

Afsar Mian Vs. State

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Court : Delhi

Decided On : Feb-21-1973

Reported in : 1974CriLJ834; ILR1973Delhi68; 1973RLR515

Judge : P.S. Safer, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300

Appeal No. : Criminal Appeal No. 159 of 1972

Appellant : Afsar Mian

Respondent : State

Advocate for Pet/Ap. : R.S. Sareen and; D.R. Sethi, Advs

Judgement :

Safeer, J.

(1) The appellant has come up against his conviction under section 307 of the Indian Penal Code, hereafter called 'the Code' on acct of which he was sentenced to 4 years rigorous imprisonment by Shri J. D. Jain, Addl. Sessions Judge, Delhi on the 11th of January, 1972.

(2) P.W. 1 Khatoon Begum wife of the appellant had suffered the injury which ultimately led to the conviction. The prosecution case can best be appreciated in

the light of her deposition. According to her, appellant had been involved in several theft cases and was sent to jail where he had to serve sentences. On being released he met P.W. I in February, 1970. At that time Khatoon Begum had shifted to a residence in Bhagwan Nagar. She was residing there along with Shakar son of Amid Hasan (P.W. 4), Hasan Shahid Khan son of Munshi Ahmed Hassain Khan (P.W. 13) and the members of their families. Khatoon Begum's daughter from her previous husband was also residing with her. When the appellant met her after his release from jail he was told that Public Witness I had been living in conditions of utter privation and had at one time shifted to Durgah Sharif Nizamud-din where she had met one Ali Musa who began providing her with embroidery work for which Ali Musa used to bring her the money from those for whom she did the embroidery work. In spite of her request that he should take to some vocation the appellant did not start any work out of which he could have made out a living for the family. He, however, wanted his wife to shift from her residence to live along with him elsewhere. She allegedly told him that he was doing nothing and may go to jail again at any time for any offence. That started estrangement between them. Public Witness 1 admitted that the appellant accused her of illicit connections with Ali Musa. It is important to notice that the accusation was leveled against her just after about 15 days of the return of the accused from jail.

(3) The occurrence in this case took place on the 18th of April, 1970. The rebuke given by Khatoon Begum that the appellant may at any time go back to jail preceded the accusation that she was having illicit relations with Ali Musa. Khatoon Begum tried to explain to the appellant her relations with Ali Musa. Her statement in that behalf may be noticed :-

'I tried to explain to the accused that his misgivings were not justified and that I had no illicit connections with Ali Musa. I also told him that I had to subsist with the help of someone and earn livelihood. I refused to stop visits of Ali Musa as desired by the accused saying that I was much indebted to him. For about 8 or 10 days Ali Musa did not give me any embroidery work but thereafter he again provided me with work at my request.'

(4) It is apparent that the appellant had spent sometime in jail and after the release he found that his wife was unresponsive and was having intimation with Ali Musa who according to her was her benefactor and was providing to her the means of livelihood. It is established that he asked Public Witness I to cut off her connections with Ali Musa but she refused.

(5) The actual occurrence as described by Khatoon Begum may be noticed :-

'ON 18th February, 1970 at about 10.15 A.M., again said on 18th April, 1970 at about 10.00 P.M. I was present at my house, when Ali Musa came to my house with some embroidery work and some money for payment to me. The accused was not present at my house at that time as he had left my house about a week before that after quarrelling with me. After 5 or 10 minutes of the arrival of Ali Musa, while I was still talking with him and I was receiving money from him the accused arrived there. Shahid Hussain and other members of his family were present in the room and taking meals. I was preparing a batel leaf for myself when the accused came there. The accused asked me loudly to stand up. I asked him 'why' and on my saying so he dealt a kick with his foot which hit me on the left side of my neck, below the chin. Some blood oozed out of the injury sustained by me. I then stood up. As soon as I got up the accused stabbed me with a knife on the abdomen. The knife had been kept by the accused in the fold of his 'pyjama'. I caught hold of the hand of the accused, with which he had dealt knife blow to me. I sustained an injury on the left side of my abdomen which started bleeding. I raised an alarm but the accused gave another knife blow on my left fore-arm. Ali Musa was present there. Shahid and Shakar rushed to the place of occurrence and secured the accused from behind. They also snatched the knife from the accused and saved me.'

