

Yusuf Vs. State of U.P.

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Court : Allahabad

Decided On : Aug-30-1972

Reported in : 1973CriLJ1220

Judge : M.N. Shukla and ;K.N. Seth, JJ.

Appellant : Yusuf

Respondent : State of U.P.

Judgement :

K.N. Seth, J.

1. Yusuf has appealed against the order of the learned Temporary Civil and Sessions Judge. Bulandshahr, convicting and sentencing him to imprisonment for life under Section 302, I. P. C, and to nine months' rigorous imprisonment under Section 323/34, IPC Kalua has preferred' a separate appeal against his conviction and sentence of nine months' rigorous imprisonment under Section 323. IPC Nasib Ullah and Babu. two other co-accused, were also awarded a sentence of nine months' rigorous imprisonment, the former under Section 323/34, IPC and the latter under Section 323, IPC but they appear to have submitted to the order.

2. Nasib Ullah and Babu accused were brothers, Yusuf and Kalua were cousins. They all lived near an open piece of land known as Penth Ka Maidan within the town of Sikandarabad Nasib Ullah carried on the vocation of welding and plating

and in the course of his business he got acquainted with Mohan, a resident of Mohalla Rampura. Four or five days prior to the occurrence Mohan had given the Farshi of his Hukka to Nasib Ullah for repairs. In the morning of 8th May 1968 Mohan went to Nasib Ullah to get his Farshi, if it had been repaired. At that time the other three accused were also present there. They were asking Nasib Ullah to restore Yusuf's son to him who was missing for the preceding three or four days. Yusuf suspected that Nasib Ullah was responsible for the disappearance of his son. Nasib Ullah declined to disclose the whereabouts of the missing child unless Yusuf was prepared to restore to Nasib Ullah the latter's son. Yusuf was said to be a pick pocket and one of the sons of Nasib Ullah was alleged to be ardently attached to Yusuf accused. In the midst of the wrangle going on between Nasib Ullah on the one hand and the other three accused on the other, Nasib Ullah took Mohan aside and demanded a sum of Rs. 200/- from him so that he could get rid of the three accused by paying off that amount to them. Mohan expressed his inability to advance the amount which annoyed Nasib Ullah. He immediately shouted that the lost child of Yusuf was with Mohan and he should be made to restore the child. At that time Akhtar and Dasi happened to arrive there. Mohan continued to assert that he had nothing to do with the lost child and was wholly ignorant as to his whereabouts. Akhtar tried to intervene in the dispute, but ,as he was in a hurry to proceed to Bulandshahr, he asked the parties to wait till the evening when he would return from Bulandshahr and try to resolve their differences. At that stage Mohan left the place.

3. At about 8.00 or 8.30 P. M. accused Yusuf and Kalua went to Mohan and persuaded him to accompany them to Nasib Ullah's place. Puran. one of the sons of Mohan, also accompanied his father. Akhtar was also summoned there and once again the earlier accusation and counter accusation started. Mohan insisted that he had nothing to do with the disappearance of the son of the Yusuf. Nasib Ullah suggested to the other accused that Mohan was probably afraid of some legal action against him by the police and that he might be persuaded to restore the lost child in case some assurance in writing was given to him that no action would be taken against him. A writing to that effect was drawn up which was signed by Yusuf and handed over to Mohan. Even after receiving the writing Mohan persisted in maintaining that he knew nothing about the lost child or his

whereabouts. Realising that the parties were in no mood to come to any settlement, Akhtar left the place at about 11-30 P.M. The accused, however still kept on pressing Mohan to restore the missing child, but Mohan maintained his earlier stand that he was not aware of the whereabouts of the child.

4. At about mid-night Kunwar Pal. another son of Mohan arrived at the Maidan accompanied by Ram Lai, Shanker. Pema and two others. Kunwar Pal asked his father to return home as it was already too late. Mohan and Puran started from the place towards their house. They had hardly covered a few paces when Nasib Ullah shouted to his companions that they were sparing the man who was withholding the missing boy and were mal-treating him for no fault of his. Kalua and Babul accused thereupon assaulted Mohan with sticks. Puran rushed forward to save his father whereupon, on the exhortation of the other three accused. Yusuf whipped out a knife from his pocket and gave a blow to Puran in his abdominal region, Puran fell down and died instantaneously. Yusuf, Kalua- and Babu managed to escape, but Nasib Ullah was apprehended by Mohan and his companions. He was taken to the police station. Sikanderabad where Mohan lodged a report of the incident at 1.00 A, M. the same night. The writing, which Yusuf had given to Mohan, was also handed over to the police.

