no witness in defence.

6. in view of the medical evidence, it cannot be disputed that the deceased Murshad died of homicidal violence. The question that arises for consideration, therefore, is whether the accused-appellant was the assailant of the deceased But, even on this point, in our opinion, the evidence is so overwhelming that there could be no doubt about it.

7. First, there is the evidence of the eye-witnesses Kallu (P.W. 3), Lalkhan (P.W. 4) and Kulsumbi (P.W. 11). They all reside in the same mohalla, very near the house of the accused-appellant, and they ail say that they had seen the accused-appellant stab the deceased with a spear on the morning of the day of the incident. No doubt, there are certain minor discrepancies and contradictions in their testimony; but on the whole their evidence reads quite cogent and consistent, and it can safely be relied on to convict the accused-appellant of the murder of the deceased Murshad. The evidence of these witnesses has been accepted by the learned Sessions Judge, and in our opinion there is no good reason to discard it altogether.

8. Apart from the fact that the evidence of the aforesaid witnesses finds adequate independent corroborate from the testimony of one another, it is also corroborated by the medical evidence, as also by the presence or human blood on the clothes of the accused-appellant and by the unexplained recent possession of the human bloodstained spear-head (Article A) as evidenced by its discovery at his instance. The accused-appellant has denied these lacts and has thus failed to give any reasonable explanation tor his being in possession of the incriminating articles. In our opinion, the oral evidence of Kallu (P. W. 3), Laikhan (P.W. 4) and Kulsumbi (P.W. 11), together with the presence of human blood on the clothes of the accused-appellant and on the spear-head which was discovered at his instance, conclusively establishes that he was the assailant of the deceased.

9. The question yet remains whether, under the circumstances of the case, the accused-appellant could be held guilty of an offence under Section 302 of the Indian Penal Code.

10. It was strenuously contended, that only one blow had been struck; and as it was struck while the accused-appellant was deprived of the power of self-control due to grave and sudden provocation, his case came within Exception 1 to Section 300 of the Indian Penal Code. Reliance was placed on the evidence of, Lalkhan (P.W. 4) who stated that it was the deceased who had picked up the quarrel by filthily abusing the accused-appellant in front of his house over the flowing of drain water into the compound of the graveyard, and that later in the quarrel he had even charged him with having committed an unnatural offence with a pigeon, whereupon the accused-appellant went into his house, came out with a spear and stabbed the deceased with it once in the stomach.

11. Exception 1 to Section 300 of the Indian Penal Code provides that 'culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other per-son by mistake or accident.'

12. It would thus be seen that in order to attract the Exception in the instant case, the evidence must establish all the following circumstances, viz.,

(a) that there was a provocation which was both grave and sudden;

(b) that such provocation had deprived the accused-appellant of his power of self-control; and

(c) that whilst the accused-appellant was so deprived of his power of self-control, he had caused the death of the person who had given the provocation.

13. Analysing the concept of 'provocation in law under the Common Law of England, Lord Devlin, delivering the judgment of the Judicial Committee of the Privy council in Lee Chun-Chuen v. The Queen, 1963-1 All ER 73 at p. 79 said.

'Provocation in law consists mainly of three elements the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation.'

The defence of 'grave and sudden provocation' thus connotes something more than a provocative incident, which could constitute only one of the elements aforesaid. And further the circumstances aforesaid must also be related to each other -- Particularly in point of time, so that there was no time for passion to cool and the inference of deliberation or design was excluded.

14. The first ingredient of the Exception is thus a provocation, which is both grave and sudden. In the first place, provocation must be such as would deprive any reasonable person of his power of self-control over himself. The test is of a normal reasonable man, who is not extra-sensitive or unusually excitable. Viscount Simson, L.C. m Holmes v. Director of Public Prosecutions, 1946 AC 588, speaking for the House of Lords, said that the case must be one in which the view can fairly be taken that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results.

In K.M. Nanavati v. State of Maharashtra, AIR 1962 S C 605 at p. 630 the test of reasonability has been laid down as depending upon the customs, manners, way of life, traditional values, etc., of the accused, so that in this context a reasonable man is one who is of the same cultural, social and emotional background of the society to which the accused belongs. Consequently, the Supreme Court has laid down (p. 630) that-

'The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self control.'

He should also satisfy the test of normality, i.e., he should be one who should not be

over sensitive or pugnacious, in the words of the Law Commissioners in their First Report 'the provocation should be such as would be likely to move a person of ordinary temper to violent passion, not any person it is to be understood, but a person of the same habits, manners, and feelings' as the accused.

Secondly, it must be grave, i.e., of sufficient serious ness to have the result of depriving a reasonable man of his power of self-control.

And thirdly, it must be sudden. 'A provocation, how ever grave, which is not sudden but is a chronic one, will not satisfy the requirements of Exception 1': (See Jumma Fateh Mohamed v. Emperor, AIR 1932 Lah 438). In Nanavatrs case, AIR 1962 SC 60S (supra), the Supreme (Court has also pointed out at p. 630 that

'the mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.'

15. The second ingredient is that there must be actual loss of self-control by the accused as a result of the grave and sudden provocation received by him. Again, in the words of Viscount Simon, L.C. in Holmes' case, 1916 AC 588 (supra),

'there must be material from which the view might fairly be taken that the accused was in fact acting under the stress of such provocation'.

In Lee's case, 1963-1 All ER 73 (supra), their Lordships considered how the loss of self-control occurred and how quickly the retaliation followed on the act, and commented on the fact that though it was not possible, under the circumstances of the case, to have direct evidence of actual loss of self-control by the accused, (and indeed, in view of the alternative defences taken by him, viz., accident or self defence, or provocation, the failure on his part to testify to loss of self-control could not be fatal). It did not mean that the law could dispense with evidence of any material showing loss of self-control, which could even be proved by evidence from which loss of self-control could reasonably be inferred. In any case, the Court was not empowered, in the absence of any material on the point, to speculate nor to give the accused the benefit of doubt on the basis of such speculation.

16. The third ingredient is that the act of killing by the accused must have been done whilst he was deprived of his power of self-control by the grave and sudden provocation, that is to say, it must be done under the immediate impulse of provocation: (see Queen v. Nokul Nushyo, 7 Suth WR Cri 27).

Discussing the question how long the law will allow for the blood continuing heated to warrant an inference that the act 'of killing was done whilst the accused was deprived of his power of self-control, it is laid down in the East Pleas of the Crown, Vol. I, p. 251, that the question has to be considered with reference to the suspension of reason arising from sudden passion continuing from the time of the provocation received to the very instant of the mortal stroke given; and if from any circumstances what-ever it appears that the party reflected, deliberated, or cooled, any time before the fatal stroke was given, or if in legal presumption there was time or opportunity for cooling, the killing will amount to murder; as being attributed to malice and revenge rather than to human frailty. Again, if it appears that the accused meditated upon his revenge, or used any trick or circumvention to effect it, it would show

deliberation, which was inconsistent with the excuse of sudden passion and was the strongest evidence of malice.

In the words of the Supreme Court in Nanavati's case, AIR 1962 SC 605 (p. 630),

'the fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation'.

In R. v. Duffy, 1949-1 All ER 932n. which Was cited with approval by the Supreme Court in Nanavati's case, AIR 1962 SC 605 (supra): it was pointed out that-

'.....the circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation. Provocation being.....as Ihave defined it, there are two things, in considering it, in which the law attaches great importance. The first of them is, whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind.....Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation --that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation given'.

17. The fourth ingredient is that the retaliation must be proportionate to the provocation, i.e., the instrument or manner of retaliation should not be grossly disproportionate to the offence given. This again appears to bear on the question whether the provocation was the primary cause for the retaliation, or whether it was only a pretext for it. Because, ordinarily, in normal reasonable persons the retaliation is always proportionate to the provocation. Consequently, greater or graver is the provocation, the more serious is the mode of retaliation. But, no reasonable person meets the threat of a fist blow with a dagger.

In Mancini v. Director of Public Prosecutions, 1942-AC 1 the House of Lords held that the use of a dagger in reply to the act of provocation, which consisted in the aiming of a first blow, was disproportionate, and that consequently the accused could not take the advantage of the plea of grave and sudden provocation, in the words of their Lordships,

'the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be reduced to manslaughter'.

18. It may here be mentioned that in India, if an accused pleads an exception, then, because of Section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within any of the exceptions lies upon him, and the Court is enjoined to presume the absence of such circumstances. Consequently, the accused must establish from the evidence the existence of such circumstances; and as we are precluded to presume them, in the absence of their proof, we are precluded from speculating and from giving the accused any benefit of doubt on the basis of such speculation.

19. In the instant case, the material bearing on the question of the plea of 'grave and

sudden provocation' consists of the evidence of Kallu (P.W. 3) and Lalkhan (P.W. 4), the relevant portion of which we reproduce below: Kallu (P.W. 3).

^^eqjlnhl dg jgk Fkk fd ;gka ls ukyka ughafudysxh vkSj ekLVj dg jgs Fks fd ukyh fudysxh] orZu /kksus ds fy;s ikuh ds fy;sukyh FkhA ekLVj lkgc us eqjlhn dks xkyh nh vkSj eqjlhn us Hkh xkyh nhA ;g ckrgksus ij ,d ne ekLVj mlh ?kj esa x;kA ;g dgdj x;k fd Bgjksa eSa vHkh vkrk gwavkSj fQj ?kj esa ls cYye fNikdj ckgj vk;k vkSj ,d eqDdk eqjlhn dks ekjk] isV esaeqDDk ekjk FkkA bl blds ckn esa cYye eqjlhn dks ekLVj us ilyh ds uhps ekj fn;k]cYye eqjlhn dks yxrs gh mldks pDdj vkdj og uhps fxj iM+k**

Lalkhan (P.W. 4):

^^eqjlhn ekLVj lkgc ds edku ij [kMk ekLVj dksxkfy;ka cd jgk Fkk] brus esa ekLVj ?kj esa ckgj vk;k vkSj cksys fd eqjlhn brjktdjus okyk dkSu gksrk gSA fQj eqjlhn dh vkSj ekLVj dh xjek xej ckrsa gksus yxhafd rqe dkSu jksdus okyk gksrk gS] o >wek >Vdh Hkh budh gqbZ] v;qc[kka usbudh >wek >Vdh rksM nh vkSj chp cpko dh A chp cpko djus ds ckn v;qc pykx;k vkSj eqjlhn ogh [kMk jgkA blds ckn eqjlhn us ekLVj ls dgk fd rqeus ,d ejrokesjs dcwrj ds lkFk esa gjdr dhA bl ij Hkh eqjlhn dh xjek xjeh ckr gq;hA ekLVjblds ckn ?kj esa vk;s vkSj mUgksus cYye ykdj eqjlhn dh ekjk] dgka yxk eSaus ughans[kkA**

20. The accused-appellant, in his statement under Section 342 of the Code of Criminal Procedure has totally denied his part in the incident, and has pleaded that ha was not at the place of the incident at all, that he did not take any part in it and that he had been falsely implicated due to enmity. He has also examined no witness in defence.

21. Though it would have been better if the accused-appellant had not lied as to the circumstances under which the incident took place, we cannot punish him for his lies. We shall, on the other hand, have to consider the evidence bearing on the issue in the light most favourable to him.