The significant part of the deposition is that the appellant came at a time when Public Witness 1 was in conversation with Ali Musa and was actually receiving money from him. The accused did not open the attack at once. Instead of doing that he asked her in a loud voice to stand up. She allegedly asked him as to why should she do that. On that he is alleged to have dealt a kick which hit on the right side of her neck. The accused, did not make any effort to inflict any injury on her

person till she actually stood up. On receiving the kick she stood up and as soon as her whole profile became available to the appellant he gave the knife blow on her abdomen. In her sitting posture the appellant could have given her a blow. There was deliberation in him, however, to obtain Khatoon Begum in a posture which could offer the choice of target.

(6) The knife was snatched from the accused at the spot and after being apprehended he was handed over to the police. At the trial Khatoon Begum identified the weapon of offence and it was exhibited as Ex. P. 1. After receiving the injury she tied her belly with her 'duppatta'. She was removed to the hospital where the injury was examined.

(7) Since the accused has come up against his conviction under section 307 of the Code, the relevant part of the statement of Dr. H. S. Walia, who performed the operation which allegedly saved Khatoon Begum's life, may be noticed :-

'On operation she was found to have perforations numbering 4 in the jejunum with tear in the omentum. The nature of injury was, therefore, given by me as grievous. She would have died of the injury had she not been operated upon well in time.'

In his cross-examination, the same witness stated :--

'The wound in this case was going into the abdomen resulting in an injury to the small bowel. By 4 perforations in the jejunum and tear in the omentum. I meant injury to the small bowel. It was the injury which could have produced peritonitis and caused death irrespective of whether there was profuse bleeding. In fact there was not much bleeding in this case.'

(8) In order to determine whether the offence would be covered by section 307 of the Code or not, the ingredients contained therein have to be noticed. The provision, is :-

'S. 307. Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may

extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.'

Where a Court is able to find that the act of the accused in causing the injury in the circumstances of the particular case was either with such intention or such knowledge that if by that act the culprit caused death he would be guilty of murder then he will be liable to be punished under the afore-quoted provision. The Court will have to consider all the circumstances established in the case in order to find whether the accused had the intention or knowledge which would bring home to him the guilt within section 307 of the Code.

(9) P.W. I's version of the incident was supported in all essential details by the testimony furnished by Public Witness s. 4 and 13. Shakar Public Witness 4 and Hasan Shahid Khan Public Witness 13 were present in the very room where Khatoon Begum was sitting and where Ali Musa was conversing with her and passing money on to her. They heard whatever was said or done by the appellant or Khatoon Begum. They saw the injury being inflicted and they were the persons who rushed at once to apprehend and disarm the appellant. It was alleged against Ali Musa that he had illicit relations with Khatoon Begum. There was no such allegation either against Public Witness 4 or Public Witness 13. It has not been brought out that they had any reason for falsely deposing against the appellant and implicating him.

(10) The appellant was given the chance of explaining the case made by the prosecution when he was examined under section 342 of the Criminal Procedure Code. It is significant that when it was put to him that he had suspected intimacy between Khatoon Begum and Ali Musa, he denied such knowledge. He denied that he gave any knife blow. It is amusing that when it was put to him that the stabbing by his knife was so severe that intestines of Khatoon Begum came out from the stomach, he answered that there was no such evidence against him that the intestines of Khatoon Begum had come out. When it was put to him that he had been arrested at the spot, he gave an evasive answer. He stated :-

'POLICE had taken the injured to the police, this part is correct. The rest is incorrect. I along with others were taken to police station.'

What the accused really meant to convey was that the injured had been taken to the hospital and he had been taken along with others to the police station. However the evasive denial the appellant admitted that he was taken by the police from the spot of occurrence to the police station. Answering the question as to why the case had been set up against him he stated that he had been falsely implicated because Ali Musa wielded lot of influence with the police. He gave no explanation regarding the injury which Khatoon Begum had suffered and asserted that there was no evidence that the injury was grievous.

(11) It is found in the deposition of Public Witness 1 that she had been told by the appellant to cut off her connections with Ali Musa. Appearing as Public Witness 2 Ali Musa not only described graphically the incident which took place on the 18th of April, 1970 but also admitted that he had overheard the accused earlier asking his wife as to why I was visiting her house. His deposition in cross-examination, was:-

'I overheard the accused asking his wife as to why I was visiting her house. I saw them quarrelling only once or twice on my visits to her house.'

