



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.70 OF 2020

Harinath s/o. Rayappa Suryawanshi,
(C/8957), Age 72 years, Occ. Labour,
r/o. Kelgaon, Tq. Nilanga, Dist. Latur
Presently serving his life sentence
at Central Jail, Harsool, Aurangabad

..Appellant

Vs.

The State of Maharashtra,
Through Police Inspector,
Nilanga Police Station,
Nilanga, Dist. Latur

..Respondent

Mr.Mukul Kulkarni, Advocate for appellant
Mr.B.B.Bhise, APP for respondent

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
DATE : MARCH 22, 2024**

JUDGMENT (PER R.G.AVACHAT, J.) :-

The appellant, vide judgment and order dated 02.07.2019, passed by learned Addl. Sessions Judge, Nilanga, in Sessions Case No.12 of 2017, has been convicted under Section 302 of Indian Penal Code for committing murder of his wife and son and therefore, sentenced to suffer imprisonment for life and pay fine of Rs.1,000/- with default stipulation. He has also been convicted for the offence punishable under Section 201 of Indian Penal Code and sentenced to

suffer imprisonment for one year and to pay fine of Rs.1,000/- with default stipulation. Both the sentences were directed to run concurrently. The appellant is, therefore, before us in appeal.

2. The facts, giving rise to the present appeal, are as follows:-

The appellant was 70 years of age at the relevant time. He was residing along with his wife Bhagirathibai (deceased) and son Vikas, at village Kelgaon, Tq. Nilanga, Dist. Latur. Deceased Vikas was married. His wife was not home on the given day. On the intervening night of 27.03.2017 and 28.03.2017, the appellant, allegedly, committed murder of Bhagirathibai and Vikas by smashing their heads with stones, while both of them were asleep in the courtyard of their residence. The appellant, thereafter, fled to Nilanga. It was PW 2 – Mahadeo, who noticed the dead bodies in the court-yard of the appellant's residence. He immediately informed the same to the Bit-Amaldar (police official). PW 3 – Pandhari Rathod, Police Head Constable, in turn, informed the same to API – Masal (PW 7). Accordingly, both of them came to the village. They saw both Bhagirathibai and Vikas to have suffered head injuries and passed away. Blood stained stones were by their side. Since nobody came forward to lodge FIR, it was PW 3 who lodged the same (FIR 35).

3. A scene of offence panchnama (Exh.18) was drawn in the presence of panchas. Inquest on the dead bodies was conducted under panchanamas (Exh.19 and 20) then and there in the presence of the very panch (PW 1). The dead bodies were subjected to post-mortem examination. It was PW 5 – Saeed Patel, who had seen the appellant leaving the village in the early morning for Nilanga. The police officers, therefore, immediately went to Nilanga. They arrested the appellant at a place nearby S.T. bus stand, Nilanga. On the following day, the appellant made disclosure statement (Exh.23), pursuant to which blood-stained shirt on his person, was recovered from a place adjacent to the public urinals at bus-stand, Nilanga. The clothes on the person of the deceased and that of the appellant were seized and sent for chemical analysis. Statements of the persons acquainted with the facts and circumstances of the case were recorded.

4. On completion of the investigation, the appellant was proceeded against by filing charge sheet before learned Judicial Magistrate, First Class, Nilanga. The case, in turn, was committed to the Court of Addl. Sessions Judge, Nilanga (Trial Court) for trial in accordance with law. The trial court framed Charge (Exh.13). The appellant pleaded not guilty and claimed to be tried. To bring home

charge, the prosecution examined seven witnesses and produced in evidence certain documents. The trial court, on appreciation of the evidence in the case, convicted the appellant and consequentially, sentenced, as stated above.

5. Heard learned counsel for the parties.

6. Mr.Mukul Kulkarni, learned counsel appointed to represent the appellant, would submit that the case is based on circumstantial evidence. Murder took place in the court-yard of the house of the appellant and not inside. The photographs indicate that the deceased were slept in the court-yard, since no bedding is seen. According to him, there is no consistency between the evidence of PW 2 and PW 5, who claimed to have met the appellant on the given day. He would further submit that, when pursuant to the so called disclosure statement of the appellant, the blood stained shirt was seized, how come PW 5 - Saeed Patel did not notice the blood stains on the shirt of the appellant, while he had seen him boarding the bus for Nilanga. According to learned counsel, no sooner the appellant was arrested, the statement given by him has been video graphed. Same has not been placed on record. An adverse inference, therefore, need to be drawn. Learned counsel has relied on the judgment of the Apex Court in the case of **Jafarudheen and ors.**

Vs. State of Kerala, AIR 2022 SC 3627. Learned counsel, ultimately, urged for allowing the appeal.

