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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.A. 302/2018 & Crl. MB 423/2018

ANIL TYAGI

..... Appellant

Through: Mr. Pankaj Sinha, Advocate
with Mr. Mukul Dev Verma,
Advocate.

versus

STATE

..... Respondent

Through: Mr. Hirein Sharma, APP for
the State.

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

JUDGMENT

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10.05.2018

Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 22nd September 2017 passed by the learned Additional Sessions Judge-03, South East, Saket Courts ('trial Court') in Sessions Case No.2272/2016 arising out of FIR No.232/2010 registered at Police Station ('PS') Govind Puri convicting the Appellant for the offence under Section 302 Indian Penal Code ('IPC'). It also challenges the order on sentence dated 30th January 2018 whereby the Appellant was sentenced to imprisonment for life along with fine of Rs.20,000/- and in default of payment of fine, to undergo simple imprisonment for a further three months.

Case of the prosecution

2. By an order dated 15th November 2010 of the trial Court, the Appellant was charged with having committed the murder of his wife, Sunita ('the Crl. A. 302/2018

deceased"), at around 11:20 pm on 28th June 2010 at their home in Govind Puri. The case of the prosecution rested essentially on the eye-witness testimony of Ritika (PW-5), the four year old stepdaughter of the Appellant.

3. The Appellant married the deceased after his first wife died. At the time of his second marriage, the Appellant had two children by his first wife and the deceased also had two children from her previous marriage. The elder child of the deceased by her first marriage was Sachin (PW-2) and the younger child was Ritika (PW-5).

4. Information was received at PS Govind Puri at around 12:33 am on 29th June 2010, which was noted as DD No.35A (Ex.PW-23/A), that a lady at House No.743A, 3rd Floor, Gali No.7, Govind Puri was lying unconscious. This was marked to Sub-Inspector Sahiram (PW-12). Accompanied by Constable Mahender, PW-12 reached the spot where he came to know that the injured had been taken to the Holy Family Hospital by her son and brother.

5. The Medico Legal Certificate ('MLC') of the deceased (Ex.PW-15/A) revealed that she (deceased) had been brought to the said hospital at around 1:15 am by Mahender (PW-8), her brother. She was brought dead to the casualty. The MLC itself noted "alleged h/o sustained multiple stabs all over her body at her husband's home nearly at around 11:15 pm on 28/06/10. H/o beaten up, attacked by her husband Anil Tyagi as told by her son Sachin accompanied with alleged body. Son Sachin informed to his uncle on phone regarding incident."

6. Meanwhile, PW-12 received another DD No.62B (Ex.PW-23/B) through Constable Ramkesh (PW-9). That DD was to the effect that at 2 pm, information had been received from Holy Family Hospital about the death of the deceased. PW-12 met PW-2 and PW-8 who were present at the hospital. He recorded the statement of PW-2 (Ex.PW-2/A). He returned to the spot with them and sent the statement of PW-2 drawn up as a *rukka* to the PS for registration of an FIR.

Investigation

7. The crime team was called to the spot. The crime team report (Ex.PW-14/A) noted that the inspection was done between 6 am and 6:30 am on 29th June 2010. The articles lifted were noted in the seizure memo prepared by Inspector Mahender Singh (PW-20), the Investigating Officer (IO) to whom the investigation was handed over at around 4:45 am on 29th June 2010. PW-20 reached the place of the incident where he was met by PW-12, PW-2 and PW-5. PW-5 told him that the Appellant had murdered her mother in the kitchen. He then recorded the statement of PW-5 (Ex.PW-5/DA) under Section 161 Code of Criminal Procedure ('Cr PC').

8. In this statement, which was prepared in a question-answer format, PW-5 disclosed that her biological father was Rakesh Kumar. She further stated that she usually addressed the Appellant as '*papa*'. She disclosed her age to be four years. When asked what she had to say about the quarrel between her mother and the Appellant, she stated that on the night of 28th June 2010, a quarrel erupted between her mother and the Appellant at dinner time and

that she could hear the sound of beating. When she stepped out of her room, she found the Appellant attacking her mother physically. Her father grabbed PW-5 by the arm and asked her to get back into the room and watch TV. After some time, PW-5 heard the sound of her mother crying and she came out again. She saw that the Appellant had pushed her mother and was inflicting injuries on her with some object and that her mother was bleeding profusely. After sometime, her mother went silent. After sometime, her brother (PW-2) came there and she disclosed all the facts to him.