After scrutinising the testimony of Public Witness 1 to 4 and 13, I am led to the conclusion that the appellant had taken exception to the relations which Khatoon Begum had in his absence developed with Ali Musa and had requested her to cut off all connections with Ali Musa.

(12) Even though the appellant had not in his statement under section 342 of the Criminal Procedure Code rendered any explanation which could be utilised for setting up the plea on his behalf that he acted out of grave and sudden provocation, I put it to the counsel appearing before me as to whether the actual giving of the blow which caused the injury was or not the result of any grave and sudden provocation which on the record as it stands may be taken into consideration because as soon as the appellant went inside the room on the 18th of April, 1970 at about 10.00 P.M. he found that Ali Musa was actually passing on

some money to his wife and she was receiving it. Mr. Sethi appearing for the State has brought to my notice the observation contained 7/7 Emperor v. Upendra Nath Das Air 1915 Cal 773, (1) to the effect that the burden of proving the circumstances bringing the case within the first exception in Section 300 Indian Penal Code lies on him who invokes it and it is for him to give the full and true account of the transaction from which the charge has arisen against him. I find that two provisions come in for consideration. Exception I in section 300 of the Code is:-

'EXCEPTION 1. 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.'

'IN my view the exception would be applicable to the cases where the offence is sought to be made out under section 307 or section 308 of the Code.'

(13) I must record that Mr. D. R. Sethi has given fair assistance in pointing out the illustration to section 308 of the Code in that behalf. Section 335 of the Code, however, does not depend upon any exception. The provision, is:-

'S. 335. Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation shall be punished with imprisonment of either description for a term which may extend to four years, or with the fine which may extend to two thousand rupees, or with both.'

The law laid down in Air 1915 Cal 773 will obviously have no applicability to a case falling under section 335 of the Code.

(14) Even otherwise I am of the view that where there is enough of evidence on the record calling upon the Court to consider whether the benefit of Exception I in section 300 of the Code be given to the accused or not as a matter of duty it will not ignore it because of any omission in the statement recorded under section 342

of the Criminal Procedure Code. Where an accused person renders the proof to plead the exception or the proof is otherwise available on the record the Court has to deal with the case as it may have been established. In Babu Lal v. State. : AIR1960 All223 the observation, was :-

'WEare, thereforee of the opinion that where the prosecution case itself indicates that an exception is applicable in favor 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.'

I am in agreement with that view. It is however, to be found whether the accused acted in such circumstances which attracted Exception 1 in section 300 of the Code. Several cases have been cited before me, but it is significant that in K. M. Nanavati v. State of Maharashtra, : AIR 1962 SC605 the Court took into consideration English as well as Indian decisions pertaining to numerous cases where it had been pleaded that the benefit of the afore-mentioned exception be given to the accused. In that case K.M. Nanavati, the appellant before the Court, on April 27, 1959, suffered a shock from the confession made by his wife Sylvia that she had developed intimacy with one Ahuja. Nanavati who , employed with the Indian Navy then went to his ship and on a false pretext obtained a semi-automatic revolver, which he loaded with six cartridges. Thereafter he went to the residence of Ahuja where he found him in his bed room. According to the prosecution on finding Ahuja in the bed room Nanavati shot him dead. In his statement under section 342 of the Criminal Procedure Code, accused Nanavati adopted a precise plea which attracted exception 1 in section 300 of the Code. He stated that on receiving the confession he had asked his wife whether Ahuja would marry her and look after the children and that his wife did not give any clear indication to that effect. On the other hand Sylvia allegedly pleaded that Nanavati should not go to Ahuja's house stating that Ahuja might shoot hint. That part of the Explanationn was probably given by Nanavati in order to establish justification for his obtaining a semi-automatic pistol from the ship. He then proceeded to explain that when he actually went to Ahuja's flat, he asked him whether he would marry Sylvia and look after the children but Ahuja retorted, 'Am I to marry every woman I sleep with?' Nanavati narrating that stated that he became enraged and put aside

the envelope containing the revolver on a cabinet and threatened to thrash the deceased. According to him Ahuja made a sudden move to grab the envelope and it was then that Nanavati whipped out his revolver telling him to get back. Grappling and struggle ensued in the course whereof allegedly two shots went off accidentally hitting Ahuja resulting in his death.

