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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 182/2002

Reserved on: February 05, 2018

Decided on: February 19, 2018

SURESH KUMAR

..... Appellant

Through: Ms. Saahila Lamba, Amicus Curiae
and Mr. Rajeev Gaur Naseem, Advocate.

versus

STATE OF DELHI

..... Respondent

Through: Ms. Kusum Dhalla, APP.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I. S. MEHTA**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 28th February 2002 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No.13 of 1999 in FIR No.433/1998 registered at Police Station ('P.S.') Moti Nagar convicting the Appellant for the offence of the murder of his wife, Mamta (deceased), punishable under Section 302 IPC and the order on sentence of the same date sentencing him to imprisonment for life and a fine of Rs.2,000/- and in default of payment of fine to undergo rigorous imprisonment (RI) for one year.

Case of the prosecution

2. The prosecution case began with Head Constable (HC) Ramphal (PW-2)

telephonically informing P.S. Moti Nagar at around 11:30 p.m. that at House No.11/10 Moti Nagar, a man had stabbed his wife and that police officers and an ambulance should be sent to the spot. The said information was entered as DD No.21-A and handed over to Sub Inspector (SI) Hem Chand (PW-8), who along with Assistant Sub Inspector (SI) Azad Singh (PW-14) and Constable (Ct.) Mukesh Kumar (PW-13) reached the spot. There they were met by PW-2 and Ct. Raj Kumar (PW-7). They found the deceased in the kitchen of the house, lying in a pool of blood.

3. Leaving PW-2 and PW-7 at the spot for protection of the crime scene, PW-8 along with PW-13 and PW-14 removed the deceased in a police ambulance to the DDU Hospital. As the doctors at DDU Hospital were on strike, the deceased was taken to the ESI Hospital where she was declared as brought dead. PW-8 then returned to the spot along with the other two policemen.

Investigation

4. PW-2 made a statement that he and PW-7 were on patrol duty in the Moti Nagar area. At around 11:25 p.m. on the intervening night of 13th -14th September 1998, they reached block 11 of Moti Nagar where one person informed them that a man was beating his wife. On receiving this information, PW-2 reached house No.11/10 Moti Nagar along with PW-7. They heard the cries of a woman from within the house. When they reached inside the said house, the Appellant came out of the kitchen with a blood stained knife in his right hand. He was saying that he had killed his wife as she was harassing him on a daily basis. The Appellant tried to run but he

was caught by PW-2 and PW-7 and the knife was snatched from his hand. PW-2 stated that they found the deceased lying in the kitchen in a pool of blood. They tried to call the neighbours but none came forward and no vehicle was also available nearby. It was at this juncture that PW-2 had called the police and asked for medical assistance. On the basis of the above statement, *rukka* was prepared and an FIR for the offence under Section 302 IPC was registered.

5. The Station House Officer (SHO) of PS Moti Nagar at the time, Inspector M.L. Sharma (PW-17) reached the spot at 3 pm. Knife was produced before him by PW-2 and he prepared a sketch thereof. Thereafter he took it in his possession and parcel was sealed. Since it was a case of murder, investigation of the case was automatically transferred to him for further investigation. PW-17 got the spot photographed, lifted the blood sample, the blood stained floor and earth sample, sealed them with the seal of ML and took them into possession. He prepared the rough site plan (Ex.PW-17/A). The Appellant was arrested at the spot and his personal search was conducted. His disclosure statement (Ex.PW1/C) was recorded. The blood stained clothes of the Appellant were seized and sealed.

Post mortem

6. The post-mortem of the deceased was performed by Dr. Sarvesh Tandon (PW-11) at 2 pm on 14th September 1998. The external injuries noted were as under:

“1. Incised penetrative wound (IPW) 2 x .2 cm size over right side chest both angles acute obliquely transfers 7 cm to the right of midline 10 cm below right nipple sharp edges clean cut margins deep.

