

**Vipln @ Kake Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/1160003](http://sooperkanoon.com/1160003)

**Court :** Delhi

**Decided On :** Jul-28-2014

**Judge :** Mukta Gupta

**Appellant :** Vipln @ Kake

**Respondent :** State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on: July 23, 2014 Judgment Delivered on: July 28, 2014 % + CRL.A. 207/2012 VIPIN @ KAKE Represented by: ..... Appellant Mr.H.R.Dhamija, Mr.N.S.Verma, Mr.N.S.Verma, Advs. versus STATE Represented by: ..... Respondent Mr.Vinod Diwakar, APP for State with Insp.Naresh Kumar PS Badarpur. CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J.

1. Vipin @ Kake has been held guilty of murder of Humayun. The finding of guilt has been returned on the basis of ocular testimony of Ram Avtar @ Bobby PW-15, the recovery of country made pistol with empty cartridge case at the instance of Vipin, FSL report and the mobile phone showing the presence of the appellant at the spot. All this happening on a sudden quarrel between Vipin and Humayun and could have been averted if Ram Avtar had reached in time with the ice-cream to cool their heated minds. The learned Trial Court after holding Vipin guilty for offence of murder vide its judgment dated November 24, 2011 pronounced the

sentence of rigorous imprisonment for life and fine of `5,000/- in default to undergo imprisonment for further period of five months vide impugned order dated November 26, 2011.

2. Learned counsel for Vipin questions the verdict that Ram Avtar was a planted witness due to the fact that when SI Girjesh Kumar PW-13 reached the hospital he found no eye witness and the FIR was registered on the basis of DD No.76B, the first PCR call. The FSL report does not support the prosecution case as the striation marks on the bullet were found insufficient to render opinion. Even relying on Ram Avtar at best the present is of sudden quarrel and thus the conviction under Section 302 IPC cannot be sustained.

3. No defence evidence has been led by Vipin and his explanation in response to the questions put under Section 313 Cr.P.C. is that he has been falsely implicated and is innocent. It is stated that signatures were taken on blank papers and he had not pointed out the place from where the country made pistol was recovered as he had not concealed the country made pistol at that place. He also states that the phone No.9718443695 was with Humayun. Between 5.00 to 6.00 PM, on September 24, 2008 he was sitting outside the house of Sanjeev Sharma along with one Bhutto Bhaiya, who was residing at the ground floor of the house of Sanjeev Sharma, Gafura and Humayun and after 6.00 PM he went to Mandir and did not know where Gafura and Humayun had gone. He also refutes the ownership of mobile No.9718443695 stating that he was not using the said mobile phone on September 24, 2008 nor he obtained the said mobile from Babbar Telecom giving ID proof of one Vikram Khanna. He admits that this phone was given to him by Sanjeev Sharma.

4. The investigation was set into motion on an information recorded vide DD No.76B on September 24, 2008 at PS Badarpur at 10.22 PM that a person has been shot at DDA Flat No.336, Badarpur, who has been taken to Holy Family Hospital. On the said DD entry PW-13 SI Girjesh Kumar reached the spot outside DDA Flat No.336, Badarpur, where he came to know that the injured had been taken to Holy Family Hospital. He found no eye witness at the spot. Leaving HC Satish and Beat Staff at the spot, he along with SHO and Constable Harender

reached the Holy Family Hospital where they found Humayun admitted. His MLC Ex.PW-1/A was collected. The injured was declared unfit for making of the statement by the doctor. As SI Girjesh Kumar did not find any eye witness in the hospital he sent the rukka vide endorsement PW-13/A on DD No.76B for registration of the FIR by Constable Harender to the Police Station. It is the version of SI Girjesh Kumar that just after leaving of Constable Harender for Police Station for FIR he met three persons in the hospital namely Ram Avtar @ Bobby, Sanjeev Sharma and Amar Singh. Ram Avtar claimed himself to be an eye witness of the incident. Thus he recorded his statement under Section 161 Cr.P.C. whereafter he went to the spot along with Constable Harender and Ram Avtar. He prepared the site plan Ex.PW-13/B at the instance of Ram Avtar and from near the spot one mobile phone make Motorola without battery cover was found lying near bushes in front of Government Senior Secondary School, Badarpur. The same was seized vide memo Ex.PW-4/A. He reached the hospital where the doctor handed over the sealed pullanda with the seal of the hospital containing lead bullet. Later on September 27, 2008 Humayun passed away in the hospital and thus the case was converted to one under Section 302 IPC. On September 30, 2008 the investigation of the case was transferred to Inspector V.P.Dahiya and Vipin was arrested. Vipin made a disclosure statement Ex.PW-13/C. On October 01, 2008 Vipin made a second disclosure statement and got the country made pistol with empty cartridge in its barrel recovered from the jungle behind the stadium. Both were seized vide memo Ex.PW-4/G.