7. Learned APP would, on the other hand, submit that except the appellant, none was residing with the deceased persons. The appellant was seen leaving the village early in the morning, i.e., within a few hours of the deceased met with homicidal death. The shirt on the person of the appellant was found stained with blood. The appellant did not offer any explanation. Learned APP read out the reasons given by the trial court in support of the judgment and order.

8. Considered the submissions advanced. Perused the evidence on record. Also perused the judgment impugned herein.

9. Let us advert to the evidence on record and appreciate the same. PW 4 - Dr. Pralhad conducted autopsy on the mortal remains of the deceased - Bhagirathibai and Vikas. He noticed following injuries on the person of both of them :-

Injuries on the dead body of Bhagirathibai :-

- (1) CLW at left ear pinna with cut left ear pinna.
- (2) CLW at left temporal bone behind left ear with irregular margin and directions.
- (3) One contusion on left side forehead.
- (4) Swelling on whole right side face.
- (5) Fracture of right maxillary and mandibular bone.

(6) Fracture of left temporal bone behind left ear pinna.
The injuries were antemortem.

Injuries on the dead body of Vikas :-

- (1) Tear of upper lip and nose.
- (2) Contusion and swelling at left eyebrow and left side of forehead.
- (3) Fracture of Nasal bone.
- (4) Tooth fall upper- Two central incises, one left incise on upper side, lower two central and left lateral incises.
- (5) Fracture of maxillary Bone on left side.
- (6) Fracture left fracture of frontal bone.

He issued the post-mortem reports of both of them vide Exhs.40 and 41, respectively. In his opinion, the cause of death of both of them was due to *"intracranial hemorrhage due to number of skull bone due to head injury."*

10. The fact that both Bhagirathibai and Vikas met with homicidal death is not disputed. The question is, whether the appellant is author of the crime in question. The appellant was husband of late Bhagirathibai. The deceased Vikas was their son. Although he was married, his wife was not there at home on the given night.

11. PW 6 - Sangita @ Chanchla was daughter of the appellant and deceased Bhagirathibai. It is in her evidence that her parents and brother Vikas would reside together at the village. They were living happily. She denied that there used to be quarrels between the appellant on one hand and the deceased, on the other. Learned APP declared this witness to have not been supporting the prosecution. She did not give in to the suggestions put to her in cross-examination by learned APP. From the evidence of PW 6 - Sangita, it has been established that the appellant and deceased - Bhagirathibai and Vikas were residing together in the house of the appellant at village Kelgaon, Tq. Nilanga, Dist. Latur.

12. To reinforce the fact of the appellant and the deceased to have been residing together, we have evidence of PW 5 - Saeed Patel. It is in his evidence that there used to be quarrels between the appellant on one hand the deceased, on the other. His evidence would further suggest that Bhagirathibai was second wife of the appellant. The appellant used to consume alcohol. It is further in his evidence that early in the morning on 28.03.2017, he was returning after Namaz. It was about 06.30 a.m., he saw the appellant talking over cellphone at the bus stand. His evidence further indicates the appellant to have boarded the bus for Nilanga. It is further in his

evidence that when the police came to village Kelgaon, he immediately informed the same.

13. Then, we have evidence of PW 2 – Mahadeo, another villager, and PW 3 – Pandhari, Police Head-Constable, besides evidence of PW 7 – Mashal, Asst. Police Inspector (Investigating Officer), to indicate that they immediately went to Nilanga. They spotted the appellant at the bus-stand. The appellant was arrested. It is true that as per the case of prosecution itself, the appellant gave one statement. It was video-graphed. The same is not forthcoming. Learned counsel for the appellant, therefore, may be justified to contend that an adverse inference, therefore, may be drawn. Learned counsel had also submitted that when PW 5 – Saeed had seen the appellant at the bus-stand, how come he did not notice blood stains on the shirt the appellant had clad in. Learned counsel may be correct to some extent. There is, however, nothing to indicate that PW 5 – Saeed and the appellant had any interaction at the relevant time. PW 5 – Saeed might have seen the appellant either from back side or from any other angle and the blood stains must have been missed to be seen. The fact remains that PW 5 – Saeed had seen the appellant leaving the village by 06.30 in the morning for Nilanga. The appellant was arrested at Nilanga within an hour.

