ALI MUHAMMAD

Versus

The State

PLD 1996 SC 274

JUDGMENT

FAZAL KARIM, J.---This appeal by the complainant, Ali Muhammad (the complainant) comes from the judgment of the Lahore High Court, Lahore dated 20-12-1992, whereby the appeal of Ali Muhammad respondent (the accused) against his conviction and sentence under the repealed section 304, Part I of the P.P.C. was accepted and he was acquitted.

2. The facts can be shortly stated as follows. Ramzan deceased, a brother of the complainant was killed at about 1-30 a.m. on 24-10-1990. There were two versions of the incident. The prosecution case was ' that the deceased man along with the complainant and two others named Sher Muhammad and Muhammad Sharif (P.W.7) was going to their land to avail of their turn of irrigation water, when the accused accompanied by four others named Muhammad Aslam, Muhammad Hayat, Sher Muhammad and Ata Muhammad all armed with Dandas appeared, caught hold of the deceased, put a cloth around his neck and physically carried him to the Dera of the accused where he was strangulated to death and was also given Danda blows. The motive for the offence according to the prosecution was that the accused suspected that the deceased man was carrying on an illicit intimacy with his wife. The other version, that of the accused, which he gave in his statement under section 342 of the Cr.P.C., was as follows. On the night of occurrence he was sleeping in one room and his wife Mst. Maqsudan alongwith his children was sleeping in the other. At about mid-night he was aroused by a noise. He Went to the room of his wife and there saw the deceased man and his wife "lying on the same bed in an objectionable position". He picked up a Danda and with it hit Ramzan deceased. His wife managed to run away. He then picked up the Chaddar of the deceased which was lying near the cot, put it around his neck and tried to drag him out of the room. In this way the deceased was strangulated to death. He added that he had acted under the sting of grave and sudden provocation.

3. The post-mortem examination of the deceased's dead body revealed that he had suffered a ligature mark on upper most part of neck I cm. broad and 16 c.m. in length besides three other blunt weapon injuries. In the opinion of the doctor, death was the result of asphyzia by strangulation.

4. At the trial the prosecution story was ought to be supported by the ocular testimony of Muhammad Sharif (P.W.7) and Ali Muhammad complainant (P.W.8). It is sufficient to state that both the learned trial Judge and the learned. Judge in the High Court did not believe their testimony; in their view the incident had occurred in the manner stated by the accused. The learned trial Judge accepted the defence of grave and sudden provocation as it was recognised by the first Exception to the repealed section 300 of the Pakistan Penal Code, convicted the accused under section 304, Part I of that Code, sentenced to seven years' R.I. and fine and acquitted the remaining accused persons. In doing so, the learned trial Judge assumed, and assumed-wrongly, that that section was still on the statute book; in fact, that section had been repealed on the 5th September, 1990. And, as in the substituted section in the Penal Code, there was no provision corresponding to the First Exception to the repealed section 300 and section 304 of the Code, the learned Judge in the High Court proceeded to determine the question as to what offence, if any, the accused had committed. He held that the statement of the accused "has to be accepted in totality and without scrutiny". In his view, as section 300, Exception I and section 304 of the Penal Code stood repealed, "the conviction can be construed to have been recorded under the (new) section 302(c), P.P.C.". He referred to the judgment of the Supreme Appellate Court in State v. Muhammad Hanif 1992 SCMR 2047, wherein were quoted two Hadiths one narrated by Abu Huraira and the other by Sahl B. Sa'd and observed that "if peep of a trespasser into the privacy justifies even throwing a pebble at him which may put out his eyes, as in the cited Hadith, then why murder of a trespasser who also commits Zina with the wife of owner of a house would not be immune from even Tazir". Sanctity of privacy, so observed the learned Judge, "has been enjoined by the Holy Quran to the extent that entry into a house without permission is forbidden". In that behalf he referred to Verses 27 and 28 of Surah-Al-Noor and added that "to enter a house without permission at night and commit Zina with wife/daughter/sister of owner of a house was obviously a vice which could be stopped with force". The learned Judge went on to say that the defence of "the person/property and honour is so virtuous an act, and here he quotes an Hadith, that—