5. The Investigating Officer, accompanied by Sub-Inspector Mool Chand, immediately left for the scene of crime and found the dead body of Puran lying there. After interrogating Mohan (P. W. 1) Ram Lai (P. W. 2). Shanker (P. W. 7). Pema (P. W. 9) and others on the spot, he completed the other necessary formalities. The investigation was subsequently taken over by Sub-Inspector Mool Chand.

6. The post mortem examination on the dead body of Puran was conducted by Dr. N. R. Manjogya on 9th May 1968 at 5.00 P. M. which revealed the following ante mortem injuries:

1. Incised wound 2' X 1/2' X abdominal cavity on the right umbilicus at 11 O'clock position, horizontal from outside to inside.

2. Abrasion A' X 4' on the middle of the nose front side.

On internal examination, the peritoneum was found punctured below injury No. 1 and the abdominal cavity contained blood. The peritoneum was protruding out of the abdominal walls. Oesophagus was congested. The liver had an incised wound at the lower lobe. The pancreas and spleen were also congested and so were the kidneys. In the opinion of the Doctor death was caused by haemorrhage and shock due to the aforesaid injuries.

7. Mohan was medically examined by Dr. B. S. Gupta (P. W. 4). Medical Officer Incharge. Sikanderabad. Dispensary on 9th May 1968 at 10-35 A. M.T who found three contusions and five abrasions on his person. All the injuries were simple having been caused by some blunt weapon. The duration was given to be one third of a day.

8. The accused denied the prosecution case and pleaded that they had been falsely implicated. Babu and Kalua expressed their ignorance regarding the allegation that Yusuf's son was missing for some time prior to the occurrence. Nasib Ullah and Yusuf, however, admitted the fact that Yusuf's son was missing for some time and that Nasib Ullah was suspected to be the man behind the mischief and was chastised by Yusuf and others. It was denied by the accused that they had confronted Mohan and demanded the missing boy from him. They further denied their involvement in the incident in which Mohan had received injuries and Puran was done to death. It was suggested during the course of cross-examination of the prosecution witnesses that Mohan and Puran had received injuries at the Maidan in a melee and, it being utterly dark in the place at that hour, the real assailants could not be identified. Budh Deo (D. W. 2), an employee in the Municipal Board of Sikanderabad. was examined to prove that street lights had not been lighted on the night of occurrence before 2.00 A. M. Nasib Ullah examined Dr. R. S. Tyagi (D. W. 1). the then Medical Officer. District Jail, Bulandshahr. to prove the injuries that he had on his person when he was admitted into the jail on the morning of 10th May 1968.

9. Mohan (P. W. 1) narrated the entire prosecution story as set out above. It is apparent from his statement that originally Nasib Ullah was suspected as being responsible for the disappearance of Yusuf's son. During the conversation that

was held in the morning Nasib Ullah managed to create an impression on the remaining accused that Mohan had a hand in it and was in a position to restore the missing child of Yusuf. Mohan continued to assert that he had no hand in the mischief and was totally unaware of the whereabouts of the missing child. In order to solve the problem Mohan was again called to Nasib Ullah's place in the evening when Akhtar (P. W, 8) was also present, but his mediation did not prove fruitful. Nasib Ullah suggested to Yusuf that he should assure Mohan in writing that no action would be taken against him and Yusuf got a writing to that effect drawn up and after signing handed it over to Mohan. This document (Ex. Ka-3) contained a recital to the effect that the missing child had already been restored to Yusuf and that no action would be taken against Mohan and Nasib Ullah. This document (Ex. Ka-3) indicates that Mohan and Nasib Ullah both were considered responsible for the disappearance of the child. In view of this document, coupled with the conduct of Mohan in agreeing to participate in the evening conference, it would be reasonable to infer that he had a hand in the disappearance of Yusuf's son or was at least aware of his whereabouts. Mohan would not have agreed to go to Nasib Ullah's house in the night and retain exhibit Ka-3 with him if he was wholly unconnected with the disappearance of the child.