2. IPW 1x.4 cm size over right side chest .2 cm to the right of midline 15 cm above umbilicus, characteristics same as in one.
3. IPW 1.2 x 0.5 cm size over left side of body 4 cm to the left of midline 9 cm below left nipple vertical on dissection only 3 cm down into the fat and ending there.
4. IPW 2.5 x 0.2 cm size transverse 4 cm above and outer to left nipple on left side of chest between 2nd and 3rd ribs, characteristics same as in one.
5. IPW 1.8 x 0.8 cm size over the outer side of left side of chest 11 cm Below left auxilliam in straight line between 7th and 8th ribs, characteristics same.
6. IPW 1.1 x 0.4 cm size over outer side of left vertical 3 cm deep into muscles, characteristics same.
7. IPW 1.6 x 0.4 cm transverse 3 cms above left knee over front of thigh one angle acute other optus cutting muscles and coming out of injury no.8 sharps edges clean cut margins.
8. IPW 2 cm x 0.4 cm size vertical communicating with injury No.7 over outer side of right thigh in lower part.
9. Abrasion 6 cm long scratch from over middle of front of right thigh by the point of a sharp edged weapon.
10. IPW 2 cm x 0.4 cm size transverse over upper part of right side of chest 4 cm to right of midline 12cm above right nipple. Deep characteristics same as in injury No.1.
11. IPW 3 x 1 cm size transverse over outer side of right forearm. 6 cms below right elbow both angle acute communicating with injury No.12.
12. IPW 2.5 x 1 cm size 3 cm above and right to injury No.11

communicating with injury No.11 both angles acute sharp edge.”

7. As far as internal examination was concerned, the chest revealed the following injuries:

“Chest – Cavity was full of blood.

Injury No.1 was 7 cm deep from the surface cutting the soft tissues and muscles only.

Injury No.2 was only 3-5 cm deep from the surface cutting soft tissue and muscles only.

Injury No.4 was 10 cm deep from the surface between 2nd and 3rd rib cutting soft tissue and muscles and entering the upper lobe of left lung and ending in its substance.

Injury No.5 cutting soft tissue and muscles between 7th and 8th ribs cutting the left dome of diaphragm and spleen sharply, 11 cm deep from the surface.

Injury No.10 cutting the soft tissues and muscles between 2nd and 3rd rib cutting the upper lobe of right lung coming out of it and entering superior vena cava and cutting it 14 cm deep from the surface.

Both pleural cavities full of blood. Both the lungs were sharply cutting.”

8. As regards the abdomen and pelvis it was noticed as under:

“Cavity was full of blood. Spleen was sharply cut. Rest of the organs were pale. Stomach about 100 m. semi digested dark colour food. Urinary bladder and rectum were empty. Uterus was small was non gravid.”

9. The opinion as to the cause of death was haemorrhagic shock due to injuries to thoracic and abdominal visceral organs caused by sharp edged

weapon. It was further opined that Injury No. 10 was fatal in the ordinary course of nature. All the injuries were said to ante-mortem in nature and caused by a sharp edged weapon and time of death was about 12 to 16 hours prior to the post mortem examination.

10. At the conclusion of the investigation, a charge sheet was filed and by an order dated 13th October 2000 charge was framed against the accused for the offence punishable under Section 302 IPC.

Defence of the accused

11. On behalf of the prosecution, 17 witnesses were examined. In his statement under Section 313 Cr PC, apart from denying the circumstance put to him, the Appellant claimed that he had been falsely implicated. He claimed that the CFSL report were not correct since the case property has been tampered with. Specific to DD No. 21/A the Appellant stated as under:

“It is incorrect as a matter of fact I along with neighbours had gone to report the matter to the police as I found my wife in an injured condition. Police came to the spot along with me and thereafter they fabricated this DD entry.”

Impugned judgment of the trial Court

12. By the impugned judgment dated 28th February 2002 the learned ASJ came to the following conclusions:

(i) The evidence of PW-2 and PW-7 was convincing. There was no reason for them to falsely implicate the Appellant. Merely because PW-2 and PW-7 were police officials their evidence cannot be discarded. Although the crime of murder had not been directly witnessed by them, the circumstances under

which the Appellant had been apprehended by PW-2 and PW-7 showed that he could have murdered his wife.

(ii) The mere fact that DD No. 21/A mentioned that one person had stabbed his wife with a knife and the Appellant was not named would not render the evidence of PWs 2 and 7 unbelievable. DD 21A was recorded when PW-2 had asked for an ambulance. It only showed that the main concern of PW-2 was to get the injured removed to the hospital.

(iii) The failure to produce the DD entries showing that PWs 2 and 7 had left for patrol duty may be a lacuna on the part of the prosecution but the benefit thereof cannot be given to the accused.