9. At around 7 pm on 29th June 2010, the IO (PW-20) received secret information that the Appellant was coming to Anand Vihar ISBT. He led a police team to the spot and at around 7:45 pm, he apprehended the Appellant at the instance of the secret informer. He was placed under arrest and his personal search was undertaken. The Appellant gave a disclosure statement (Ex.PW-10/C). At his instance, the weapon of the offence was recovered from under the wash basin sink in the kitchen. The scissors were blood stained. It was kept in a cloth *pullanda* and sealed. The clothes of the deceased were also seized. There were some fresh injuries/marks on his face and neck. He was taken to Batra Hospital for medical examination.

Post mortem

10. The post-mortem examination of the deceased was conducted by Dr. Y. Shiva Prasad on 30th June 2010. In his post-mortem report (Ex.PW-17/A), he *inter alia* noted multiple stab wounds of varying sizes spread over the left upper back, right upper back, and left lower back of the deceased. Some of the injuries were pleural cavity deep and had pierced the

lung tissues. There were also stab injuries present over the posterior aspect of the right forearm. Multiple stab wounds, around fifty in number, were found present over the sternum, xiphisternum, left hypochondrium and right hypochondrium regions. These stab wounds were of varying sizes as well as varying depths from bone deep to chest cavity and peritoneal cavity deep.

11. Later, when the weapon of offence, i.e. a pair of scissors, was shown to Dr. Y. Siva Prasad, he was of the opinion that injury nos.1, 2, 4, 5, 6, 7, 8 and 9 could have been inflicted by the said weapon and that injury nos.3 and 10 could have been inflicted by the sharp edge of one of the blades of the examined weapon. Injury no.11 was opined to be due to blunt force and was unlikely to have been caused by the examined weapon.

Statement under Section 164 Cr PC

12. On 2nd July 2010, PW-12 took PW-5 to the Patiala House Courts for her statement to be recorded by the learned Metropolitan Magistrate ('MM') under Section 164 Cr PC. In this statement, PW-5 more or less stuck to the earlier statement she made to the police. She mentioned certain additional aspects such as asking the Appellant why he was beating her mother; about her beating the Appellant with a *danda*; and her remaining unconscious despite her brother (PW-2) sprinkling water on their mother's face. She also spoke about PW-2 calling up her uncles one after the other and how PW-8 responded to the call and came to their place to take the mother to the hospital. Further, she described the weapon of offence being a pair of scissors which she did not mention earlier to the police.

13. After the investigation concluded, a charge sheet was filed. By order dated 15th November 2010 of the trial Court, charge was framed against the Appellant in the manner indicated hereinbefore.

Defence of the Appellant

14. During the trial, twenty-three witnesses were examined on behalf of the prosecution. Apart from PW-5 who more or less stuck to her earlier versions of the incident, PW-2 spoke about noticing his father having a bleeding injury on his forehead at the foot of the stairs.

15. In his statement under Section 313 Cr PC, the Appellant took the stand that he was not even present at home when the incident occurred. According to him, he had gone to his mother's house at Ghaziabad on 25th June 2010. When asked about his injuries, the Appellant denied that he had any fresh injuries on his face and neck. According to him, he had an old injury on his forehead which had been stitched up. According to him, PW-5 deposed against him as she was tutored by her maternal grandparents. When asked why he had been implicated, he answered thus:

“My two elder sons from my first wife were studying in hostel at Manav Bharti School, Mussori and my second wife children Ritika and Sachin were up to the mark in education and they resist me to get them admitted in Mussori. Hence, they all were annoyed with me, therefore, they are making false allegations against me. My son Sachin who was working with one Sardar ji for Refrigeration. I say to him not to join him, hence, he was also annoyed with me.”