5. The prosecution case thus hinges on the statement of Ram Avtar who has supported his version in the statement under Section 161 Cr.P.C. Ram Avtar deposed that on September 24, 2008 he came from duty at about 8.00 PM when his uncle Sanjeev Sharma @ Sanju was taking dinner with his friends Humayun and Gafura @ Amar. He also sat with them. At about 9.00-9.30 PM a phone call was received by his uncle from Vipin. After talking for some time, his uncle Sanjeev Sharma handed over the phone to Humayun. After talking to Vipin, Humayun stated that he had to go with Vipin as there was some financial transaction between them. AT about 9.30 PM Ram Avtar along with Humayun went to meet Vipin who was present at the gate of DDA Colony. Soon there were heated talks on money transaction between Sanjeev Sharma and Vipin with

regard to some property. Ram Avtar asked them to talk with a cool mind and to cool them he said that he would bring ice-cream for them. He went to take ice-cream. After 5-10 minutes, he came back to the spot i.e. Government School, outside the DDA Park on the Mathura Road when he found both of them scuffling. In the meantime, Vipin took out a pistol, abused him aa tuje abhi batata hoon and shot at him. Humayun shouted save me, I have been shot by Kake. On this Ram Avtar became nervous and immediately went to the house of his uncle Sanjeev and told that Vipin had shot Humayun. They came back found injured Humayun on the road near the gate of DDA flats. Humayun was shouting that he has been shot by Kake and was asking for help to save him. He, Sanjeev Sharma and Gafura @ Amar Singh took Humayun to hospital in a vehicle. There police met him and he narrated the entire story. This witness is also a witness to the preparation of the site plan, recovery of country made pistol with cartridge case at the instance of Vipin.

6. Learned counsel for Vipin submits that Ram Avtar is not an eye witness, if so he would have been available to SI Girjesh Kumar when he reached the hospital. This contention deserves to be rejected for the reason that though this witness in his cross-examination admitted that he did not take the injured to the hospital after seeing him in the injured condition, how he has explained that he ran towards the house to call Sanjeev Sharma and other persons. He came back with Sanjeev Sharma and Gafura. Then in Gafuras Maruti Car the injured was taken to the hospital by the three of them i.e. Gafura, Sanjeev Sharma and Ram Avtar. This fact stands corroborated by the MLC of Humayun Ex.PW-1/A which notes the arrival of Humayun at 22.16 PM on September 24, 2008 and the person accompanying is noted as Sanjeev (friend), 496, DDA Flats, Badarpur. Nothing further has been elicited in the cross-examination of Ram Avtar.

7. PW-12 Narender Kumar identified Vipin as the person who had purchased mobile sim card from his shop around 2 years back i.e. around the time of incident by giving him photocopy of the election ID proof which was of his uncle and exhibited the copy of the ID proof. In cross-examination this witness admitted that he knew Vipin for the last six years. He knew his family. Thus though this witness may have given the Sim card on the basis of a different identity but he accepts

having issued the Sim card in the Motorola phone recovered from the spot to Vipin. As noted above Vipin has not denied the factum of black colour mobile phone in his statement under Section 313 Cr.P.C. and the explanation rendered was that the said mobile phone was given to him by Sanjeev Sharma. Recovery of the mobile phone Motorola having the Sim Card No.9718443695 from the place of occurrence further proves the presence of Vipin at the spot and corroborates the version of Ram Avtar.

8. The prosecution also relies on another valuable piece of evidence i.e. recovery of country made pistol Ex.P2 with empty cartridge Ex.P3 from the back of MCD Pump house pursuant to the disclosure of Vipin. Though the FSL report has not able to give any conclusive opinion with regard to the bullet recovered from the body of the deceased to have been fired by this weapon in view of striation marks being insufficient however, the country made pistol and the cartridge recovered were of .303 bore. It was also opined vide the FSL report Ex.PW-22/I that the bullet recovered from the body of the deceased was also .303 cartridge.

9. PW-9 Dr.Susheel Sharma appeared in the witness box and stated that as per the alleged history the deceased got gunshot injuries over abdomen on September 24, 2008, on being brought to Holy Family Hospital surgical intervention was done and during treatment he passed away on September 26, 2008 at 8.40 PM. A bullet was recovered from the body of the deceased, clothes were removed with the injury marks on the shirt and the baniyan which were consistent with gunshot injury as alleged. According to him the shot was fired from a loose contact or close range. The cause of death was opined to be shock due to haemorrhage consequent upon visceral injuries caused by fire arm injuries which were sufficient to cause death in the ordinary course of nature. The doctor noted the following ante mortem injuries:

A single, gunshot entry wound, sized 2x2.5 cm (large dimension towards outer aspect) oval in shape, obliquely placed, present over left side of front aspect of abdominal wall, in left hypochondrial region of abdomen in left mid clavical line situated 116 cm above to left heel, 12 cm below to left nipple and 12 cm left to mid line. Wound surrounded by an abrasion collar, sized 1 x 3 cm, margin inverted and

contused. Wound surrounded by burn area, sized 2 x 5 cm with large dimension towards mid line. Tattooing in 15 x 10 cm area was present around wound. A cavity deep track was established directed inwards, downward and towards right, passing through abdomen wall, through peritoneum, through stomach (Two surgical stitched suture size 3 cm was present at greater curvature and near pyloric ring is present), through head of the pancreas, associated with blackening and haematoma. Above 2 litre of blood was present in peritoneal cavity, retroperitoneal haematoma about 500 CC was present. Bullet was not present in the peritoneal cavity (removed by the surgical intervention as per hospital records).

10. With the prosecution case being based on an overwhelming evidence of a reliable eye-witness duly corroborated in material particulars, learned counsel for Vipin seeks to draw our attention to the fact that admittedly even as per Ram Avtar the gun shot firing was not a premeditated action and happened on the spur of the moment after a scuffle between Vipin and Humayun. Thus, the offence does not fall within the ambit of murder but culpable homicide not amounting to murder. As noted above, it is the case of Ram Avtar that Vipin called Humayun to meet at the gate of DDA colony at about 9.30 AM and he accompanied Humayun there. While the two were having heated talks, he went to purchase ice-cream so that they could talk with a cool mind but before he could cool the minds they were scuffling with each other and in the said scuffle Vipin took out a pistol and abused Humayun and shot the fire. The injury to Humayun is on the left side frontal aspect of abdominal wall situated 12 cm below the left nipple. It was fired from a close range, but on a sudden quarrel where both Humayun and Vipin were physically involved. Though the act committed can be said to be done with the clear intention to kill the other person, however since the same was a sudden fight and proceeded from heated exchange to a physical quarrel to a gunshot injury, the offence would not fall under Section 302 of the Code but would be punishable under Section 304 of the Code. One of the important tools to determine the same is the brutality and cruelty which as noted was a single gunshot injury pursuant to a physical quarrel between the two.

11. This brings us to the next question whether the same would be punishable under Section 304 Part I or Part II of the Code. There are two distinctions between

the two one in relation to the punishment the other founded on the intention of causing that act. The Supreme Court in (2012) 8 SCC289Rampal Singh Vs. State of U.P. discussed the distinction between Section 304 Part I and Part II IPC and in a similar situation on a single gunshot injury aimed on the lower part of the body i.e. the stomach came to the conclusion that the offence fell under Section 304 Part I of the Code. The report held:

25. As we have already discussed, classification of an offence into either Part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the 'principle of exclusion'. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, 'culpable homicide amounting to murder'. Then secondly, it may proceed to examine if the case fell in any of the exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the ends of criminal justice delivery. This is more so because presumption of innocence and right to fair trial are the essence of our criminal jurisprudence and are accepted as rights of the accused.

12. Even in (1987) 2 SCC652Radha Kishan V. State of Haryana, 1996 CrI.L.J.

Bhudev V. State of U.P. and (2004) 11 SCC381Parkash Chand V. State of H.P. where the accused had acted on the spur of moment and there was only single gunshot, the Supreme Court came to the conclusion that the accused therein were guilty of offence under Section 304 Part I, IPC and not u/S302IPC.

13. There being no previous enmity, the dispute being on money transaction which took an ugly turn over heated exchange of words resulting in the death of Humayun could at best bring offence of Vipin under Section 304 Part I IPC. Consequently, the conviction of Vipin is altered to one under Section 304 Part I and he is sentenced to rigorous imprisonment for a period of 10 years and a fine of `10,000/- and in default to undergo simple imprisonment for a period of six months.

14. T.C.R. be returned.

15. Two copies of the judgment be sent to the Superintendent Central Jail Tihar one for his record and the other to be handed over to the appellant. (MUKTA GUPTA) JUDGE (PRADEEP NANDRAJOG) JUDGE JULY28 2014 vn

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