(iv) There were frequent altercations between the Appellant and the deceased for both of whom it was a second marriage. Merely because the deceased slapped the Appellant in the midst of their altercation did not justify his killing his wife with a knife. As many as ten stab injuries were found on the dead body of the deceased (Ex.PW-11/A). Therefore, this was a case of intentional killing of his wife by the Appellant. It was not culpable homicide but murder.

(v) If indeed PW-9 had noted the Appellant coming out of his house claiming that somebody had stabbed his wife, they would have taken her to the hospital first and not to the police station. The evidence of PW-9 was, therefore, not believable.

13. This Court has heard the submissions of Ms. Saahila Lamba, learned

Amicus Curiae appointed by this Court by its order dated 30th November 2017 on behalf of the Appellant. Mr. Rajeev Gaur 'Naseem', learned counsel for the Appellant was also heard. On behalf of the State, Ms. Kusum Dhalla, learned APP advanced arguments.

PWs 2 and 7

14. The first submission is that failure to prove the DD entries for PW-2 and PW-7 having left PS Moti Nagar on patrol duty made their versions doubtful. Reliance was placed on the decision in *Shekhar v. The State of NCT of Delhi 2008 (2) JCC 871* where it was held that on account of the failure to establish the DD entries in relation to the departure of police officials, an adverse inference could be drawn regarding their presence at the scene of crime. It is further pointed out that the shopkeeper from the phone of whose shop they made a call to the PS was not examined. Also none of the arrest or recovery documents were witnessed by either PW-2 or PW-7 and therefore their presence at the spot was doubtful.

15. The Court has considered the above submissions. No doubt the DD entries for departure of PW-2 and PW-7 for patrolling duty were not produced. Also, they do not appear to have attested any of the seizure or arrest documents as witnesses. However, when their depositions are carefully perused, they appear to be natural and probable. PW-2 states that while he and PW-7 were on patrolling duty, a person informed them about a violent altercation between a husband and wife at House No. 11/10 Moti Nagar. This is what made them rush there. PW-2 denied the suggestion given to him that he was not on patrol duty or that the DD entries regarding

the offence as a result of information given by him were fabricated.

16. Turning to PW-7 he too was consistent that he did go on patrol duty although there was no documentary evidence to substantiate the same. When both the depositions of PW-2 and PW-7 are carefully read it is seen that there were no inconsistencies and contradictions in their versions. Merely because the witnesses happened to be the police witnesses will not in the context of the present case justify disbelieving their credible and consistent testimonies.

17. PW-2 and 7 were not eye-witnesses to the crime but to the fact that they saw the Appellant come out of the kitchen with a blood stained knife. As two policemen on their patrolling duty, their presence at the spot was not unusual. They heard the screams of a woman coming from inside the house. Soon thereafter they saw the Appellant emerge from the house with a blood stained knife. If they wanted to falsely implicate the Appellant they could have well claimed to have witnessed the crime. Despite extensive cross examination by counsel for the Appellant in the trial Court, neither PW-2 nor PW-7 was able to be shaken from their cogent and consistent versions. Their testimonies inspire confidence about their truthfulness and reliability.

18. In this context it is sufficient to refer to the following passage in ***Girja Prasad v. State of M.P (2007) 7 SCC 625***:

“24.It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence

cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence.

25. It is not necessary to refer to various decisions on the point. We may, however, state that before more than half-a-century, in the leading case of *Aher Raja Khima v. State of Saurashtra* AIR 1956 SC 217, Venkatarama Ayyar, J. stated:

“The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration. (emphasis supplied)

26. In *Tahir v. State (Delhi)* (1996) 3 SCC 338, dealing with a similar question, Dr. A.S. Anand, J. (as His Lordship then was) stated:

“Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case.”

Other circumstances

19. Apart from the above circumstance, the report of the Forensic Sciences Laboratory (Ex PW-17/E) proved that human blood was found on the clothes worn by the Appellant at the time of his arrest. Further the blood

group of the stains on his banian and half pant matched the blood group of the blood on the clothes of the deceased.

20. The motive for the crime was the frequent quarrels between the Appellant and his wife. The neighbour Gurdial Bindra (PW-9), who has otherwise turned hostile, has also spoken to this fact. It is another matter that according to him it was the wife who was at fault. But the motive for the crime was established by the prosecution. It also provided an important link in the chain of circumstances.