16. When asked whether he had anything else to say, he answered thus:

“Mr. Ashok Sethi, brother in law (jija of the deceased, husband of her elder sister Deepa) is in possession of one shop which actually belonged to the deceased’s first husband Rakesh and deceased used to ask Mr. Sethi to handover the possession of the shop. On this point, there were quarrels scuffles a number of time between the deceased and Mr. Sethi. In my absence Ashok Sethi used to come in my house, which my landlord has informed me.”

Defence evidence

17. The Appellant then examined his mother, Kelawati (DW-1) in order to prove his plea of *alibi*. According to her, she had called the Appellant as she was unwell. According to her, the Appellant remained at her house between 25th and 29th June 2010. At around 6 am on 29th June 2010, PW-8 came there followed by some policemen who then arrested both the Appellant and his younger brother, Prem. In her cross-examination, DW-1 maintained that the Appellant and the deceased had a cordial relationship. She further stated that she had thrown the Appellant out of her house prior to his marriage and despite doing so, he used to come stay at her home along with his wife.

Impugned judgment of the trial Court

18. In the impugned judgment, the trial Court came to the following conclusions:

- (i) The prosecution had proved that there were blood stains found on the floor of the kitchen. The pair of scissors used to commit the murder were recovered from the kitchen at the instance of the Appellant. The serological and biological reports gave a positive result for human blood. There was no explanation from the Appellant as to how the blood was found in the kitchen.

- (ii) The medical evidence proved that the deceased died a homicidal death as a result of multiple stab wounds which were caused by the scissors recovered. These injuries were sufficient to cause death in the ordinary course of nature.
- (iii) The evidence of PW-5 was trustworthy and truthful and she withstood the cross-examination. The Appellant failed to prove his *alibi*. DW-1 failed to furnish any document to show that the Appellant was with her.

19. This Court has heard Mr. Pankaj Sinha, learned counsel for the Appellant, and Mr. Hirein Sharma, learned APP for the State.

Evidence of PW-5

20. Mr. Sinha first tried to demonstrate that the testimony of PW-5 was unreliable. He pointed out that in her statement under Section 164 Cr PC, PW-5 made significant improvements. In her initial statement to the police, she did not identify the weapon of offence whereas in her statement under Section 164 Cr PC, she mentioned that it was a pair of scissors. He submitted that she made further improvements to her story during her deposition in Court by stating that the Appellant was attacking her mother with scissors and a knife. In her statement under Section 164 Cr PC she claimed that she had attacked the Appellant with a *danda* whereas she had not stated that to the police earlier. According to Mr. Sinha a material improvement was made by PW-5 when she claimed while deposing in the Court that the Appellant had inserted a gas pipe in the mouth of the deceased.

21. The Court does not consider the above improvements to be material enough to doubt the truthfulness of the evidence of PW-5. The law with regard to the appreciation of the evidence of child witnesses is well settled. In ***Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5 SCC 341*** it was held as follows:

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

22. In ***Nivrutti Pandurang Kokate v. State of Maharashtra (2008) 12 SCC 565***, the Supreme Court highlighted the importance of the trial Judge having to be satisfied that the child understands the obligation of having to speak the truth and is not under any influence to make a statement. The Court explained:

“The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because

child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

23. The Court has to proceed with caution while examining the testimony of a child witness. In the present case, the core of her testimony, which is about the Appellant repeatedly attacking the deceased with a sharp-edged weapon which resulted in her death, has remained consistent throughout. The fact that PW-5 did not mention scissors in the first instance but only later and that she only mentioned a knife when she deposed in Court does not shake the core of her testimony.

24. The Appellant had sought to introduce an alternate theory by mentioning the visits of the brother-in-law of the deceased who was purportedly involved in a dispute with her ex-husband. However, this has not been substantiated. Even though the Appellant claims that the frequent visits of the brother-in-law of the deceased were in the knowledge of the landlord, the landlord himself, who was examined as PW-4, was not confronted on this aspect. PW-2, the son of the deceased, has denied this suggestion and has even stated that there was no dispute between his mother and her brother-in-law.