14. The appellant and both the deceased were residing together. Those were summer days (27th-28th March). Although learned counsel for the appellant would submit that only the dead bodies were seen in the court-yard, he meant to say that the deceased were not sleeping in the court-yard. We have, therefore, seen the colour photographs (Articles `E-1' to `E-6') of the scene of offence, to find that both the deceased had their bedding below their person. Same suggests that both of them, because of heat of summer, must have been sleeping in the court-yard of their residence. In the opinion of Dr. Pralhad, the death might have occurred within 12 hours next before the post mortem examination. The post mortem report indicates that the autopsy was conducted between 03.30 p.m. and 04.30 p.m. on 28.03.2017. Same suggests the deceased to have been assaulted and breathed their last at the dead of night and to be specific, little past 03.00 a.m. on 28.03.2017. When the appellant was residing along with the deceased in the very house, he did not offer any explanation, where was he at the fateful night. On the contrary, he was seen leaving the village three hours after his wife and son were murdered in the court-yard of his residence. Even if we ignore recovery of the blood-stained shirt, pursuant to his discovery statement, the fact remains that the

appellant was at his residence and his wife and son were sleeping just outside the same (court-yard). The conduct of the appellant in leaving the village, while his wife and son met homicidal death in their court-yard, is inconsistent with his innocence. PW 2 – Mahadeo was specific to testify that there used to be quarrels between the appellant on one hand and the deceased, on the other. In our view, therefore, it is the appellant and none else who has killed his wife and son with dropping heavy stones on their heads.

15. The prosecution has, however, not come with any genesis of the case. It is a settled legal proposition that the appellant can make out his defence or case within any of the exceptions of the Indian Penal Code, either leading positive evidence or bringing it on record through the prosecution case itself.

16. PW 2 – Mahadeo was in the company of police. We are conscious of the fact that any confession made to the police is inadmissible. However, any part thereof beneficial to the appellant may be read in his favour. We are, therefore, reproducing the evidence in paragraph 2 of PW 2 – Mahadeo, as under:-

2. Earlier to the incident Bhagiratibai had been to her parental home at Kanegaon. She was

also tried to bring back to home but she refused. Again on earlier day of incident, the deceased Vikas had gone to village Kanegaon and brought her back. The accused further disclosed to the police that, in the night the deceased Vikas and Bhagiratibai have assaulted to him without food and he was empty stomach until 12.00 in the midnight. Therefore, in the night at about 12.00 in the midnight, he first assaulted Bhagiratibai with the boulder and then to Vikas. He slept in the house until 5.00 am and then left to Nilanga. The police have taken my statement. Accused before the Court is the same.

17. PW 1 is witness to multiple panchnamas such as, scene of offence panchnama (Exh.18), inquest panchnamas (Exhs.19 and 20), seizure of clothes panchnamas (Exhs.21 and 22) and even the discovery statement made by the appellant on the following day. The discovery statement, allegedly, made by the appellant is being relied on by us for his benefit. It is at Exh.23. The appellant has stated therein that both the deceased namely, Bhagirathibai and Vikas had assaulted him on the given night. He was even not given dinner/meal. He was annoyed thereby. As such, the appellant killed his wife and son, since both the deceased had assaulted him few hours therebefore and even he was starved since he was not provided food by both of them. In our view, therefore, the case of

the appellant would get covered by Exception 1 to Section 300 of Indian Penal Code. Exception 1 to Section 300 of Indian Penal Code 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.

