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Babu Lal Vs. State

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Court : Allahabad

Decided On : Jul-24-1959

Reported in : AIR1960All223

Judge : A.N. Mulla and ;R.A. Misra, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34, 300 and 302; Code of Criminal Procedure (CrPC) , 1898 - Sections 32 and 223; Evidence Act, 1872 - Sections 105

Appeal No. : Criminal Appeal No. 541 of 1958

Appellant : Babu Lal

Respondent : State

Advocate for Def. : Badruzzaman, Adv. for ;Addl. Govt. Adv.

Advocate for Pet/Ap. : Hakimuddin Siddique, Adv.

Disposition : Appeal dismissed

Judgement :

Mulla, J.

1. Balm Lal appellant has been convicted under Section 302 I. P. Code and sentenced to imprisonment for life by the Sessions Judge, Lucknow. The charge

against the appellant was that on 11-1-1958, at about 4.30 P. M. he along with his servant Laltastruck the deceased Ramnath with a scythe with the intention of killing him and thus committed an offence under Section 302/34 I. P. Code. The trial court did not frame the charge properly for in every case where section 34 I. P. Code is applied the court should clearly mention that the crime was committed in furtherance of a common intention. This fact was- not mentioned in the charge framed by the trial court. The trial court acquitted Lalta and gave him the benefit of doubt and convicted the appellant under Section 302 I. P. Code simpliciter.

2. As we am criticising the trial court, we may at this very stage observe that we have not been impressed by the reasoning of the trial court when it completely acquitted Lalta, the other accused. The reasoning, adopted by the trial court cannot bear scrutiny and good evidence has been ignoredon fanciful grounds. The medical evidence alone is conclusive on the point that two persons at least committed this crime and yet the trial court by fallacious reasoning came to the conclusion that the bruises and the abrasions on the person of the deceased could have been caused in grappling alone. We fail to understand how a large dimension on the face could have been caused by friction alone.

It is inconceivable that one assailant used a blunt weapon and then put it down and picked up a sharp-edged weapon. We, therefore, have no doubt in our minds that the convincing evidence of two eye-witnesses together with the medical evidence was ignored by the trial court and on faulty reasoning it gave the benefit of doubt to Lalta accused. This, however, in our opinion has not caused a grave miscarriage of justice because we arc inclined to the view that Lalta did not share the intention of the appellant and he could have been held responsible only for his individual act. His individual act brought him under the purview of Section 323 I. P. Code alone and he should have been convicted and punished under that section.

3. The prosecution story is that the appellant had taken the Theka of the crop in the orchard situate in the Government House compound. He erected a hut in the said orchard and began to reside with his wife Shrimati Kamla (C. W. 1) and his two children including Kumari Meena Kumari (C. W. 2). Kumari Meena Kumari was aged only about 7 years at the time of the incident. Earlier the appellant

resided in Nishatganj and the deceased Ramnath was his maternal cousin who also resided in the same mohalla.

The appellant suspected that illicit intimacy existed between Ramnath deceased and his wife and he thereupon took his wife to Kanpur. There he called a Panchayat to divorce his wife, but the Panchcs enquired from him whether he had seen with his own eyes anything which would justify his suspicions. The appellant could not say that he had seen his wife and the deceased together in a compromising position and so the Panches directed that he should reside with his wife and not divorce her. The appellant then came to the Government House orchard and started living there as mentioned above. This Panchayat was held about two months before the incident.

4. On the date of the incident which is the 11th of January, 1958, the appellant had gone with his servant Lalta to sell the guavas of the orchard. He had gone sometime during the day and the two of them came back at about 4-30 in the evening. When the appellant came back, he found Ramnath deceased present at the hut. He completely lost his self-control and caused serious injuries to him which proved fatal. In causing these injuries Lalta accused assisted him. Ramnath had raised an alarm and this incident was seen by another servant of the appellant P. W. 2 Yaqub, P. W. 1 Jamil Ahmad, who is a watchman engaged by the Golf course which was near this orchard also heard the cries at about 4-30 P. M., when he came to assume his duties Both these witnesses rushed up and remonstrated and then the appellant and Lalta ran away. These witnesses had seen the appellant causing injuries to the deceased with a scythe and when they approached the hut, they found that Ramnath was dead. Shrimati Kamla and Kumari Meena Kumari were there at the hut. Jamil Ahmad thereupon proceeded to police station Hazratganj, which was four furlongs away and lodged the first information report. The facts mentioned above were narrated in this report. It may further he mentioned that when Jamil Ahmad saw the appellant striking the deceased with a scythe, he also heard the appellant abusing the deceased and telling him that this was the consequence of his having an intrigue with the wife of the appellant.

5. Investigation started on the basis of this report and the appellant surrendered three days later in court. At that time it was found that the clothes that he was wearing were blood-stained and so they were recovered from his person. On interrogation the appellant took the investigating officer to a place in Benarasi Bagh and took out a scythe and handed it over to him. The scythe and the blood-stained clothes recovered from the possession of the appellant were sent to the Chemical Examiner and the Serologist and they reported human blood upon these articles.

6. The appellant denied his guilt. As a matter of fact? he even denied that Ramnath deceased was murdered at his hut. He examined no witnesses in defence and did not offer any explanation as to how the blood-stained clothes were found on his person or that the scythe came into the possession of the investigating agency. He merely stated that these clothes were not taken from his person and he did not hand over the scythe to the investigating officer. The appellant did not take up the plea that he killed the deceased under grave and sudden provocation. As a matter of fact when the court put a question to him that there was illicit intimacy between his wife and the deceased, the appellant stated that this allegation was entirely false and unfounded. His counsel was however cross-examining the witnessed in order to establish such circumstances which caused a grave and sudden provocation to the appellant.

7. Before us the counsel for the appellant has not contended that the appellant was not responsible for the death of Ramnath deceased. As a matter of fact, it was not possible to advance this contention. We, however, need not mention those facts which conclusively establish that Ramnath deceased was killed at the hut in the Government House orchard at 4-30 P. M. on the 11th of January, 1958. There is overwhelming evidence to prove this fact, but as the counsel for the appellant has not challenged the findings of fact reached by the trial court, it is not necessary to mention those facts. He has advanced only one contention before us, namely, that the appellant committed this crime when he had completely lost his self-control and, therefore, his case falls under Section 304. I, P. Code and not section 302. I. P. Code.

8. In deciding the question of law placed before us, there are two subsidiary questions which should be decided first. These subsidiary questions are:

1. Can the benefit, of an exception be given to an accused person although he does not plead it?

2. Do the facts proved in the case establish that the appellant received a grave and sudden provocation when he committed this crime?

9. We will deal with the first question now. nO case law was placed before us either by the counsel for the appellant or by the counsel for the State. We, are, therefore, deciding this question on Our own interpretation of the law and some decisions on which we could place our hands. In our opinion the onus of establishing an exception shifts to the accused when he pleads an exception. Section 105 of the Indian Evidence Act is clear on that point. We have now apply to see how this onus can be discharged by the appellant and to what extent this onus is placed upon him. In our opinion this onus can be discharged in two ways. In the first place, it can be discharged by affirmatively establishing the plea taken up by in accused person. In the second place, it can also be discharged by eliciting such circumstances which would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection cf the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself. If it becomes apparent from the evidence led in the case whether produced by the prosecution or the defence that an exception would be applicable the presumtion against the accused is removed and the onus placed upon him if discharged and the court must consider whether the case of the accused is covered by the exception or not irrespective of the standtaken or the plea advanced by him. Where on concideration of the entire evidence the court is left in doubt the benefit of the exception cannot be denied to the accused. In this case the prosecution itself came forward with the story that the deceased had come to the wife of the appellant in his absence, even though the appellant Had suspected on earlier occasions that he carried on an illicit intimacy with his wife and had gone even to the extent of drawing the attention of the community Panchayat to this fact. It was

further a part of the prosecution case that even at the time when the appellant was committing this crime, he was uttering words to the effect that he was causing injuries to the deceased because in his opinion the victim was having an intrigue with his wife. We may further mention that in the course of the investigation of this case Shrimati Kamla and Meena Kumari were examined by the prosecution and as they were closely related to the appellant, it was considered necessary that a Magistrate should record their statements under Section 164 Cr. P. Code. The statement given by Shrimati Kamla also fully supported the version mentioned above. No doubt we cannot use the statement of Shrimati Kamla under Section 164 Cr. P. Code, because it is not a substantive piece of evidence. It can only be used either to corroborate the statement of Shrimati Kamla or to contradict her and for no other purpose. The prosecution did not examine Shrimati Kamla in this case, but the court examined her as a court witness, Shrimati Kamla resiled from her former statement and claimed that she was as chaste as Caesar's wife. She was confronted with her earlier statement and she gave absurd explanations as to how that statement came to be recorded. It is, therefore obvious that Shrimati Kamla is not willing to speak the truth. The same thing is? noticeable in the statement of Meena Kumari also. For some reason the defence instead of accepting the allegations contained in the prosecution case preferred to take up the stand that there was no substance in these allegations and even the crime was not committed in the orchard. The trial court made no mistake when it accepted the evidence of the two eye-witnesses Tamil Ahmad and Yaqub and rejected the statements of Shrimati Kamla and Meena Kumari. We are, therefore of the opinion that where the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not. In such a case the charge framed against the accused comes in conflict with the prosecution evidence itself.

10. The rule of law that would be applicable to this case is laid down in Mangal Ganda v. Emperor, AIR 1.925 Nag 37. In this case the Sessions Judge found that the offence seemed to have been committed under a grave and sudden provocation but since the accused did not raise this plea ho could not accept it and he sentenced the accused under Section 302 I. P. Code. The learned Judges

observed:

'This is obviously wrong. Section 105 of the Evidence Act says nothing about pleas but places the burden of proof in certain circumstances on an accused person. But if the prosecution has already performed that task for him, it is clearly not necessary for him or anybody else to do it all over again. For a Court to say that a fact is not proved, which, after considering the matters before it, it confidently believes to exist is to stultify itself and to go contrary to the dictates of common sense and the definition of proof in Section 3 of the Evidence Act.'

This view is also supported by the observations inIn the matter of Kali Charan Mookerjee, 11 Cal LR 232 which is a Bench decision of the Calcutta High Court. A contrary view was taken in Queen-Empress v. Timmal, ILR 21 All 122, but this was again modified to a certain extent in King Emperor v. Wajid Husain ILR 32 All 451. In Wajid Hussain's case the learned Judges observed:

'While we agree with what was laid down in ILR 21 All 122 we also hold that circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record; but there must be evidence upon which such circumstances can be found to exist.....' It, therefore, appears that where there are circumstances proved in the case whether by the prosecution or the defence to make an exception applicable it is immaterial from which side that evidence is placed on the record, and the benefit of these circumstances cannot be denied to an accused on the ground that he did not plead the exception.'

11. In another Calcutta case Kuti v. Emperor : AIR1930 Cal442 it was held that where it was clear from the cross-examination that an exception was being pleaded but the accused himself did not do so it amounted to a misdirection to the Jury when the trial court asked them not to consider this plea as it was not the stand of the accused. In this case also the counsel for the appellant was all the time pleading an exception and the trial court erred when it did not consider this plea. The law does not prevent an accused from taking even an alternative plea and the court cannot confine its attention to the plea advanced by the accused

himself and ignore the other plea which is manifest from the cross-examination even though it is fully made out on the evidence. No doubt in such a case the plea assumes the aspect of an argument but it must prevail if it is supported by evidence. We are, therefore, satisfied that the first question framed by us must be answered in favour of the appellant.

12. We will now take up the second question and mention the facts proved in the case.

13. We find that the prosecution came forward with the allegation that an illicit intimacy was suspected by the appellant between his wife and the deceased. It further collected evidence to prove that the appellant went to Kanpur and held a Panchayat there. It further proved that the appellant shifted from Nishatganj to the Government House orchard and, therefore, the deceased could not- have had any reason to come to the house of the appellant. We have mentioned above that the deceased was no relation of Shrimati Kamla. He was a maternal cousin of the appellant and if the appellant did not want that he should come to his houses, he had no business to go there.

Lastly, it has proved that at the time of the commission of the crime the appellant was taunting the deceased with the illicit intimacy which he was carrying on with his wife. The only fact which is wanting is that the prosecution did not admit specifically that there was actually illicit intimacy between the deceased and Shrimati Kamla. In our opinion the circumstances mentioned above cannot leave any doubt in any reasonable mind that the persistence of the deceased in coming to the house of the appellant even in his absence could have been due to no other reason but because he was carrying on an intrigue with Shrimati Kamla.

The appellant did not take any drastic action against the deceased in the beginning. The first tried to get rid of his wife and then he shifted his place of residency yet the deceased kept on visiting his house in his absence. These circumstances lead only to one conclusion, namely that the deceased was having an illicit intimacy with Shrimati Kamla, the denial of Shrimati Kamla or even the denial of the appellant himself cannot take away the evidentiary value of these circumstances.

14. We have now to consider whether the circumstances proved amount to a grave and sudden provocation or not. There are innumberable cases where it has been held that where the husband surprises his wife in a compromising position with another man, it amounts to a grave and sudden provocation. In other words where knowledge that his wife is unfaithful to him comes all of a sudden to the husband, it is considered likely that he may lose his self-control and act in a wild manner. The question arises whether in the absence of actually seeing one's wife in a compromising position, the sudden appearance of a lover would amount to a sudden provocation or not. In our opinion this would depend upon the background and the circumstances of the case. The law nowhere lays down that only an ocular proof can bring a conviction of illicit intimacy. Where the circumstances can be interpreted only in one way by any reasonable person the mental picture which will form in the mind of the husband by what he saw would be just as potent and powerful to disturb his mental balance and make him lose his self-control as the ocular proof itself. In Desraj v. Emperor, 29 Cr. LJ 454 (All) the accused found his wife seated on the same cot with a man whom he had expelled from his house only a day previously and losing his self-control he killed her. It was held that he must be considered to have received a grave and sudden provocation. We do not see any difference between finding the lover inside the house and finding himself seated on the same cot. Both these circumstances in the background of other facts were sufficient to convince the absent husband about the infidelity of his wife and provoke him to an ungovernable rage. The subsequent act of killing was, therefore, not the outcome of any brutal and diabolical malignity but a consequence of human frailty to which all are liable.

15. Where the husband is living in a fool's paradise and thinks that the illicit intimacy which might have existed earlier had ceased to exist because of the changed place of residence or other circumstances and then suddenly he finds that he was mistaken in his belief and this intimacy was continuing all the time, this in our opinion would amount to a sudden knowledge which would come as a shock to him. The appellant when he came to reside in the Government House orchard felt that he had removed his wife from the influence of the deceased and there was no more any contact between them. He had lulled himself into a false security. This belief was shattered when he found the deceased at his hut when he was

absent. This would certainly give him a mental jolt and as this knowledge will come all of a sudden it should be deemed to have given him a grave and sudden provocation. The fact that he had suspected this illicit intimacy on an earlier occasion also will not alter the nature of the provocation and make it any the less sudden. We, therefore, accept the contention advanced by the counsel for the defence that the circumstances established in this caseprove that the appellant when he killed the deceased had lost his self-control because of a grave andsudden provocation.

16. For the reasons given above, we think that an offence under Section 302 I. P. Code is not made out against the appellant. His conduct is protected by Exception I to Section 300 I. P. Code.His offence fells under Section 304 I. P. C. and he can be convicted only under this section.

17. It is to be determined now as to what sentence should be imposed upon the appellant under Section 304 I. P. Code. We feel that the appellant was really a victim of circumstances and his own fault was only to this extent that he could not control himself better and he became absolutely wild. The deceased pursued the wife of the appellant even to the Government House orchard and in spite of the earlier displeasure clearly exhibited by the appellant, the deceased did not mind continuing this intimacy. He came stealthily at a time he thought the appellant would be away. Shrimati Kamla was obviously equally guilty for without her encouragement and active co-operation this intrigue could not have continued. We are, therefore, inclined to take a lenient view of the crime committed by the appellant. In our opinion a sentence of five years' rigorous imprisonment would meet the ends of justice in this case. The appellant is acquitted under Section 302 I. P. Code but convicted under Section 304 I. P. Code and sentenced to five years' rigorous imprisonment.

18. Before parting with this decision we would like to observe that it is highly undesirable that where the longest term of imprisonment is awarded to an accused person, this punishment should be supplemented by an additional sentence of fine. Tha trial court either misread the words of Section 302 I. P. Code and thought that it was obligatory to impose a sentence of fine or it was of the opinion that even

a sentence of life imprisonment was not enough and something else should be added to this sentence. This Court has expressed its view repeatedly in several cases and if we mistake not even in those cases which have come up to this Court from Lucknow. It is, therefore surprising that the observations made by this Court are not read by the lower court, for we would not go to the extent of believing that they are being deliberately disregarded. We, therefore, set aside the sentence of fine Rs. 100/- imposed upon the appellant The fine, if deposited, should be refunded.

19. With the modifications mentioned above,this appeal is dismissed.

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