

Dauvaram Nirmalkar vs The State Of Chhattisgarh on 2 August, 2022

Author: Bela M. Trivedi

Bench: Bela M. Trivedi

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1124 OF 2022
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO. 2481 OF

DAUVARAM NIRMALKAR

.....

VERSUS

STATE OF CHHATTISGARH

.....

JUDGMENT

SANJIV KHANNA, J.

Leave granted.

2. The appellant, Dauvaram Nirmalkar, has been convicted under Section 302 of the Indian Penal Code, 1860, 1 for the murder of his brother, Dashrath Nirmalkar, and sentenced to undergo imprisonment for life, pay fine of Rs.1,000/-, and in default, to undergo simple imprisonment for a period of six months.

3. Dr. Nohar Prasad Jangde (PW-12), the senior medical officer at the Government District Hospital, Durg District – Durg, Chhattisgarh, has proved the post mortem report - Ex. P-18, and 1 For short, “IPC”.

has testified that Dashrath Nirmalkar had died due to coma as a result of shock, in view of the injuries given on the scalp of his head, causing multiple fractures on the skull bone. Dashrath Nirmalkar suffered fractures in the left temporal, frontal, parietal, and left occipital lateral side with a deep lesion. A lacerated wound was also present on the chin. Homicidal death of Dashrath Nirmalkar is not disputed and challenged before us.

4. On the question of the involvement of the appellant as the perpetrator, we are in agreement with the High Court and the trial court. No doubt the public witnesses, Manoj Vishwakarma (PW-1) – a local teacher; Brijesh Sharma (PW-2) – a vegetable seller; Bhagwati Prasad Nirmalkar (PW-3) – younger brother of the appellant; Nakul Ram Sahu (PW-4) – neighbour of the appellant; Treveni Bai (PW-7) – sister of the appellant; Geeta Bai (PW-8) – sister-in-law of the appellant; Kumari Shanti Nirmalkar (PW-9) – niece of the appellant; Kumari Madhu Nirmalkar (PW-10) – niece of the appellant; and Kejauram Nirmalkar (PW-11) – half brother-in-law of the appellant had turned hostile, there is ample evidence and material implicating and establishing the appellant's involvement beyond doubt.

5. On 26th September, 2011, the appellant himself went to the police station and confessed the crime, albeit, the confession is inadmissible as proof of confession is prohibited under Section 25 of the Indian Evidence Act, 1872². This Court in *Aghnoo Nagesia v. State of Bihar*³ has held that the confessional statement not only includes the admission of the offence, but all the other admissions of incriminating facts relating to the offence. The severability test which was applied by some of the High Courts to admit evidence, wherein each sentence is treated separately to admit the non-confessional part, was held to be misleading and consequently rejected. Thus, no part of a First Information Report lodged by an accused with the police as an implicative statement can be admitted into evidence. However, the statement can be admitted to identify the accused as the maker of the report. Further, that part of the information in the statement, which is distinctly related to the 'fact' discovered in consequence of such information, can also be admitted into evidence under Section 27 of the Evidence Act, provided that the discovery of the fact must be in relation to a material object.⁴ We add that the conduct of the appellant is relevant and admissible under Section 8 of the Evidence Act.

² For short, "Evidence Act".

³ (1966) 1 SCR 134.

⁴ *Khatri Hemraj Amulakh v. State of Gujarat*, (1972) 3 SCC 671.

6. In the present matter, on the disclosure made by the appellant, a pick-axe was seized from a wooden box kept in the house where the appellant used to reside vide Ex. P-1. The seized pick-axe and the shirt of the appellant, which he wore at the time of the incident, were found to be stained with blood. The disclosure made by the appellant also led to the discovery of the body of Dashrath Nirmalkar at the house where the appellant was residing.

7. It is an accepted position that the public witnesses, Manoj Vishwakarma (PW-1), Brijesh Sharma (PW-2), Bhagwati Prasad Nirmalkar (PW-3), Nakul Ram Sahu (PW-4), Treveni Bai (PW-7), Geeta Bai (PW-8), Kumari Shanti Nirmalkar (PW-9), Kumari Madhu Nirmalkar (PW-10), and Kejauram Nirmalkar (PW-11), though declared hostile, have more or less in unison deposed that the appellant and Dashrath Nirmalkar used to stay in separate rooms at the same house. Testimonies of Kumari Shanti Nirmalkar (PW-9) and Kumari Madhu Nirmalkar (PW-10) are important as they were present in the house at the time of the incident. Kumari Shanti Nirmalkar (PW-9) had avowed that

her sister Kumari Madhu Nirmalkar (PW-10) had come and told her that their uncle Dashrath Nirmalkar had died. Kumari Shanti Nirmalkar (PW-9) had claimed that Kumari Madhu Nirmalkar (PW-10) had told her that Dashrath Nirmalkar was killed by the appellant. However, Kumari Madhu Nirmalkar (PW-10) did not profess to having made any such statement, or that she had seen the appellant committing the offence. At the same-time, Kumari Shanti Nirmalkar (PW-9) and Kumari Madhu Nirmalkar (PW-10) have not deposed about the presence of any intruder or third person that night. No such suggestion was given to them in the cross- examination as well. Such suggestions were also not given to Manoj Vishwakarma (PW-1), Brijesh Sharma (PW-2), Bhagwati Prasad Nirmalkar (PW-3), Nakul Ram Sahu (PW-4), Treveni Bai (PW-7), Geeta Bai (PW-8), and Kejauram Nirmalkar (PW-11). Therefore, defence of the appellant in his statement under Section 313 of the Code of Criminal Procedure, 1973 5 that some third person had killed his brother Dashrath Nirmalkar, carries no weight and has been rightly rejected. The appellant had suffered from burn injuries in his hands, which the appellant had accepted in his statement under Section 313 of the Cr.P.C. The appellant had tried to commit suicide by catching live electrical wires, and consequently he was charged for the offence under Section 309 of the IPC6. The appellant had admitted his guilt and was consequently sentenced to undergo simple imprisonment for 10 5 For short, “Cr.P.C.” 6 309. Attempt to commit suicide. —Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year 3 [or with fine, or with both.] days vide Ex. P-33. Thus, the fact that the appellant and the deceased were together the night when the deceased suffered the fatal injuries is established and proven. Therefore, Section 106 of the Evidence Act7 gets attracted and in the absence of any break- in or third-party involvement, the chain of facts and circumstances established beyond doubt, bares that the appellant and no other person was the perpetrator who had inflicted the injuries on Dashrath Nirmalkar.

8. However, in our opinion, this case will fall under Exception 1 to Section 300 of the IPC8. Bhagwati Prasad Nirmalkar (PW-3), the 7 106. Burden of proving fact especially within knowledge. — When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. 8 300. Murder. —Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or— Secondly. —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or— Thirdly. —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or— Fourthly. —If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. 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.

younger brother of the appellant and the deceased, had deposed that the deceased used to frequently drink alcohol, barely interacted with the family, and used to debate and quarrel with the appellant. Nakul Ram Sahu (PW-4), the neighbour of the appellant, had similarly testified that the deceased was addicted to alcohol and his wife had left him. Dashrath Nirmalkar's addiction to alcohol, and that he was extremely abusive and ill-tempered is the common narration by Geeta Bai (PW-8), wife of Bhagwati Prasad Nirmalkar (PW-3), and Kumari Shanti Nirmalkar (PW-9), and Kumari Madhu Nirmalkar (PW-10), nieces of the appellant and Dashrath Nirmalkar. The prosecution does not dispute this position and in fact, has relied upon these facts to show motive.

9. Exception 1 differs from Exception 4 of Section 300 of the IPC 9.

Exception 1 applies when due to grave and sudden provocation, the offender, deprived of the power of self-control, causes the death of the person who gave the provocation. Exception 1 also 9300. Murder. — Exception 4. —Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation. —It is immaterial in such cases which party offers the provocation or commits the first assault.

applies when the offender, on account of loss of self-control due to grave and sudden provocation, causes the death of any other person by mistake or accident. Exception 4 applies when an offence is committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel and the offender commits culpable homicide without having taken undue advantage of acting in a cruel and unusual manner. The Explanation to Exception 4 states that in such cases it is immaterial which party gives the provocation or commits the first assault.

10. Interpreting Exception 1 to the Section 300 in K.M. Nanavati v.

State of Maharashtra,¹⁰ 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 10 1962 Supp (1) SCR 567.

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,¹¹ 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...[I]ndeed, 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 11 (1949) 1 All.E.R. 932.

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.¹² 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 ¹² See the opinion expressed by Goddar, CJ. in R v. Duffy (supra). 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 Ashworth¹³ in the following words:

“[T]he 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.

13 1975 Criminal LR 558-559, and George Mousourakis's elucidation in his paper 'Cumulative Provocation and Partial Defences in English Criminal Law'.

14. Following the view expressed in K.M. Nanavati (supra), this Court in Budhi Singh v. State of Himachal Pradesh¹⁴ 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 Pradesh¹⁵.

¹⁴ (2012) 13 SCC 663.

¹⁵ (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.

16. Applying the provocation exception, we would convert the conviction of the appellant from Section 302 to Part I of Section 304 of the IPC.

17. On the question of sentence, we have been informed that the appellant has already suffered incarceration for over 10 years, as he has been in custody since 27 th September, 2011. In the aforesaid circumstances, we are inclined to modify the sentence of imprisonment to the period already undergone. In addition, the appellant would have to pay a fine of Rs. 1,000/- and in default, will undergo simple imprisonment for a period of six months. On payment of fine or default imprisonment, the appellant is directed to be released forthwith, if not required to be detained for any other case.

18. The appeal is partly allowed modifying the conviction and sentence in the aforesaid terms.

.....J. (SANJIV KHANNA)J. (BELA M. TRIVEDI) NEW
DELHI;

AUGUST 02, 2022.