10. The incident in which Puran received the fatal knife blow took place soon after Kunwar Pal arrived on the scene with his companions and asked Mohan and Puran to return home. They set up and started from the place towards their house. It was at this stage that Nasib Ullah pointed to the other accused that the man responsible for the disappearance of Yusuf's child was going away. The accused had already formed an impression that Mohan had a hand in the disappearance of the child. They must have been annoyed that even after receiving an assurance in writing Mohan was walking away without disclosing the whereabouts of the missing child. Kalua and Babu started the assault on Mohan with sticks. Puran, who was standing close by, rushed forward to save him whereupon Nasib Ullah. Kalua and Babu exhorted Yusuf to beat him. On their exhortation Yusuf whipped out a knife from his pocket and struck a blow at Puran in the abdominal region.

11. The medical evidence on record leaves no room for doubt that Mohan was present at the time of the incident and had witnessed the entire occurrence. The

fact that a report was lodged by Mohan immediately after the occurrence lends support to his claim that he was present at the time of the incident. This claim is further strengthened from the fact that Nasib Ullah was also taken to the police station after effecting his arrest.

12. Ram Lal (P. W. 2) had arrived on the scene in the company of Kunwar Pal a few minutes before the incident. He stated that on his arrival he found the four accused. Mohan Lai and Puran sitting on the ground and that when the two victims started leaving the place on the request of Kunwar Pal. Babu and Kalua assaulted Mohan with sticks and when Puran stepped forward to save his father, he was given a knife blow by Yusuf. The presence of this witness on the scene is established by the fact that he had accompanied Mohan to the police station which the latter did immediately after the occurrence. He has also assisted Mohan in arresting Nasib Ullah and taking him to the police station. Mohan was an old man and could not possibly apprehend Nasib Ullah all alone unless he was assisted by a couple of other persons. From Mohan's evidence it is clear that he had left his son Kunwar Pal near the dead body of Puran. He must have been assisted by some others in escorting an unwilling man, Nasib Ullah, to the police station. We find no sufficient reason to doubt the presence of this witness at the time of the incident.

13. The prosecution also relied on the testimony of Shankar (P. W. 7) and Pema (P. W, 9). The learned trial Judge did not find it possible to accept the testimony of Shanker and we find no sufficient reason to differ from his assessment about the veracity of this witness. With regard to Pema's presence on the scene the learned trial Judge felt that it could not be accepted with as much certainty as in the case of Ram Lai but his statement also deserved weight. Pema was also one of the persons whom Kunwar Pal had collected before going to Nasib Ullah's place. It appears quite probable that when Mohan and Puran did not return till about mid-night, Kunwar Pal must have felt anxious about them and before going to Nasib Ullah's place, he must have collected some persons to accompany him. The mere fact that these persons were not armed would not indicate that they could not have gone with Kunwar Pal. Probably these people did not apprehend any serious trouble and, therefore, went there unarmed. Pema's presence on the scene was.

therefore, quite probable. Even if his testimony is not taken into consideration, that would not weaken the prosecution case or create any doubt with regard the salient features of the case.

14. In the trial Court a lot of controversy was created regarding the availability of electric light at the time of the incident. The prosecution evidence was to the effect that there were two electric poles near the scene of incident and they provided sufficient light there. It was also claimed that the night of occurrence was a moonlit night as it was the tenth day of waxing moon and the moon must be of two third of the full size. The accused examined Budh Deo who on the basis of the municipal records, deposed that the street lights had not been lighted on the night of occurrence before 2.00 A. M. Relying on this evidence, the learned Judge held that the availability of electric light at the time of occurrence was not free from doubt. He however, came to the conclusion that there was enough light provided by the moon and there was no chance of making a mistake in recognising the assailants. It must be borne in mind that the accused and the victims were sitting together for about four hours trying to solve their dispute. It is also proved from the testimony of Akhtar Hussain (P. W. 8) that there was a lantern at the place which provided sufficient light. It is also in evidence that Exhibit Ka-3 was written out _ on the spot. Unless there was sufficient light. Exhibit Ka-3 could not have been written out there. The defence suggestion that due to absence of sufficient light the real assailants could not be recognised has no legs to stand and must be discarded. On a careful consideration of the evidence on record we are satisfied that Yusuf must be held responsible for causing the death of puran.