21. Relying on the decision in *Shekhar v. The State of NCT of Delhi* (*supra*) by Ms. Lamba to urge that the mere fact that the blood stains on the clothes of the Appellant matched the blood group of the deceased would not by itself constitute a circumstance to find the Appellant guilty of the offence punishable under Section 302 IPC.

22. The Court has examined the said decision carefully. In that case, even the arrest of the accused and the evidence of his having led the police to the place of crime was held not to be proved. The above observation was made in that context. Here the matching of the blood group of the stains on the underclothes of the Appellant with that of the deceased is certainly a strong circumstance but by no means the only circumstance that points to the guilt of the Appellant.

Plea of alibi not proved

23. Another factor that provides an additional link in the chain of circumstances is the failure by the Appellant to make good his plea of alibi.

It is seen that under the statement under Section 313 Cr PC, the Appellant claims to have not been present when the crime took place and that he had returned home to find his wife in an injured condition.

24. The fact of the matter is that the Appellant himself has not examined a single witness to prove his alibi. The burden of proving alibi was on the Appellant and he failed to discharge it. The evidence of Gurdial Bindra (PW-9) that he saw the Appellant come out of his house stating that somebody had given knife blows to his wife, also does not help the Appellant to show that he was not present in the house when the crime was committed. According to PW-9 the Appellant took the injured wife on to his lap. PW-9 stated that the Appellant agreed to his suggestion that should they go to the PS and that subsequently they proceeded to do that after which two or three police officials came from there to the spot. This part of the testimony is wholly unbelievable. If indeed the wife had been stabbed by someone else, the natural reaction of her husband would be to seek medical help and not go to the PS.

25. Reliance was placed by Mr. Rajeev Gaur, learned counsel for the Appellant on the decision in ***Gottipulla Venkata Siva Subbrayanam v. State of Andhra Pradesh AIR 1970 SC 1079*** where it was held that even if a false plea of alibi was taken, the accused cannot be denied the benefit of the right of private defence if it is evident from the material on record.

26. The Court has examined the said decision and finds that it is not helpful to the Appellant. Here the Appellant has not pleaded the right of private defence at any stage including in this Court. As regards the plea of alibi,

there is no material on the basis of which it can be concluded that the Appellant was not in the house when the crime was committed. On the contrary the evidence led by the prosecution proves to the contrary.

27. In *Shaikh Sattar v. State of Maharashtra (2010) 8 SCC 430* the Supreme Court held:

“20. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case.”

28. In the same decision it was observed:

21. But it is also correct that, even though, the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the appellant. To this extent, the submission of the learned counsel for the appellant was correct. The failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be independently proved by the prosecution beyond reasonable doubt

29. In the present case, the guilt of the Appellant is not sought to be established only on account of his failure to make good his plea of alibi. It is only an additional circumstance. In any event, there is nothing in the evidence of the prosecution to suggest that the Appellant was present elsewhere at the time when the crime was committed. The Court therefore, is unable to accept the submission of the Appellant that notwithstanding him not having proved alibi, he should still be given the benefit of doubt.

Section 106 of the Evidence Act

30. The prosecution has in the present case successfully proved that shortly before the commission of the crime the Appellant was together with his wife in their place of usual residence. Under Section 106 of the Indian Evidence Act, 1872 (IEA), the burden was on the Appellant to show how his wife received the fatal injuries. In a similar context, in ***Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681*** where the wife was injured in the dwelling home where the husband ordinarily resided, the Supreme Court held:

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

Exception 1 to Section 300 IPC

31. Finally, an earnest plea was advanced on behalf of the Appellant, based on his own disclosure statement to the police, that the crime took place as a result of grave and sudden provocation of the Appellant by the deceased wife. The Appellant is stated to have returned in the evening after closing his shop, and when served his meal, complained to the deceased wife that it was not properly cooked. The deceased is supposed to have retorted that he may take his meals if he wanted to or else she would return to her parents in Rohtak. She then started packing her attaché case which the Appellant threw away. An altercation followed during which she slapped the Appellant and

he lost control by flying into a rage and stabbing her repeatedly with a knife in the kitchen. Reference is also made to the deposition of PW-9 who stated that there were frequent quarrels between the appellant and his wife in which he also tried to intervene and that the deceased was a short tempered person who could, when infuriated, “slap anyone.” It was, therefore, submitted that this was culpable homicide not amounting to murder and fell within the ambit of Section 304 Part I IPC.

32. Reliance was placed on the decisions in *Krishna Chandra Pati v. Emperor AIR 1929 Patna 201* and *Changdeo v. State of Maharashtra 1992 Cri LJ 1240 (Bom)*. In the former decision, the throwing of dirty water by the wife on the face of the husband following a quarrel was said to constitute grave and sudden provocation. In the latter decision, the Court accepted the plea that the husband lost the power of self control “due to grave and sudden provocation caused by the charge of impotency.”

33. What in effect is sought to be urged is that since the crime took place as a result of grave and sudden provocation, the benefit of Exception 1 to Section 300 IPC must be extended and it must be held that the crime is not one of murder but of culpable homicide.

34. The above plea has been considered. To begin with the Court notes that a similar plea on behalf of the Appellant was rejected by the trial Court in the impugned judgment. Secondly, the Court notes that the line of defence of the Appellant in his statement under Section 313 Cr PC was to totally deny his presence in the house when the crime took place. His stand was that when he returned home he found his wife in an injured condition. Therefore

the plea now taken in the alternative is an inconsistent one. It is doubtful whether, without leading any positive evidence to back this plea, the Appellant can rely on his own disclosure statement to the police which is otherwise inadmissible under Section 25 of the IEA. However, for the purposes of supplying the motive, and given the line of cross-examination of the hostile witness PW-9 by the Additional PP in the trial Court, it appears that the prosecution is itself accepting that there were frequent quarrels between the Appellant and his wife preceding the killing of the wife.

35. Nevertheless, it is necessary first refer to Exception 1 to Section 300 IPC which reads thus:

“Exception 1.—When culpable homicide is not murder.

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. The above exception is subject to the following provisos:

(First) —That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

(Secondly) —That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

(Thirdly) —That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.”

36. The ingredients of Exception 1 to Section 300 IPC are:

(i) The victim must be the person who gave the provocation.

(ii) The provocation must be both 'grave' and 'sudden'.

(iii) The provocation must deprive the offender of the power of self-control.

(iv) As a result of the loss of self-control the offender must cause the death of the victim by 'mistake or accident'.

37. The first proviso to Exception 1 to Section 300 IPC states that if the provocation is sought by the offender himself or it is voluntarily given by the offender as an excuse for killing or doing harm to any person, the offender will lose the benefit of Exception 1. Secondly, it is not every provocation that can be characterised as 'grave' or 'sudden'. Whether it was grave or sudden enough to prevent the offence from becoming a murder is in terms of the Explanation to Exception 1 "a question of fact."

38. In Halsbury's Laws of England 4th edition, Volume 11, paragraph 1163, page 619, the word 'provocation' is defined thus:

"Provocation may reduce a charge of murder to one of manslaughter. It consists of something done which would cause in any reasonable person, and actually causes in the defendant, a sudden and temporary loss of self-control, making him so subject to passion that he is not the master of his mind. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked, whether by things done or said, to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did must be left to be determined by the jury. In determining that question the jury must take into account everything both done and said according to the effect which, in the jury's opinion, it would have on a reasonable man."

39. In *K. M. Nanavati v. State of Maharashtra AIR 1962 SC 605*, the Supreme Court was, *inter alia*, considering the question whether “a reasonable person placed 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.” In answering the said question, the Supreme Court observed:

“In *Mancini v. Director of Public Prosecutions L.R. (1942) A.C. 1*, Viscount Simon, L.C., states the scope of the doctrine of provocation thus:

‘It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death.’

The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex v. Lesbini [1914] 3 K.B. 1116*, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.”

40. In *B.D. Khunte v. Union of India (2015)1 SCC 286*, the Supreme Court explained:

“11. What is critical for a case to fall under Exception 1 to Section 300 Indian Penal Code is that the provocation must not only be grave but sudden as well. It is only where the following ingredients of

Exception 1 are satisfied that an accused can claim mitigation of the offence committed by him from murder to culpable homicide not amounting to murder:

- (1) The deceased must have given provocation to the accused.
- (2) The provocation so given must have been grave.
- (3) The provocation given by the deceased must have been sudden.
- (4) The offender by reason of such grave and sudden provocation must have been deprived of his power of self-control; and
- (5) The offender must have killed the deceased or any other person by mistake or accident during the continuance of the deprivation of the power of self-control.”

41. The Madras High Court appears to have recognized, as part of Exception 1 to Section 300 IPC a sub-species of ‘sustained provocation’. In ***Sankaral alias Sankarayee v. State 1989 L.W. (Crl.) 468***, a Division Bench of the Madras High Court held:

"When there is positive evidence to show that there was grave and sudden provocation at or about the time of occurrence, there would be no difficulty in applying the said principles. There are other types of cases, where there has been sustained provocation for a considerable length of time and there would not have been a real sudden provocation immediately preceding the murder. In such cases, the Courts have given the benefit of Exception 1 to Section 300, I.P.C. on the ground that the provocation which is the root cause for the commission of the offence need not arise at the spur of the moment."

42. Again in ***Re Chandran 1988 Mad LW (Crl.) 113*** it was as follows:

"As the prosecution itself is relying on the confessional statement of the accused under Section Ex. P-13, we have no reservation in accepting the case of the accused that he cut the deceased on account of the sudden and grave provocation caused by the deceased and also

on account of the sustained provocation the accused has been nurturing for a long period because of the conduct of the deceased in having illicit intimacy with his wife. Hence, we hold that the accused is entitled to Exception 1 to Section 300, I.P.C."

43. However in ***Guruswami Pillai v. State 1991 (1) M.W.N. (Crl.) 153***, another Division Bench of the same High Court cautioned:

"... though technically the exceptions to Section 300I.P.C. appear to be limitative (*sic* limited) they can no longer be considered so, after efflux of time. ...Since the Code in the structure makes the exceptions limitative (*sic* limited), Courts have to show restraint or circumspection in adding exceptions and such additions should be *eiusdem generis*."

44. Likewise, another Division Bench of the Madras High Court in ***Chinnan @ Chinnaswami v. State (1995) 2 M.W.N. (Cr.) 178*** observed:

"While we accept the suggestion that the last straw could be considered as grave and sudden in a series of provocations, we are of the opinion that the last straw should at least be in the nature of provocation referred to in the earlier case reported in 1988 L.W. (Crl.) 113."

45. The key element is proportionality. The reaction to the grave provocation must be commensurate from the point of view of an even tempered and not a bad-tempered person. The Gujarat High Court, in ***Rafik Yakubhai Shaikh v. State of Gujarat 2008 Cri LJ 1851 (Guj)***, drawing on the decision in ***K.M. Nanavati (supra)*** explained further as under:

"21. It is required to be appreciated that in order to apply this doctrine and fall in the exception, the law requires both grave and sudden provocation. The word used is "and" between the words grave and sudden provocation meaning thereby it is not disjunctive would necessarily imply that before this doctrine could be applied for falling a case in the exception, the law requires that it is to be both:

i. provocation must be of a grave nature that one would lose his control;

ii. further it is to be sudden.

22. It has also been well accepted principle and the Courts have while expressing the word of caution, observed that that law cannot permit ill-temper and other abnormalities to become assets for the purpose of committing murder, for if it did, a bad tempered man would be entitled to a lighter verdict of manslaughter where a good tempered one would be convicted for murder.

46. The Bombay High Court in ***Balasaheb Ramrao Latkar v. State of Maharashtra 1984 Cri LJ 1014 (Bom)*** formulated the questions that require to be addressed as under:

“25. The question arises: if a bad tempered person warns another that he would not be responsible for consequences in case the addressee persists in giving provocation for some matter in dispute, and if the addressee does not pay heed to the warning resulting in deprivation of the power of self-control by grave and sudden provocation, could his conduct come within the ambit of Exception 1 to S. 300 of the Penal Code? In other words, while judging reactions to provocations, is it necessary to take into account the peculiar abnormal or subnormal characteristics of the offender such as exceptional excitability, pugnacity, disposition to lose his temper readily; or should the Court look at the matter objectively and try to surmise as that would have been and should have been the reaction of a normal reasonable person placed in similar circumstances and having the normal attributes of the offender?

26. We feel that the objective test must be applied as was done by the Privy Council in *Phillips v. R (1969) 2 AC 130*:

"..... the question is not merely whether in their (i.e. Lordships') opinion the provocation would have made a reasonable man lose his self-control but also whether having lost his self-control, he would have retaliated in the same way as the person charged in fact did."

An argument was addressed at the Bar before the Privy Council that a person who has lost his self-control acts with more or less faro according to the degree of provocation which caused the loss of self-control. The Privy Council rejected the argument:

"..... that loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships' view, false."

The two questions which require affirmative answers are:

- (i) Would a reasonable man have lost his self-control? and
- (ii) Would he then have retaliated as the offender did?

Shades of temper - from phlegmatic to vitriolic - would then become irrelevant in such an exercise."

47. The legal position that emerges from the above decisions is as under:

- (a) Not every act of provocation can be termed as grave or sudden. It is not enough if either exists. In other words, the provocation must be both 'grave' and 'sudden', if Exception 1 to Section 300 IPC is to apply.
- (b) It is necessary to consider whether sufficient time has elapsed since the provocation to allow a reasonable man time to cool,
- (c) The Court will have to take into account the instrument with which the homicide is effected. To kill, in the heat of passion induced by provocation, with a simple blow, is a very different from using a deadly instrument like a dagger.
- (d) The key element is proportionality. The mode of resentment must

bear a reasonable relationship to the provocation if the offence is to be reduced from murder to culpable homicide.

- (e) 'Sustained provocation' will be recognised only if the 'last straw' or the immediate act that led to the killing is in the spur of the moment and has a nexus to the past acts of sustained provocation. The Court will have to be cautious in adding further exceptions of that kind to Exception 1 to Section 300 IPC.
- (f) Ill-temper cannot become an advantage for the purposes of Exception 1 to Section 300 IPC. The yardstick will have to be that of a reasonable man and not a hyper-sensitive one. Otherwise, a bad tempered man would be entitled to a lighter sentence whereas a good tempered one would be convicted for murder.
- (g) The questions to be answered are (i) would a reasonable man have lost his self-control? and (ii) would he then have retaliated as the offender did?

48. The Court also finds that in the context of killing of a wife by the husband the provocation is usually of a really serious nature for e.g., where the husband finds the wife in a compromising position with the deceased. The decisions relied upon by the counsel for the Appellant do not account for the above legal position as explained in several decisions. The benefit of Exception 1 to Section 300 IPC is not usually extended when there is a mere exchange of hot words between spouses or for trivial acts of provocation. It cannot also be extended when the provocation was self induced. And then again, the burden is on the accused to show how his action falls within the four corners of Exception 1 to Section 300 IPC.

Not Culpable homicide

49. In the present case, even if one were to accept the narration of the Appellant in his disclosure statement to the police, the altercation begins with the Appellant provoking the deceased by complaining about the quality of food. He provokes her again by his throwing away the attaché case that she was packing. All that she did in response was to slap him. This in the circumstances outlined could not be characterised as a ‘grave’ provocation. The reaction to that from the Appellant, however, was far too disproportionate. It was not the act of a reasonable man. There were as many as 10 incised wounds on the body of the deceased. Basically he went on a stabbing spree with his knife. The loss of self-control is evident but that was not as a result of any ‘grave’ provocation. It was as a result of the Appellant being on a short fuse and not reacting like any reasonable man might in similar circumstances. He was using a dangerous weapon and he used it indiscriminately. He was ruthless and merciless in completing the endeavour of eliminating his wife. To answer the two questions posed in ***Balasaheb Ramrao Latkar*** (*supra*), a reasonable man would not have in face of such a mild provocation lost his self-control and more importantly, would not have retaliated in the manner that the Appellant did in this case.

50. The self-serving testimony of the Appellant regarding sustained provocation by the wife cannot carry his defence further. The fact that there were frequent quarrels will explain the motive for the murder. But if the Appellant wants the offence to be viewed as culpable homicide, he would still have to show that irrespective of the ‘sustained provocation’ over a certain length of time, the immediate provocation was both ‘grave’ and

‘sudden’. From the sequence of events narrated by him it cannot be said that the provocation was ‘grave’ although it might have been ‘sudden’. The Appellant has been unable to demonstrate that the offence falls within the ambit of Exception 1 to Section 300 IPC.

Conclusion

51. The Court is unable to find any error committed either in the impugned judgment of the trial Court or the order on sentence holding the Appellant guilty of the offence punishable under Section 302 IPC and sentencing him accordingly.

52. The appeal is accordingly dismissed. The bail bonds and surety bonds of the Appellant are cancelled. He is directed to surrender forthwith to serve out the remaining sentence failing which the SHO of the concerned PS should take him into custody forthwith. The trial Court record be returned together with a certified copy of this judgment.

S. MURALIDHAR, J.

I. S. MEHTA, J.

FEBRUARY 19, 2018

Rm