"He who lays down his life while defending his person or property is a Shaheed." In his view, therefore, "Islam does extend the right to the aggressed to take life of the aggressor in such a situation". The right to defend the honour to the extent of even killing the aggressor, if need be there, is, observed the learned Judge "not only available to the aggressed lady but also to her husband, Mahram or the person in whose lawful custody she is residing on the basis of Quranic Injunction in Verse 34 of Sura-Al-Nisa which reads:

"Men are in charge of women.

He also referred to Verse 33 of Sura Bani Israel which reads:

"And slay not the life which Allah hath forbidden save with right.

" and went on to say: "it clearly permits taking life of another in assertion of Haq this entitlement is traversed he would be within his limits to go to the extent of Qatl-bil-Haq". He, therefore, concluded that the accused "as custodian of honour of his wife had the right to kill the deceased while he was engaged in sex act with his wife and he had not earned liability of Qisas or Tazir or even Diyat".

5. Leave to appeal was granted to consider "whether the learned Judge in Chamber was justified in allowing respondent No. Is above appeal for the reasons which prevailed with him".

6. Learned counsel for the complainant did not dispute the finding of fact recorded by the learned trial Judge and affirmed by the learned Judge in the High Court that the killing of the deceased man had taken place in the manner stated by the accused. He also did not doubt the proposition that in the circumstances of the case, the Courts below were right in accepting the story, as to the manner of the incident, told at the trial by the accused. In his view, the case fell under section 302, clause (c) of the P.P.C. as it now stands. He agreed that the accused had a right to defend the person and honour of his wife; his contention, however, was that he had exceeded that right. In the view of the learned counsel for the complainant, the' defence of grave and sudden provocation is not recognized in Islam. For this contention he relied upon certain observations of Maulana Muhammad Taqi Usmani, J. in Federation of Pakistan v. Gut Hasan Khan PLD 1989 SC 633 to which observations we shall have the occasion to advert.

7. The learned Additional Advocate-General who appeared for the State supported the learned counsel for the complainant. Learned counsel for the accused, however, advanced the view that the accused had 'property' in the person and honour of his wife and as the deceased man had committed a crime, by trespassing into his house at dead of the night and was found lying naked with his wife, obviously to commit Zina, the accused had the right to kill the deceased man.

8. To the uninitiated, it might seem strange that the self-same substratum of fact which in the opinion of the learned trial Judge could be the basis of the defence of grave and sudden provocation, was used by the learned Judge in the High. Court to found the plea of right of self-defence. It appears however that the pleas of self-defence and provocation have a close connection. As has been pointed out by J.W.C. Turner in his essay "Mental Element in Crimes at Common Law' at pages 193, 224 in the "Modem Approach to Criminal Law the idea that killing under provocation was in some measure excusable developed from the recognition of the view that killing in self-defence was excusable"; and it was held in Bullard case (1957) A.C. 635, that if the evidence in a case does not support self-defence, it may support provocation. The two pleas are not mutually destructive. "Conduct which cannot justify may well-excuse".

9. The doctrine of provocation has a long history of evolution at common law; it had been developed entirely by judicial decision until the British Parliament first intervened by passing the Homicide Act, 1957:

"The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Homles admitted in the present case), or inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognised, viz., the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rules .....

Necessary' self-defense, or action taken in the necessary defence, for example, of wife or child from outrage or maltreatment, stand apart, as in such cases there is no crime at all committed."

(Viscount Simon in Holmes (1946) AC 588)

10. These observations in Holmes were commented upon in Lee Chun. Chuen (1963) AC 220 as follows:

"It is plain that Viscount Simon must have meant the word 'actual' to have a limiting effect and that he had in mind some particular category of intention. He cannot have meant that any sort of intention to kill or cause grievous bodily harm was generally incompatible with manslaughter because that would eliminate provocation as a line of defense.

and the following statement of law by Lord Goddard in Kumarasinghege Don John Perera (1953) A.C. 200 was re-affirmed:

"The defense of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour, and the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received.

It was added: "Their Lordships do not think it necessary to interpret the dictum any further than to say that it cannot be read as meaning that the proof of any sort of intent to kill negatives provocation, Lord Simon was evidently concerning himself with the theoretical relationship of provocation to malice and in particular with the notion that where there is malice there is murder; and he may have had it in mind that actual intent in the sense of pre-meditation must generally negative provocation ……..

11. Provocation in law consists mainly of three elements -- the act of provocation, the loss of self-control, both actual and reasonable and the retaliation proportionate to the provocation ... ... Their relationship to each other--particularly in point of time, whether there was time for passion to cool--is of the first importance. The point ... ... to emphasize is that provocation in law means more than a provocative incident. (Lord Devlin in Lee Chun-Chuen (1963) A.C. 220, 231, 232.

12. The law, it has been said, is not concerned with the brain but- with the mind.', in the sense that mind is ordinarily used--the mental faculties of reason, C memory and understanding. Devlin, J. in R v. Kemp (1957) Q.B. 399. Therefore: 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. In deciding the question of whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind. (Stephen's Digest of the Criminal Law, Art.317) (Mancini v. Director of Public Prosecutions (1942) AC 1).

13. The rationale of the doctrine of provocation, then, is that "homicide is owing to a sudden transport of passion, which, through the benignity of the law, is imputed to human infirmity". (Sir Michael Forster; also cited by Lord Diplock in R v. Carnplin (1978) A.C. 705, where the doctorine was ascribed to law's compassion to human infirmity). Explaining the doctrine, J.W.C. Turner said in his essay: "The Mental Element in Crimes at Common Law" in the Modem Approach to Criminal Law": “... ... ... we have to consider the mental state of the wrong-doer, not in relation to mens (for the blow he struck was voluntary., and he intended to kill by means of it), but in relation to the criminality of the actus itself ... .” It is for this reason that if the wrong-doer had sufficient time "for the blood to! cool and the reason to resume its seat", provocation, however, grave was not F treated as an excuse. The Principles and Practice of the Criminal Law by Seymour F. Harris (15th Edition) at pages 201, 202. The reduction of a crime from murder to manslaughter was the same as in Pakistan under -the old section 300., Exception 1, and section 304 of the Penal Code, where the lesser crime was known as culpable homicide not amounting to murder.

15. The old section 300 defined murder but provided by its Exception 1 that '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 and other person by mistake or accident", The old section 304 provided: "Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or by causing such bodily injury as is likely to cause death".

16. It was well-settled that offences falling under the Exceptions to the other section 300 of the P.P.C. Were to be punished under Part I of section 304, the punishment being imprisonment for life or imprisonment of either description for a them which could extend to ten years.

17. Section 300, Exception 1 and section 304 of the P.P.C. were considered in the context of their repugnance to the Injunctions of Islam first by a Shariat Bench of the Peshawar High Court in Gul Hasan Khan v, Government of Pakistan PLD 1980 Peshawar I . then by the Federal Shariat Court in Muhammad Riaz v. Federal Government PLD 1980 FSC I and finally by the Shariat Bench-of this Court in Federation of Pakistan v. Gul Hassan Khan PLD 1989 SC 633. 1 shall be content to refer to the judgment of the Federal Shariat Court in Muhammad Riaz case and the judgment of the Shariat Appellate Bench of this Court in Gul Hassan case which are mines of knowledge on the subject. In the leading judgment in Muhammad Riaz case, dealing with the old section 304 of the P.P.C. Aftab Hussain, Member noticed that according to Fiqh hanafi, murder was of five kinds:--

Qatl-e-Amd or premeditated murder.

(2) Qatl-e-Shibeh Amd is murder when a person dies as a result of injury from something which is neither a weapon nor like a weapon;

(3) Qatl-e-Khata i.e. homicide by error;

(4) Qatl_e-Misle Khata, or homicide by quasi-error; and

In the view of the learned Member, the old sections 304 and 30-4-A of the P.P.C. "correspond to Qatl-e-Shiba Amd and Qatl-e-Khata. As in Shariah offences under sections 304 and 304-A are not punishable with death, they are punishable with imprisonment and/or fine. These sentences can be maintained on the principle of Tazir with the result that the sentences already provided would not be considered to be contrary to the Holy Quran. In the opinion of the learned Member "the repugnancy with Quran and Sunnah can be removed by adding the provision for payment of blood-money to the heirs of the deceased". The learned Member went on to say that "homicide may. be justifiable and culpable". In support of his view he cited Quranic Verses 5:32 and 6:152, 17:33. Basing himself upon these Verses and certain Hadiths the learned Member held: "Exceptions to section 300 also dera not present any difficulty in respect of reconciliation with Quran and Sunnah. The first Exception is. Where death is caused when the offender was deprived of power of self-control by grave or sudden provocation or by mistake or accident. Death caused by accident or mistake is nothing but murder by error Provocation when grave and sudden would take the matter out of the category of intended or premeditated murder".

18. In the leading judgment of the Sharikt Appellate Bench of this Court in Federation of Pakistan v. Gul Hassan Khan. Pir Muhammad Karam Shah, J. noticed the view of Aftab Hussain, Member in Muhammad Riaz case and stated the opinion of the Shariat Appellate Bench in the following words:--

Justice Muhammad Afzal Zullah, Chairman agreed with the reasoning of my learned brother Pir Muhammad Karam Shah ... ... with consequential orders", and so did Justice Nasim Hasan Shah, Member, Justice Shaflur Rehman, Member wrote a separate note and made certain observations with reference to the "detailed draft judgment prepared by my learned brother Pir Muhammad Karam Shah, J.". In his separate note, Maulana Muhammad Taqi Usmani, J. appears to have had a different view of the effect of grave and sudden provocation. In his opinion mere provocation, however, serious and however sudden, cannot reduce murder to manslaughter or culpable homicide not amounting to murder. In the view of the learned Member if a husband sees his wife in the act of adultery, he would be justified in killing, not because of grave and sudden provocation but because the act which caused the provocation was in Islam punishable with death,

19. It is in the light of the guidance gained from the judgments in the Federation of Pakistan v. Gul Hassan Khan and the declaration that sections 299 to 338 of the Pakistan Penal Code, 1860 were repugnant to the Injunctions of Islam that the new sections 299 to 338-H of the Pakistan Penal Code have been enacted. Section 300 defines 'Qatlli-Amd'. Section .302, provides punishment for Qatl-i-Amd. It runs: "Whoever commits Qatl-i-Amd shall, subject to the provisions of this Chapter be---

(a) punished with death as Qisas;

(b) punished with death or imprisonment for life as Tazir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunction of Islam the punishment of Qisas is not applicable.

" Section 304 provides proof for Qatl-i-Amd liable to Qisas. Section 306 enact that the Qatl-i-Amd shall not be liable to Qisas in the following cases, namely:

(a) when an offender is a minor or insane;

(b)when an offender causes death of his child or grandchild how lowsoever and

(c) when any Wali of the victim is a direct descendant, how lowsoever, of the offender.

Section, 307 provides that Qisas for Qatl-i-Amd shall not be enforced in the following cases, namely---

(a) when the offender dies before the enforcement of Qisas;

(b) when any Wali, voluntarily and without duress, to the satisfaction of the Court, waives the right of Qisas under section 309 or compounds under section 310; and

(c) when the right of the Qisas devolves on the offender as a result of the death of the Wali of the victim, or on the person who has no right of Qisas against the offender.

Section 308 enacts that "where an offender guilty of Qatl-i-Amd is not liable to Qisas under section 306 or the Qisas is not enforceable tinder clause (c) of section 307, he shall be liable to Diyat. Section 309 entitles the Wali to waive his right of Qisas in the case of Qatl-i-Amd; section 310 permits the compounding of Qisas; section 315 defines Qatl Shibh-i-Amd and section 316 provides for its' punishment, section 318 defines Qatl-i-Khata; it reads: "Whoever, without any intention to cause the death of, cause harm to a person, causes death of such person, either by mistake of act or by mistake of fact, is said to commit Qatl-i-Khata" and section 319 provides punishment for Qatl-i-Khata.

20. The newly enacted section 302- was considered in the context of the defence of grave and sudden provocation in two cases both decided by the Supreme Appellate Court; namely:

"The State v. Abdul Waheed alias Waheed 1992 PCr.LJ 1596; State v. Muhammad Hanif 1992 SCMR 2047. "

21. In Abdul Waheed case, two persons named Abdul Waheed and Khalil Ahmad were tried for the murder of Shaukat Nizarni under section 302 read with section 34, P.P.C. The learned trial Judge did not believe the eye-witnesses; in his view their testimony required to be independently corroborated before it could be acted upon. He, therefore, acquitted Khalil Ahmad accused but as Abdul Waheed had admitted in his statements under sections 340 and 342, Cr.P.C. that "he had fired at the deceased on account of grave and sudden provocation because he saw him in a compromising position with his sister", the learned trial Judge found him guilty under section 302, clause (c) of the P.P.C_ and sentenced him to seven years' R.I. The State appealed against the judgment and relying upon the observations of Maulana. Muhamamd Taqi Usmani, J. in Gul Hassan Khan case PLD 1989 Sc 633. Justice Nasim Hasan Shah, Chairman observed "that grave and sudden provocation is not an Exception per se and the punishment of Qisas where Qatl-i-Amd is committed under grave and sudden provocation, can be mitigated only if proof of Zina is produced, which conforms to the required standard of evidence prescribed under the Islamic Injunctions". In other words, Qatl-i-Amd by husband (or by inference, by

a near relative, as in the instant case) will attract a! punishment lesser than Qisas only if proof of commission of such Zina exists which satisfies the required standard of evidence prescribed under Isiamic Injunctions". The learned chairman held, therefore, "that the plea of grave and sudden provocation raised by Abdul Waheed could not have been given effect to in this case so as to make 'his case fall within the ambit of clause (c) of section 302, P.P.C. and to take it out of the mischief of clause (a) of section 302, P.P.C. because the requisite evidence to establish this plea under the Islamic Injunctions ' was not produced by Abdul Waheed respondent". The appeal was accordingly accepted and Abdul Waheed was sentenced to death as Qisas.

22. In Muhammad Hanif case 1992 SCMR 2047 the prosecution evidence that the accused had killed the deceased without any provocation was disbelieved; the statement of Muhammad Hanif accused that he had "caused the death of Muhammad Ashraf under the state of grave and sudden provocation when he disgraced and dragged my wife on .the date of this incident" was accepted "in totality and without scrutiny" and Justice Shafiur Rahman, Chairman, speaking for the Court observed: "If we go by the strict Injunctions of Islam we find that punishment of death is permissible where under Hadd the offence already committed or sought to be committed by the person is one liable to Hadd of death. If this strict view of the Injunctions of Islam is kept in view, then if an unmarried person commits Zina-bil-Jabr with one's wife, the husband will have no right, even though the event takes place in his sight, to murder the Zani/accsued of that crime because Zina-bil-Jabr by or Zina by itself by an unmarried man is not punishable with - death. The other requirement of the law that the person who is done to death must be 'Massom-ud-Dam' is stronger repugnance. The Qur'anic Verse 34 of Sura An-Nisa starting with has been translated as and interpreted in Tafhim-ul-Qur'an (Volume I) as page 349, as hereunder:-

"A person like the deceased who suffered - from a prohibition under Qura'nic injunctions not to touch or deal with a lady who was not Mehram to him could not so disgrace and insult as to evoke the corresponding duty of the husband to protect and guard the wife. Such a man under the Injunctions of Islam cannot be said to be 'Maasoom-ud-Dam' when he is indulging in such an activity. Be it a person disgracing a lady or committing Zina-bil-Jabr with her being unmarried, it is not provocation but an exercise of the right conferred on the husband under the express words of the Qur'an itself. Qisas will not be liable in such a situation". The learned Chairman observed further that Abdul Waheed case was distinguishable; he referred to the observation of Maulana Muhammad Taqi Usmani, J. in Gul Hussan Khan case namely that provocation when it does not give rise to the right of self-defence is by itself no defence to murder, and went on to hold that "the amplitude of right of self-defence under Injunctions of Islam is far wider than is available under the Pakistan Penal Code". This was supported by certain illustrations taken from

Mishkat-al-Masabih and it was held that the case of Muhammad Hanif was rightly treated as one falling under section 302, clause (c) of the P.P.C.

23. It has been noticed that the new sections 299 to 338-H of the P.P.C. are based upon the Injunctions of Islam as interpreted by the Shariat Bench of this Court in Gul Hussan case PLD 1989 SC 633. As has been seen above, in that case all the learned Judges constituting that Bench were unanimous in declaring that those sections were repugnant to the Injunction of Islam. Yet, there was difference of opinion between Pir Muhammad Karam Shah, J. and Maulana Muhammad Taqi Usmani, J. in one important respect, namely the repugnance of the Exception to the old section 300 read with the old section 304, P.P.C. to the Injunction of Jslam. It has been noticed that the Federal Shariat Court in Muhammad Riaz . case was of the opinion that the old sections 304 and 304-A of the P.P.C. "correspond to Qatl-e-Shiba-Amd and Qatl-e-Khata"; that the offences falling within those sections were not punishable with death and that the sentences provided therein could be maintained on the principle of Ta'zir with the result "that the sentences already provided could not be ; considered to be contrary to the Holy Qur'an. The Federal Shariat Court was also of the view that "the repugnancy with Qur'an and Sunnah can be removed by adding the provision for payment of blood-money to the heirs of the deceased". In taking that view, the learned Member, Aftab Hussain, expressly referred to the first exception to section 300, and held that "provocation when grave and sudden would take the matter out of the category of intended or premeditated murder". In Gul Hasan Khan case one of the appeals before the Shariat Bench of this Court was against the judgment of the Federal Shariat Court in Muhammad Riaz case. As has been noticed above in the leading judgment written by Pir Muhammad Karam Shah, J., which was concurred in by Muhammad Afzal Zullah, Chairman and Nasim Hasan Shah, J., the offences within the old sections 304 and 304-A were held to be generally falling within the category of Qatl-e-Khata. To quote fro a recent judgment of the learned Chief Justice speaking for a five Judges Bench of this Court in Criminal Appeal No.29 of 1995, Abdul Haq v. State PLD 1996 SC 1 "the recommendation in the judgment of the Shariat Appellate Bench of this Court, PLD 1989 SC 633 is to the effect that section 304, P.P.C. was not consistent with Injunctions of Islam for the reason that it did not provide for punishment of Diyat and was not made compoundable as required under Islam". We respectfully agree.

24. As has been observed above, the judgment of Pir Muhammad Karam Shah, J. was expressly concurred in by Muhammad Afzal Zullah, J. as Chairman and Nasim Hasan Shah, J., Shaflur Rahman ' J. wrote a separate note; but in that note there was no reference to the views on the subject of Maulana Muhammad Taqi Usmani, J., his observations had reference to "detailed judgment prepared by my learned brother Pir Muhammad Karam Shah, J. should think, therefore, that as regards the old section 304 and offences falling within it the majority opinion was the one written by Pir Muhammad Karam Shah, J. and concurred in expressly by two other learned

Members of the Bench and that the opinion of Maulana Muhammad Taqi Usmani, J. as to the defence of grave and sudden provocation and its effect upon the nature of the offence committed, must be regarded as minority opinion. In taking that view, the learned Judges of the Shariat Appellate Bench of this Court must be taken to have proceeded on the basis, first, that the old section 304, Part 1, had provided punishment for cases of homicide not amounting to murder falling within the Exceptions to the old section 300, P.P.C. which Exception included killing under grave and sudden provocation and killing in self-defence, but where the right of self-defence was exceeded, and secondly, that the rationale of the doctrine of grave and sudden provocation as enacted in Exception 1 to the old section 300, P.P.C. was as has been indicated above.

25. It has been seen also that the judgment of the Bench of the Supreme Appellate Court which decided Abdul Waheed case 1992 PCr.LJ 1596 was based upon, the views of Maulana Muhammad Taqi Usmani, J - in Gul Hassan Khan case. The ratio of Abdul 151 Waheed case was explained, and if we may say so with great respect, was explained away, in Muhammad Hanif case 1992 SCMR 2047. Fortunately for the development of the Islamic Penal Law, Shaflur Rahman, J. was able, in Muhammad Hanif case' to discover the Qur'anic provision in Verse 34 of Sura Al-Nisa and to enunciate the law that in such circumstances the offender has a right of self-defence which includes the right to defend the honour of his wife and that such a case falls under section 302, clause (c) of the P.P.C. I respectfully adopt the view of Shafiur Rahman, J. in Muhammad Hanif case as also the, reasons supporting it. I may add that the, fundamental right to act as conferred as it has been by the Holy Qur'an, which is intended to endure for all times to come, must receive a construction most beneficial to the widest possible amplitude of that right and on the principle of interpretation enunciated by the U.S. Supreme Court and adopted by this Court in Muhammad Nawaz Sharif case PLD 1993 SC 473, 557, peripheral rights or rights of penumbra, that is, rights closely associated to it are also basic rights. There can be no doubt that included in the basic right of the man to act as is the right to protect the honour of his women and to defend them from outrage, disgrace and insult.

26. The case of Abdul Haq, referred to above was a case of provocation by words: in such cases the Courts proceeded on the basis that "hard words break no bones, 'and the law expects a reasonable man to endure abuse without resorting to fatal violence", and that "mere words (not being menace of immediate bodily harm) do not reduce murder to manslaughter ... ... (Holmes case). The significance of Abdul Haq case, however, lies in the fact that it recognised that (1) grave and sudden provocation is a factor to be taken into consideration in determining the punishment in cases within clause (b) of section 302 of the P.P.C. and (2) that cases such as this in which the husband finds his wife in the act of adultery or in a compromising position with another man are a class apart.

A word about the relation between clause (b) of section 302 and section 306 of the P.P.G. In Abdul Haq case after holding that that case was covered by clause (b) of section 302, Ajmal Mian, J. in his separate note observed:

"it may be pointed out that clause (c) of section 302 is not relevant as the instant case is not covered by amended section 306, P.P.C. which lays down that Qatl-i-Amd shall not be liable to Qisas.

in cases mentioned therein. Similarly Manzoor Hussain Sial, J. observed that "in the instant case clause (c) is not attracted as the offence committed by the appellants is not covered by section 306, P.P.C . ...

28. This dictum (I use this expression purposely) tends to give the impression that clause (c) of the new section 302 of the P.P.C. is limited to cases mentioned in this new section 306, P.P.C. namely (a) when an offender is a minor or insane; (b) when an offender causes death of his child or grandchild how lowsoever; and (c) when any Wali of the victim is a direct descendant, how, lowsoever of the offender. If this impression be correct, then, I would venture to say, and I do so -with great respect, that it does not take into account the provisions of the new section 308 which provides that where an offender guilty of Qatl-i-Amd is not liable to Qisas under section 306 or the Qisas is not enforceable under clause (c) of section 307, he shall be liable to Diyat. So, for cases enumerated in section 152 306, punishment is provided in section 308 and that punishment is the payment of Diyat. On the other hand the cases falling in the category of Qatl-i-Amd but punishable under clause (c) of section 302, P.P.C. are punishable with imprisonment of either description for a term which may extend to twenty-five years. It seems to me, therefore, that the class of cases to which clause (c) of section 302 applies is different from the cases enumerated in section 306 and punishable under section 308 and that clause (c) of section 302 is not limited to cases enumerated in section 306 and punishable under section 308.

29. The new section 302 itself divides Qatl-i-Amd, for purposes of punishment into three categories:

(1) Qatl-i-Amd which is punishable with death as Qisas;

(2) Qatl-i-Amd punishable with death or life imprisonment as Ta'zir; and

(3) Qatl-i-Amd punishable with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishment of Qisas is not applicable.

Section 302 of the P.P.C. therefore, itself contemplates plainly clearly a category of cases which are within the definition of Qatl-i-Amd but for which the punishment can, under the Islamic Law, be one other than death or life imprisonment. As to what are the cases falling under clause (c) of section 302, the law-maker has left it to the Courts to decide on a case to case basis. But keeping in mind the majority view in Gul Hassan case PLD 1989 SC 633, there should be no doubt that the cases covered by the Exceptions to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C. In this connection --L-should be content to refer to translation by Manzoorv Ahsan Abbasi), Volume V at page 581 which enumerates a large number of situations in which Qisas is not liable for Qatl-i-Amd; one of the situations mentioned by the learned Author at page 584 is';

30. I can now return to the facts of this case. This was not a case of a mental condition described in picturesque, if inaccurate language, as the Other syndrome' which is defined as morbid jealousy for which there is no cause. For the reasons given by the learned Judge in the High Court, which are' based upon those stated by Justice Shaflur Rahman,. as Chairman, of the Supreme Appellate Court, in Muhammad Hanif case 1992 SCMR 2047, the Courts below were entitled to accept the truth of the story in t6to given by the accused. According to that story the deceased had intruded into the accused's home -- his castle -- at the unearthly mid-night hour; that was invasion of his property and privacy and was criminal trespass. As if that was not enough, the deceased was found by the accused sleeping with his wife. In these facts, the accused was, in my opinion, entitled to invoke the defence of grave and sudden provocation; he was also entitled to invoke the defence of self-defence based on Verse 34 of Sura AI-Nisa as interpreted by Justice Shaflur Rahman, J. in Muhammad Ha'nif case. In such cases, there is no duty to retreat.

31. It appears however that in addition to the grounds stated in Muhammad Hanif case, the accused had also exceeded his right of self-defence. In that he had overpowered the deceased man by putting a 'Chaddar' around his neck but had pressed it so hard as to strangulate him to death. His case, therefore, clearly fall under clause (c) of section 302. It must follow, therefore, that the learned Judge in the High Court was not right in holding that the accused had committed no offence and was not liable to any punishment.

32. I would, therefore, convict the accused under section 302, clause(c) of the P. P.C.

33. As regards the question of sentence, the accused was arrested on 34 1-1990 and he remained in jail till 13-12-1992 when he was acquitted by the High Court's

judgment of that date. In the circumstances, I am of the opinion that the sentence of imprisonment that the accused has already suffered will serve the ends of justice.

M.B.A./A-1370/S Orders accordingly -