25. The Court sees no reason why a child as young as PW-5 would falsely implicate the Appellant. The explanation offered by the Appellant that his

children were upset with him as they were being sent away to a boarding school appears too flimsy to be believed. In any event, no question was put to PW-5 herself that she was upset with the Appellant over any issue. The concerted attempts to discredit her testimony by subjecting her to extensive cross-examination did not yield much for the Appellant.

26. The testimony of PW-5 stands fully corroborated by the medical evidence, which shows multiple stab wounds. The biological and serological reports also confirm that the bloodstains on the knife were of human origin. Her version also gets corroboration from PW-2 who reached there soon after the occurrence and to whom PW-5 conveyed how their mother had been killed. Additionally, we have the testimony of PW-2 finding the Appellant at the foot of the stairs with an injury on his forehead. Even at the time of arrest, the Appellant was found to be having those injuries. His MLC also confirms those injuries.

27. Therefore, the evidence of the child witness PW-5, having been fully corroborated by the other evidence as discussed above, is both truthful and reliable and can safely form the basis for the conviction of the Appellant.

28. As explained in ***Ramnaresh v. State of Chhattisgarh (2012) 4 SCC 257***:

“The principles stated in these judgments are indisputable. None of these judgments say that the testimony of the sole eye witness cannot be relied upon or conviction of an accused cannot be based upon the statement of the sole eye-witness of the crime. All that is needed is that the statement of the sole eye-witness should be reliable, should not leave any doubt in the mind of the Court and has to be corroborated by other

evidence produced by the prosecution in relation to commission of the crime and involvement of the accused in committing such a crime.”

Not culpable homicide

29. Lastly, it was contended by Mr. Sinha that the manner in which the offence was committed showed that it was as a result of a sudden quarrel and at the spur of a moment and, therefore, the offence would really be culpable homicide not amounting to murder falling within the scope of the first exception to Section 300 IPC.

30. In other words, Mr. Sinha seeks to persuade the Court to hold that the crime was committed as a result of grave and sudden provocation as contemplated by Exception 1 to Section 300 IPC. Although no such plea was advanced during the trial, the Court proceeds to examine it nevertheless.

31. There are several decisions of the Supreme Court and High Courts on accepting a plea of culpable homicide falling under the first exception to Section 300 IPC. In ***B.D. Khunte v. Union of India (2015)1 SCC 286***, the Supreme Court explained:

“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.”

32. In *K. M. Nanavati v. State of Maharashtra AIR 1962 SC 605*, the Supreme Court was *inter alia* considering 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.”

33. The key element is proportionality. The reaction to the provocation, which must be grave, 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 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.”

34. 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?

.....

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."

35. In *Suresh Kumar v. State of Delhi (decision dated 19th February, 2018 in Crl.A.182/2002)*, this Court summarised the legal position as under:

"(i) 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 the first exception to Section 300 IPC is to apply.

(ii) It is necessary to consider whether sufficient time has elapsed since the provocation to allow a reasonable man time to cool.

(iii) 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.

(iv) 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.

(v) '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 the first exception to Section 300 IPC.

(vi) Ill-temper cannot become an advantage for the purposes of the first exception 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.

(vii) 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?"

36. Turning to the facts on hand, the Court is unable to agree with the submission of Mr. Sinha that the crime in this case would fall within the first exception to Section 300 IPC. There is nothing to show that the victim offered any provocation to the Appellant, leave alone a 'grave' or 'sudden' provocation. There were multiple stab wounds on the vital parts, leaving the deceased with absolutely no chance of survival. If it was a single stab wound, it might still have been possible for the Appellant to argue that there was no intention to kill the deceased. However, with there being numerous stab wounds all over the body of the deceased, it is plain that the Appellant

acted in a manner wholly disproportionate to the alleged provocation, if any, from the deceased.

37. The fact remains that the Appellant never took the above plea before the trial Court. There, he chose the route of *alibi* which he could not establish. The testimony of DW-1 was obviously of an interested witness making a desperate attempt to somehow save her son from the clutches of the law.

Conclusion

38. For all of the aforementioned reasons, the Court concludes that no grounds exist to interfere with the impugned judgment and order on sentence of the trial Court. The appeal and the application are accordingly dismissed with no orders as to costs.

39. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

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