(15) The Explanation rendered by Nanavati was meant not only to attract exception 1 in section 300 but also to plead in the alternative that Ahuja's death had resulted from accidental shots. The Supreme Court being concerned with exception 1 in section 300, discussing the numerous cases in detail in paragraph 81 of the judgment posed to itself the question as to whether a reasonable person in the same position as the accused was, would have reacted to the confession of adultery by his wife in the manner in which the accused did. The observation made by Viscount Simon L.C. in 1942 Appeal Case 1 in respect of the doctrine of provocation was noticed.

(16) The passage occurring in the address of Baron Parke to the jury in *R. V. Thomas* (1837) 7 C&P; 817 extracted in *Russell on Crime*, 11th Edition, Volume I at page 593 was also quoted, and I consider it proper to produce it here:-

'BUT the law requires two things: first that there should be that provocation: and secondly that the fatal blow should be clearly traced to the influence of passion arising from that provocation.'

In paragraph 85 of the judgment, the Supreme Court observed:-

'PARA85. The Indian law, relevant to the present enquiry, may be stated thus: (1) 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. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to S. 300 of the Indian Penal Code. (3) 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. (4) 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.'

(17) After hearing the learned counsel appearing on both sides and giving my deepest thought to this case as well as to the scope of Exception 1 in section 300 of the Code, I am of the view that in order to invoke the benefit of the Exception, circumstances must be established which may lead to the only conclusion that the act of violence was a simultaneous reaction to an act or a situation which enured for the purpose of causing grave and sudden provocation. Grave and sudden provocation in the assailant is intimately co-related to the act or omission either on the part of the injured or someone else which may occasion a mental state in which a normal person could lose his control over reason. Grave and sudden provocation would be there, where the Court can find that the act which caused it was such which infuriated the assailant so as to eliminate the control over faculties of reason and contemplation. Where it is shown that the assailant had a period of time during which he could contemplate over the act which may be the alleged source of grave and sudden provocation then it will have to be seen whether he had not pondered over every aspect and conceived criminal intention to take revenge. In the instant case. after his release from the jail, the appellant began to suspect that his wife had illicit connections with Ali Musa. He reprimanded her. Instead of incurring grave or sudden provocation he requested her to cut off all relations with Ali Musa. Whatever irritation the alleged illicit connections may have caused, the appellant reprimanded his wife. There was enough of time in the month of March, 1970 for him to decide as to what was he going to do in order to handle the situation arising out of the intimacy prevailing between his wife and Ali Musa. The appellant on the 18th of April, 1970 at 10.00 p.m. went armed with the weapon of offence. He saw his wife conversing with Ali Musa and receiving money from him. Both of them were sitting. If the passing of money provided grave and sudden provocation the appellant would have at once attacked Ali Musa or his wife. Instead of doing that, he asked Khatoon Begum in a loud voice to stand up, I am persuaded that in the peculiar situation in which Ali Musa and Khatoon Begum were found sitting, it was not possible for him to inflict any injury on a vital part of the body in accordance with his preconceived intention to take revenge. When

Khatoon Begum did not respond and did not stand up the appellant gave a kick on her neck and she stood up. The appellant had deliberated that he will use the knife when the profile of the victim would be available to permit the choice for inflicting the blow which could achieve revenge. As soon as Khatoon Begum got up she was given injury on her abdomen. According to Public Witness 5 if he had not operated upon her she would have died.

(18) Persuaded as I am, I find that there was sufficient period for the appellant to contemplate and devise the manner in which he was to take revenge and that even on finding that Ali Musa was conversing with Khatoon Begum and passing the money on to her he did not receive any grave or sudden provocation and selected the infliction of injury only after he was able to get Khatoon Begum in a standing posture. In such a case no benefit of Exception 1 in section 300 of the Code can be given to the appellant.

(19) I do not find any scope for interfering with the appellant's conviction under section 307 of the Code. The appellant has been sentenced to 4 years' rigorous imprisonment. Even though the benefit of Exception 1 in section 300 of the Code is not available to him this is a case in which the husband stabbed his wife in peculiar circumstances. Howsoever had he may have been on coming out of the jail it was intolerable to him to find that his wife had turned unfaithful during his imprisonment. There was no justification for the offence, but I am persuaded that this case calle for reduction in sentence. It would meet the ends of justice if the sentence is reduced to 2' years' rigorous imprisonment. With that modification, the appeal is dismissed.