15. Sri C. S. Saran raised the plea of grave and sudden provocation in mitigation of the offence. Exception I to Section 300, IPC reads:

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 person by mistake or accident.

Under this exception culpable homicide is not murder if the offender causes death of the person who gave the provocation or that of any other person by mistake or

accident provided the provocation was grave and sudden and by reason of the said provocation the offender was deprived of his power of self-control and the offence was committed during the continuance of deprivation of the power of self-control. It was contended that Yusuf's son was missing for the preceding three or four days and an impression had been created in his mind that Mohan had a hand in it. The protracted discussion between the parties had an assurance in writing that he would take no action, Mohan continued to deny that he had a hand in the disappearance of the child or knew his whereabouts. In these circumstances, it was contended, it was quite natural for Yusuf to have lost his self-control when he saw Mohan walking away with his son acted in the manner and if he acted in a manner which resulted in the death of Puran. the offence committed by him could not be termed murder within the meaning of Section 300, L P. C. The stand taken by the State, on the other hand, was that the case fell squarely within the purview of Section 300 'thirdly'.

16. The question that the Court has to consider is whether a reasonable person placed in the same position as Yusuf would have reacted in the manner in which the accused did. The applicability of the doctrine of provocation rests on the fact that it brings about a sudden and temporary loss of self-control. As laid down by Goddard, C. J. in *R. v. Duffy*. 1949 (1) All ER 932:

Provocation is some act. or series of acts, done by the dead man to the evidence on record does not indicate accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.

The test applied is the conduct of a reasonable person in circumstances which give rise to grave and sudden provocation. In *K. M. Nanavati v. State of Maharashtra* : AIR 1962 SC605 Subba Rao, J. laid down:

What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values -'etc.; in short, the culture, social and emotional background of the society to which an accused belongs.

Relying on this observation it was contended that keeping in mind the cultural, social and emotional background of the would not be unreasonable to hold that the conduct of Mohan in walking away with written assurance in his pocket and persisting in his denial of any knowledge about the missing boy must have caused grave and sudden provocation in which the accused lost self-control and Reliance was also placed on another rule laid down in Nanavati's case : AIR 1962 SC605 that the mental background created by the previous act of the victim may be taken into consideration in ascertaining that a subsequent act caused grave sudden provocation to cause death.

17. learned Counsel for the appellant also sought support from the following observations of Beg. J. in Akhtar v. State : AIR1964 All262 :

A greater attention is paid to the subjective condition of the particular offender under our law. and conformity to the standards of an artificial or notional or imaginary reasonable man by the offender is certainly not required under our law. We are, as I understand the law in this country, not to conjecture what an imaginary reasonable man would have done when placed in the circumstances of the accused, but we have to decide whether a particular in the circumstances found, could reasonably be held to have been and actually was so suddenly and gravely provoked as to be deprived of his power of self-' control and. therefore, get the benefit of the, exception No. 1 to Section 300, Indian Penal Code.

There can be no doubt that situated as the accused was. he must have felt annoyed by the conduct of Mohan, but the that the accused- lost his self-control when he noticed Mohan walking away, In fact the evidence points out that Yusuf remained quiet at that particular moment and did nothing which could indicate that he was provoked to such e passion that he had lost self-control. According to the eve-witnesses when Mohan started leaving the place. Nasib Ullah shouted to his companions that they were sparing the man who was withholding the missing boy and allowing him to leave. On this exhortation Kalua and Babu started the assault on Mohan with sticks. At that stage Puran stepped forward to protect his father and then the three co-accused instigated Yusuf to beat. It was at this stage that Yusuf whipped out the knife from his pocket and gave a blow which landed in the

abdominal region of Puran. But for the instigation by the co-accused Yusuf might not have joined in the assault at all. On the evidence in the case we are not satisfied that the offence committed by Yusuf was the result of grave and sudden provocation which entitled him to claim the benefit of the First Exception to Section 300, I, P. C.-

18. Another feature of the case which renders the First Exception to Section 300. I. P. C, inapplicable to the case of the appellant is the fact that the provocation did not flow directly from the victim. If some other factors emanating from other sources intervene which lead to the provocation and the fatal blow cannot be traced directly to the influence of passion arising from the conduct of the victim, the accused is deprived of the benefit of the exception in mitigation of the offence which he has committed. It is reasonable to conclude in the present case that the fatal blow which resulted in the death of Puran could not be directly traced to the influence of passion arising from the conduct of Mohan or Puran.

19. The question that we have still to consider is whether Yusuf could be held guilty of the charge of murder. The contention on behalf of the State that the offence fell squarely under Section 300 'thirdly' does not appear to be sound. In *Faqira v. State* : AIR1955 All321 it was pointed out that it was not enough to establish that the injuries were sufficient in the ordinary course of nature to cause death but it must further be established that the offender intended to cause an injury of that nature. Beg. J. observed:

To attract the provisions of Clause (3), two requirements have to be fulfilled. The first requirement is that the act by which the death is caused should have been done with the intention of causing bodily injury to any person. This requirement would not present much difficulty in most of the cases as the very fact that a person strikes or assaults another or does an act to harm another would by necessary implication point to the conclusion that he intended to cause bodily injury to that person. The second requirement of this clause is that bodily injury intended to be inflicted should be such as is sufficient in the ordinary course of nature to cause death.

It was further observed:. that to-bring an act within the four corners of Clause (3). it is not enough that the injury actually inflicted is sufficient in the ordinary course of nature to cause death. It is further necessary that the offender should intend to cause an injury of this nature. From the fact that the injury caused is sufficient in the ordinary course of nature to cause death, it does not necessarily follow that the offender intended to cause an injury of that nature. The one does not conclusively prove the other. It is possible that the offender intended to cause one degree of harm and the injury actually inflicted cause a degree of harm exceeding in violence the harm intended by him.

20. The Supreme Court in Virsa Singh v. State of Punjab : 1958 CriLJ818 has laid down that the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly':-

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; these are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Bose. J. further observed;

Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 'thirdly'. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge

that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

The law laid down in Virsa Singh's case (supra) was considered in the case of Rajwant Singh v. State of Kerala AIR 1966 SC 1874 : 1966 Cri LJ 1509 wherein it was emphasised that .apart from other factors it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. The same principle was reiterated in Harjinder Singh v. Delhi Administration. : 1968 CriLJ1023 . After analysing the evidence in the case the Court came to the conclusion that it could not be said with any definiteness that the appellant aimed that blow at the particular part of the thigh knowing that it would cut the artery and in the circumstances of the case it could not be said that it had been proved that it was the intention of the appellant to inflict that particular injury on that particular place and it was. therefore, not possible to apply clause (2) of Section 300 to the act of the accused.

21. The Supreme Court had occasion to consider the same provisions in Laxman Kalu v. State of Maharashtra : 1968 CriLJ1647 , In that case a single injury was inflicted on the deceased with knife 2' below the outer 1/3 of right clavicle on the right side of the chest and penetrated to the depth of 4' into the chest cavity. . Dealing with the question whether the offence could be covered by 'thirdly' of Section 300 of the Indian Penal Code, Hidayatullah, C. J. observed:

That section requires that the bodily injury must be intended and the bodily injury intended to be caused must be sufficient in the ordinary course of nature to cause death. This clause is in two parts: the first part is a subjective one which indicates that the injury must be an intentional one and not an accidental one. the second part is objective in that looking at the injury intended to be caused, the court must be satisfied that it was sufficient in the ordinary course of nature to cause death.

On the basis of the evidence it was held that the first part was complied with and the second part was not fulfilled because but for the fact that the injury caused the severing of artery, death might not have ensued and the ' injury which the accused

intended to cause did not include specifically the cutting of the artery but to wound the victim in the neighbourhood of the clavicle. In these circumstances Section 300 'thirdly' was held to be inapplicable.

22. In the case before us Mohan's evidence is that Puran was a couple of steps behind him when the assault on Mohan started and Yusuf was in front of him. Puran stepped forward to protect his father from the assault of Kalua and Babu. At this moment the three co-accused exhorted Yusuf to beat and on their exhortation Yusuf thrust a knife in the abdominal region of Puran. Mohan was being beaten by Kalua and Babu with sticks and it is just possible that he may not have carefully noticed the circumstances in which Puran received the fatal injury. Pema (P.W. 9), deposing about that particular moment, clearly stated that when Mohan was being assaulted Yusuf was standing towards north-west of him and when Yusuf attacked with his knife, Mohan stepped aside and the knife hit Puran. This appears to be a more probable version of the incident. The accused had no animus against Puran and they must have concentrated on Mohan whom they considered to be responsible for the mischief. Yusuf must have, therefore, tried to hit Mohan but unfortunately the blow landed on his son Puran who had stepped forward to protect his father. In these circumstances it appears to be more reasonable to hold that the injury caused was unintentional not only in the sense that it was caused to a person who was not intended to be the victim but also in the sense that the precise injury caused has not been shown to have been intended by the assailant. However, he must be credited with the knowledge that a blow with a knife was likely to result in death. A single blow was given with a knife which, according to Mohan (P.W. 1), was not visible till it was taken out of the pocket. It indicates that the knife must have been a small one. In these circumstances it would be legitimate to hold that the offence committed was culpable homicide not amounting to murder punishable under the II Part of Section 304, I.P.C.

23. Kalua appellant has been convicted under Section 323, I.P.C. and sentenced to nine months' rigorous imprisonment. Akhtar Hussain (P.W. 8) was present during the discussion between the accused and Mohan in the morning as well as during the night. He supported the prosecution case in all material particulars. According to this witness Kalua was an Imam of a Mesjid situated about six or

seven furlongs from the house of Nasib Ullah and had left the scene of incident at about 10-00 P.M. before the witness himself had left the place. This witness was declared hostile by the prosecution. The learned trial Judge discarded this part of the evidence of Akhtar Husain. We are, however, not satisfied that the learned Judge exercised his discretion properly in declaring this witness hostile and discarding his testimony with regard to the presence of Kalua at the time of the incident. Akhtar Husain's examination-in-chief was entirely in favour of the prosecution. The application that was made by the prosecution for declaring him hostile contained two allegations against him. One was that his assessment of distance of the electric pole from the place of incident was wrong and secondly that his statement with regard to Kalua was also incorrect. A witness cannot be treated as hostile merely because his evidence is favourable to the other side. A hostile witness is one, who, from the manner in which he gives evidence, shows that he is not desirous to give the truth to the court. The fact that the witness was willing to go back upon his previous statement would be one of the circumstances which may lead to that conclusion, but the mere fact that the evidence of a witness tends to be favourable to the accused of what is elicited by the defence in cross-examination would not be a valid ground to declare such a witness as hostile. There is no principle that a witness, who is not partial or partisan to the prosecution, is to be treated as hostile. Akhtar Husain had gone to the extent of deposing in favour of the prosecution with regard to the presence of electric light at the time of incident when it was fully established from the evidence on record, which has been relied upon by the learned Judge, that there was no electric light at the time of the incident. Akhtar Husain had not previously made any statement either during his examination under Section 161. Cr.PC or in his statement before the committing Court that Kalua was present at the time of the incident. There was therefore, no contradiction in his statement at the trial and any previous statement made by him in that connection. We are not prepared to treat Akhtar Husain as a hostile witness and discard his testimony with regard to the presence of Kalua at the time of occurrence. He appears to be a reliable witness and there is no reason to doubt that he had been won over by the defence and was not telling the truth when he stated that Kalua had left the place before the incident. In view of this evidence, the prosecution case against Kalua has not been proved beyond

reasonable doubt and he must be acquitted. .

24. In the result criminal appeal of Yusuf is partly allowed His conviction under Section 302, I.P.C, is set aside. Instead he is convicted under Section 304, Part II. I.P.C. and in view of the circumstances of the case we are inclined to take a lenient view of the matter and award him a sentence of five years' rigorous imprisonment. His conviction and sentence of nine months' rigorous imprisonment under Sections 323/34, I.P.C. are maintained. The sentences shall run concurrently. He is in jail. He shall serve out the sentences awarded by this Court.

25. The appeal of Kalua is allowed. His conviction and sentence under Section 323. I.P.C. are set aside. He is on bail. He need not surrender. His bail bonds are discharged.

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