22. The provocative incident is alleged to be the uttering of abuses which the deceased was hurling at the accused-appellant in front of his (accused's) house. While the tempers were thus frayed, there followed an insinuation from the deceased that the accused-appellant had once misbehaved with reference to his pigeon:

rqeus ,d ejrck esjs dcwrj ds lkFk esa Hkhgjdr dh

Though Kallu (P.W. 3) does not give the nature of the abuses, Lalkhan (P.W. 4) in his cross-examination has stated that

^eqjlhn ekLVj ds edku ds lkeus [kM+k gksdj ekacfgu dh xkyh ns jgk Fkk*

We can, therefore, hold that the abuses were filthy and could consequently have provoked the accused-appellant to losshis self-control. This is also evident from the fact that in retaliation the accused-appellant was also provoked to abuse the deceased in return, and even to grapple with him. Thereafer, according to Lalkhan (P.W. 4), the deceased made an insinuating reference to the pigeon incident, we do not know what the pigeon incident was. The witness (P.W. 4) was not asked to explain what it was, nor hasthe accused-appellant explained it. it is, however, clear that the expression is capable of bearing the meaning which the learned counsel for the

defence suggested, viz., that the deceased had insinuated that the accused-appellant had sexually misbehaved with his pigeon. The insinuation aforesaid 'coming closely after the filthy abuses which had led to a scuffle between the deceased and the accused-appellant, we are of opinion that it would amount to a grave and sudden provocation, because any reasonable man belonging to the same class of society as the accused and placed in the situation in which the accused was placed, would be so provoked at the suggestion as to lose his self-control. It would be a grave provocation, because it would have been a very serious aspersion on the character of the accused-appellant, and it would also have been sudden because in the midst of abuses, when due to frayed tempers abuses were being hurled by the parties on each other, the accused-appellant could not have expected that the deceased would then make such a scurrilous suggestion when the dispute betwaen them was relating to the flow of household dirty water through a drain leading towards the graveyard.

23. The next ingredient is whether the accused had actually lost his self-control because of the grave and sudden provocation. Of this fact, there is no evidence, because the person, namely, the accused-appellant, who could have thrown the best light on it, has chosen to deny the incident altogether. It is true that, as pointed out by the Judicial Committee of the Privy Council in Lee's case, 19S3-1 All ER 73 (supra), proof of this fact, cannot be dispensed with by the Courts; but loss of self-control can also be shown by inference instead of by direct evidence; and if the facts proved do suggest a reasonable inference of loss of self-control, we would be entitled even to discard the denial of the accused and hold that there was loss of self-control, As has been pointed out by the Judicial Committee of the Privy Council in Lee's lease, 1963-1 All E R 73 (supra), at p. 80, 'what is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law'. The evidence of Kallu (P.W. 3) and Lalkhan (P.W. 4), which we have detailed above, amply shows that the hurling of abuses by the deceased on the accused-appellant only provoked the accused-appellant to retaliate with abuses and physical violence with his hands, so that a scuffle ensued between them. This was interrupted by Ayubkhan, who then went away. Murshad (the deceased), however, stayed behind and made the filthy insinuation referred to above. On that there was further exchange of hot words. It appears that by that time the frayed tempers had not cooled, and it was the last insinuation which so infuriated the accused-appellant that after a few more exchanges of hot words, he went into his house, came out with a ballam and hit the deceased with it In our opinion, the interval of time between the throwing of the insinuation and the accused-appellant's going into his house and coming out with a ballam was so short that it cannot be said that there was time enough for passion to cool and for reason to regain dominion over the mind. We are, therefore, of opinion that, under the circumstances established in the case, the accused appellant struck the deceased with 6 spear whilst he was deprived of the power of self-control by the grave and sudden provocation given by the deceased.

24. The last ingredient is that retaliation must be proportionate to the provocation. It is true that retaliation must bear a reasonable relationship to the provocation; but, in the instant case, we cannot say that the giving of one blow with a spear, which it appears the accused-appellant found handy at the moment in his house, can be said to be so grossly disproportionate to the provocation as would show that the provocation was not the primary cause of the retaliation but only a pretext for it.

25. We, therefore, hold that the accused-appellant is entitled to protection under Exception 1 to Section 300 of the Indian Penal Code. His case would thus fall under part one of Section 304 ibid. The conviction and sentence of the accused-appellant under Section 302 are accordingly set aside and, instead, he is convicted under part one of Section 304 ibid. As regards the sentence, in our opinion, a sentence of rigorous imprisonment for a period of seven years would amply meet the ends of justice. We order accordingly.