18. In case of **Dauvaram Nirmalkar Vs. State of Chhattisgarh** (2022 LiveLaw (SC) 650, the Apex Court observed :-

“10. Interpreting Exception 1 to the Section 300 in K.M. Nanavati v. State of Maharashtra, (1962 Supp (1) SCR 567, this Court has held that the conditions which

have to be satisfied for the exception to be invoked are (a) the deceased must have given provocation to the accused; (b) the provocation must be grave; (c) the provocation must be sudden; (d) the offender, by the reason of the said provocation, should have been deprived of his power of self-control; (e) the offender should have killed the deceased during the continuance of the deprivation of power of self-control; and (f) the offender must have caused the death of the person who gave the provocation or the death of any other person by mistake or accident. For determining whether or not the provocation had temporarily deprived the offender from the power of self-control, the test to be applied is that of a reasonable man and not that of an unusually excitable and pugnacious individual. Further, it must be considered whether there was sufficient interval and time to allow the passion to cool. K.M. Nanavati (supra) succinctly observes:

“84. Is there any standard of a reasonable man for the application of the doctrine of “grave and sudden” provocation? No abstract standard of reasonableness can be 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 cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision: it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

85. 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 Section 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.”

11. K.M. Nanavati (supra), has held that the mental background created by the previous act(s) of the deceased may be taken into consideration in ascertaining whether the subsequent act caused sudden and grave provocation for committing the offence. There can be sustained and continuous provocations over a period of time, albeit in such cases Exception 1 to Section 300 of the IPC applies when preceding the offence, there was a last act, word or gesture in the series of incidents comprising of that conduct, amounting to sudden provocation sufficient for reactive loss of self-control. K.M. Nanavati (supra) quotes the definition of ‘provocation’ given by Goddard, C.J.; in R. v. Duffy, (1949) 1 All E.R. 932, as:

“...some act or series of acts, done by the dead man to the 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 own mind... Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person had the time to think, to

reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation...”.

12. The question of loss of self-control by grave and sudden provocation is a question of fact. Act of provocation and loss of self-control, must be actual and reasonable. The law attaches great importance to two things when defence of provocation is taken under Exception 1 to Section 300 of the IPC. First, whether there was an intervening period for the passion to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given. The retaliation should be proportionate to the provocation. (R V.Duffy). The first part lays emphasis on whether the accused acting as a reasonable man had time to reflect and cool down. The offender is presumed to possess the general power of self-control of an ordinary or reasonable man, belonging to the same class of society as the accused, placed in the same situation in which the accused is placed, to temporarily lose the power of self-control. The second part emphasises that the offender's reaction to the provocation is to be judged on the basis of whether the provocation was sufficient to bring about a loss of self-control in the fact situation. Here again, the court would have to apply the test of a reasonable person in the circumstances. While examining these questions, we should not be short-sighted, and must take into account the whole of the events, including the events on the day of the fatality, as these are relevant for deciding whether the accused was acting under the cumulative and continuing stress of provocation. Gravity of provocation turns upon the whole of the victim's abusive behaviour towards the accused. Gravity does not hinge upon a single or last act of provocation deemed sufficient by itself to trigger the punitive action. Last provocation has to be considered in light of the previous provocative acts or words, serious enough to cause the accused to lose his self-control. The cumulative or sustained provocation test would be satisfied when the accused's retaliation was immediately preceded and precipitated by some sort of provocative conduct, which would satisfy the requirement of sudden or immediate provocation.

13. Thus, the gravity of the provocation can be assessed by taking into account the history of the abuse and need not be confined to the gravity of the final provocative act in the form of acts, words or gestures. The final wrongdoing, triggering off the accused's reaction, should be identified to show that there was temporary loss of self-control and the accused had acted without planning and premeditation. This has been aptly summarised by Ashworth (1975 Criminal LR 558-559) in the following words:

“The significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's retaliation should continue to tell against him. The point is that the significance of the deceased's final act and its effect upon the accused – and indeed the relation of the retaliation to that act – can be neither understood nor evaluated without reference to previous dealings between the parties.” Exception 1 to Section 300 recognises that when a reasonable person is tormented continuously, he may, at one point of time, erupt and reach a break point whereby losing self-control, going astray and committing the offence. However, sustained provocation principle does not do away with the requirement of immediate or the final provocative act, words or gesture, which should be verifiable. Further, this defence would not be available if there is evidence of reflection or planning as they mirror exercise of calculation and premeditation.

14. Following the view expressed in K.M. Nanavati (supra), this Court in Budhi Singh v. State of Himachal Pradesh (2012) 13 SCC 663, observed that in the test for application of Exception 1 to Section 300 of the IPC, the primary obligation of the court is to examine the circumstances from the point of view of a person of

reasonable prudence, if there was such grave and sudden provocation, as to reasonably conclude that a person placed in such circumstances can temporarily lose self-control and commit the offence in the proximity to the time of provocation. A significant observation in *Budhi Singh* (supra) is that the provocation may be an act or series of acts done by the deceased to the accused resulting in inflicting of the injury. The idea behind this exception is to exclude the acts of violence which are premeditated, and not to deny consideration of circumstances such as prior animosity between the deceased and the accused, arising as a result of incidents in the past and subsequently resulting in sudden and grave provocation. In support of the aforesaid proposition and to convert the conviction from Section 302 to Section 304 Part I of the IPC in *Budhi Singh* (supra), the Court also relied upon *Rampal Singh v. State of Uttar Pradesh* (2012) 8 SCC 289.

15. For clarity, it must be stated that the prosecution must prove the guilt of the accused, that is, it must establish all ingredients of the offence with which the accused is charged, but this burden should not be mixed with the burden on the accused of proving that the case falls within an exception. However, to discharge this burden the accused may rely upon the case of the prosecution and the evidence adduced by the prosecution in the court. It is in this context we would refer to the case of the prosecution, which is that the deceased was addicted to alcohol and used to constantly torment, abuse and threaten the appellant. On the night of the occurrence, the deceased had consumed alcohol and had told the appellant to leave the house and if not, he would kill the appellant. There was sudden loss of self-control on account of a 'slow burn' reaction followed by the final and immediate provocation. There was temporary loss of self-control as the appellant had tried to kill himself by holding live electrical wires. Therefore, we hold that the acts of provocation on the basis of which the appellant caused the death of his brother, *Dashrath Nirmalkar*, were both sudden and grave and that there was loss of self-control."

19. The appellant, at the relevant time, was of 70 years of age, a rustic and illiterate person. Grave and sudden provocation, is a question of fact and changes with person to person. In the case in hand, both the deceased had kept the appellant hungry. He was not provided food entire night. When both of them had assaulted him having been annoyed thereby, the appellant killed both of them in a manner stated above.

20. The Investigating Officer filed charge-sheet with the following summary of the prosecution case:-

..... यांनी सतत घरगुती कारणावरून भांडणतक्रार करून मारहाण केल्याचा राग मनात धरून यातील दोन्ही मयत रात्री घराचे बाहेर मोकळे अंगणात झोपले असता, आरोपीने दोन्ही मयताचे डोकीत दगड घालून दोन्ही मायातास जीवे ठार मारून अंगावरील शर्टला रक्त लागलेने शर्ट बसस्थानक निलंगा येथील मुतारीजवळ झुडपात लपवून पुरावा नष्ट केला, म्हणून यातील आरोपी विरुद्ध दोष सिद्धी साठी भा द वि चे कलाम 302, २०१ प्रमाणे दोषारोप असे".

21. We have already not believed the case of the prosecution as regards recovery of blood-stained shirt, pursuant to the discovery statement of the appellant from an open place nearby a public urinal at bus-stand Nilanga. We are, therefore, not at one with the findings recorded by the trial court convicting the appellant for the offence under Section 201 of Indian Penal Code.

22. The appellant, by now, is 77 years of age. In our view, the offence would be falling under Section 304 Part I of Indian Penal Code. Considering the appellant's age, we propose to impose sentence of rigorous imprisonment of ten and half years with fine of Rs.1,000/-.

23. For the reasons given herein above, the appeal partly succeeds. Hence, the following order:-

(i) The appeal is partly allowed.

(ii) The order dated 02.07.2019, passed by learned Addl. Sessions Judge, Nilanga, in Sessions Case No.12 of 2017, convicting and sentencing the appellant for the offences punishable under Sections 302 and 201 of Indian Penal Code, is set aside. The appellant stands acquitted thereof.

Instead, the appellant is convicted for the offence punishable under Section 304 Part I of Indian Penal Code and therefore, sentenced to rigorous imprisonment for ten and half years and directed to pay fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for one month.

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP