

**Arvind Kumar Vs. State**

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**Court :** Delhi

**Decided On :** Apr-22-2014

**Judge :** Sanjiv Khanna

**Appellant :** Arvind Kumar

**Respondent :** State

**Judgement :**

\$~5. \*IN THE HIGH COURT OF DELHI AT NEW DELHI + CRIMINAL APPEAL No.389/2011 Date of decision:

22. d April, 2014 ARVIND KUMAR ..... Appellant Through Mr. Mohan Tyagi & Ms. Ruchi Kapur, Advocates. Versus STATE ..... Respondent Through Mr. Rajat Katyal, APP for the State. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE G.P. MITTAL SANJIV KHANNA, J.

(ORAL) Arvind Kumar has challenged his conviction under Section 302 of the Indian Penal Code, 1860 (IPC, for short) for having committed murder of Kusheshwar on 29th April, 2006 by a fire arm injury. The impugned judgment dated 12th January, 2011, however, acquits the appellant under Sections 25 and 27 of the Arms Act, 1959 on the ground of want of sanction. State has not preferred any appeal against the said acquittal. By order on sentence dated 27 th January, 2011, the appellant has been sentenced to Rigorous Imprisonment for life and fine of Rs.10,000/-. In default of payment of fine, the appellant has to

undergo Simple Imprisonment for a period of six months. Benefit of Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short) has been granted.

2. Learned counsel appearing for the appellant did not dispute and challenge before us homicidal death suffered by Kusheshwar as a result of fire arm injury, but has questioned the reasoning given in the impugned judgment and the prosecution case on the involvement of the appellant. Homicidal death suffered by the deceased Kusheshwar is established from the MLC (Exhibit PW-1/A), which records that the deceased was brought to Sanjay Gandhi Memorial Hospital, Mangolpuri on 29th April, 2006 at 10.30 P.M. by Head Constable Shiv Charan, 1093 of PCR van. The patient was declared brought dead. Blood pressure was not recordable and ECG showed a straight line. The MLC also mentions about wounds noticed on the deceased, i.e., Kusheshwar. The said MLC was proved by Dr. Indermeet Singh (PW1), who has deposed that on local examination he had noticed a circular wound of 4 cm in diameter on the left side of the chest near left axilla and there was also a circular wound of about 4 cm in diameter on the right side of the back near right axilla. Overlying skin had black stain. The post-mortem on the body was conducted by Dr. Manoj Dhingra (PW-4), who in his report (Exhibit PW-4/A) and in his court deposition has opined as under:

1. Lacerated punctured wound of size 4 cm x 3 cm present over right scapular region 7 cm lateral to midline and 10 cm below shoulder tip with abrasion collar over upper and side margins with inverted margins and tattooing in an area of 5 x 5 cm. Entry wound of fire arm.

2. Lacerated punctured wound present over left axillary region 3 x 2.5 cm 8 cm from shoulder joint, 8 cm from left nipple around anterior axillary line with everted margins. Track 3 Injury No.1 after penetrating skin sub cutaneous tissues scapula entering into the chest cavity from back and fracture of 3rd and 4th rib on back. Further penetrating plura and right lung then passing through and penetrating left lung upper lobe and went into the 4th space and came out through injury No.2. It also piercing the T2 vertebra right to left. Chest cavity filled with 500 cc of clotted blood. The cause of death of shock as a result of fire arm injury to chest. Time since death is 14 hours.

3. As noticed above, the main plea and contention of the appellant relates to his involvement and whether he was a perpetrator, who had fired the fire arm causing the injury. The prosecution version, which has been accepted by the trial court primarily relies upon the disclosure statement of the appellant (Exhibit PW-14/H) pursuant to which one fire arm, i.e., deshi katta and with one fired cartridge were seized on 4th May, 2006. The prosecution also relies upon empty cartridge, which was recovered/found at the place of crime, i.e., on the road near G Block, Nihal Vihar and the CFSL report (Exhibit PW-15/A), which opines that the said fired cartridge mark EC1 recovered from the place of crime was fired from the weapon examined. The said report also opines that the fired cartridge EC2 found in the pistol matched with the fired cartridge EC1, which was recovered from the spot. As the said report firing pin mark, breech face marks and chamber marks on EC1 and EC2 matched with the test fired bullet TC1.

4. Learned counsel for the appellant has disputed and challenged the prosecution version primarily on the ground that the seized cartridge (EC1) found at the place of occurrence as per the seizure memo (Exhibit PW-13/B) bore number KF8m 00, a number which was also mentioned in the sketch of the said cartridge marked Exhibit PW-13/A, but as per the court depositions of Constable Ashok Kumar (PW-13), Inspector Ramesh Singh (PW-14) and ACP Harpal Singh (PW-18), who was also the Investigating Officer, the said cartridge produced in the court bore the number KF8mm 86. It is also highlighted that ACP Harpal Singh (PW-18) had stated that the cartridge found from the spot bore the number KM8MM00 which is not the number of the cartridge recovered from the spot, as per the prosecution case. Other related arguments raised will be noticed in the later portion of this judgment.

5. The FIR in question (Exhibit PW-9/A) was recorded on 29th April, 2006 at about 11.35 P.M. at Police Station Nangloi, Delhi. Before that, DD entry No.27 (Exhibit PW-14/A) was recorded at 9.35 P.M. The said DD entry does not mention the name of the culprit or the suspect, who had committed the said offence, but records that one person had suffered injury and Constable Raj Kumar, 2243 PCR had informed the police station through the control room. The tehrir thereafter records that the DD entry No.27 was marked to Constable Ashok Kumar (PW-13)

and Inspector Ramesh Singh (PW-14), who went to the spot near lakkad factory, Nangloi, Nihal Vihar Road and were able to ascertain that the dead body was that of Kusheshwar. Blood was lying near the injured and was oozing from left side of his chest and right side of his back. On search, one pocket diary, Rs.290/and a ball pen from pocket were found. The deceased was wearing a watch, and a black colour bag of Reebok make and one polythene bag containing vegetables and fruits was lying nearby. The said factum was deposed to and affirmed by both PWs-13 and 14 in their court depositions.

6. After some time, the crime team and SHO Inspector Harpal Singh (PW-18) reached the spot. Photographs of the site of the incident were taken on the instructions of Inspector Harpal Singh. The photographs were proved by Head Constable Vijay Kumar (PW-17), attached to the mobile crime team. He proved the negatives and the positives of the said photographs, which were marked Exhibit PW17/A1 to A4 and Exhibit PW-17/B1 to B4 respectively. Similarly, SI Lalit Kumar (PW-10) has deposed that on 29th April, 2006, he was posted as Incharge Mobile Crime Team and had reached the spot. On instructions SI Ramesh, PW-17 had taken photographs of the spot from different angles. He also proved the crime report prepared by him marked Exhibit PW-10/A.

7. Learned counsel for the appellant is right in his contention that the report (Exhibit PW-10/A) does not mention about recovery of any empty cartridge from the place of occurrence. The Crime Team as per report Exhibit PW-10/A had remained at the spot from 10.45 P.M. to 11.15 P.M., They had noticed blood and had asked the IO to seize the blood earth control, black plastic bag and a packet of biscuit. In another column, the IO was directed to do the needful. It has come on record in the statement of Constable Ashok Kumar (PW-13) and Inspector Ramesh Singh (PW-14) that an empty cartridge was recovered from the spot in question. The place of recovery of the empty cartridge is also indicated in the site plans, with and without scale marked Exhibits PW-18/A and 18/B. Examination of the site plans indicates that the empty cartridge was found on the opposite side of the road, when we compare and notice the place where the dead body of Kusheshwar was found lying. On the said aspect, we have deposition of ACP Harpal Singh (PW-18), who in his crossexamination had accepted that the empty

cartridge at the spot was recovered after the crime team had left. This is the true and correct position as is also apparent from the seizure memo of the empty cartridge (Exhibit PW-13/B), which was recorded on 30th April, 2006, after the crime team had left the spot at 11.15 P.M. on 29th April, 2006. Similarly, the sketch of the empty cartridge (Exhibit PW-13/A) was prepared by PW-18 on 30th April, 2006. Both the Exhibits PW-13/A and 13/B were witnessed by PW-13 Constable Ashok Kumar and PW14 Inspector Ramesh Singh respectively. The empty cartridge, which was recovered from the spot was deposited in malkhana on 30 th April, 2006 as deposed by Head Constable Tarif Singh (CW-1), who has stated that on 30th April, 2006 Inspector Harpal Singh (PW-18) had deposited one sealed parcel duly sealed with the seal of HSY containing one empty cartridge having the number/alphabet KF8m 00, along with other articles. He had received the said articles and made entry No.5160 in register No.19.

8. Head Constable Tarif Singh (CW-1) has also proved the entry No.5173 in register No.19, which was made on 4 th May, 2006 after Inspector Harpal Singh (PW-18) has deposited one sealed parcel containing deshi katta with one cartridge duly sealed with the seal of HSY. The articles were recovered pursuant to the disclosure statement of the appellant, after his arrest.

9. The appellant was apprehended and arrested on 3rd May, 2006 at about 9.30 P.M. as per arrest memo (Exhibit PW-14/F), which has been proved by both, Inspector Ramesh Singh (PW-14) and ACP Harpal Singh (PW-18). We will discuss the reason and cause why the police suspected involvement of the appellant, later on. Suffice it is to notice that after the arrest of the appellant on 3rd May, 2006 at 9.30 P.M. vide arrest memo Exhibit PW-14/F, he had made a disclosure statement (Exhibit PW-14/H). As per the said disclosure statement, the appellant had thrown the deshi katta in aam ka bagh at Nihal Vihar in the bushes. The said disclosure statement is dated 4th May, 2006. The recovery, as mentioned, has been supported and proved by ACP Harpal Singh (PW-18) and Inspector Ramesh Singh (PW-14). In addition to these two police witnesses, we have testimony of two independent or public witnesses, namely, Kushwant Singh (PW-3) and Shiv Karan (PW-12). Kushwant Singh (PW-3) has stated that on 4th May, 2006 at about 11.30 A.M. he was going on his motorcycle from factory at

Vishnu Garden to Nihal Vihar, when in front of Hanuman Mandir he was stopped by some police officers. He joined investigation along with the police officers and the appellant Arvind was present. Arvind took them inside the park and got recovered one country made pistol from the bushes. The pistol had one fired cartridge in it. The Investigating Officer had prepared sketch of the country made pistol and the cartridge, which were marked Exhibit PW-3/A and signed by PW-3 at point A. PW-3 gave the total length of the pistol and admitted the seizure memo (Exhibit PW-3/B) signed by him at point A. Shiv Karan (PW-12) has similarly deposed that on 4 th May, 2006 he was going towards F Block on scooter and he had reached Hanuman Balaji Mandir at about 11.30A.M., when he was asked by the police officers to join investigation with Inspector Harpal Singh and others. The appellant took them in the park and got recovered one country made pistol from the bushes. The said pistol was measured and on checking one fired cartridge was found in the pistol. Sketch of the pistol and the fired cartridge was prepared, which was marked Exhibit PW-3/A and was signed by him at point B. The said articles were sealed with the seal of HSY and the seizure memo (Exhibit PW-3/B) was signed by him at point B.

10. Learned counsel for the appellant challenged testimony of Kushwant Singh (PW-3) and Shiv Karan (PW-12) on the ground that they are not natural witnesses and have been introduced or were tutored witnesses. It was submitted that there was no cause or reason for Kushwant Singh (PW-3) and Shiv Karan (PW-12) to join the investigation, when the police could have asked the nearby shopkeepers to act as public witnesses. The argument does not impress us and has to be rejected. It is open to the police officers to ask anyone from the public to join and witness the recovery proceedings. Normally, public is hesitant but in the present case keeping in view the facts, the Investigating Officer took care and had stopped two persons, who were travelling near the place of recovery. He had asked them to join the proceedings. Kushwant Singh (PW-3) and Shiv Karan (PW-12) accordingly joined the proceedings and have witnessed recovery of the pistol and one cartridge on the pointing out of the appellant. It was not suggested or alleged that the said public witnesses were stock witnesses. Learned counsel for the appellant submitted that Kushwant Singh (PW-3) had stated that the entire procedure took three minutes, whereas Shiv Karan (PW-12) had claimed that the

procedure might have taken more than an hour to be completed, as PW-12 had deposed that he left the spot at about 12.30/1 P.M. We are not impressed by the said argument. Kushwant Singh (PW-3) has given detailed version of what had happened at the spot and has also stated that he remained at the spot till the seizure memo was prepared after recovery and measurements were taken of the pistol and the cartridge. The sketch was prepared. Kushwant Singh (PW-3) in his cross-examination has stated that he remained at the spot for about three minutes, but we do not think that the time stated is correct or plausible. The said sentence in the testimony of PW-3 does not merit complete disregard or rejection of the entire statement by Kushwant Singh (PW-3). It is obvious that the measurements, sketch etc. would have taken some time to be completed, as is reflected and apparent from the statement of Shiv Karan (PW-12). We also reject the contention of the counsel for the appellant that Kushwant Singh (PW-3) and Shiv Karan (PW-12) had not given the number inscribed on the fired cartridge in their court deposition and, therefore, their testimonies should be disbelieved. PWs-3 and 12 had identified the cartridge, which was shown to them in the court and have deposed that the said fired cartridge was recovered and found inside the pistol. Mere fact that PWs-3 and 12 had not mentioned the cartridge number, which possibly they may not have remembered because of passage of time, is immaterial. The cartridge number was specifically mentioned in the sketch (Exhibit PW-3/A).

11. This brings us to the main issue and contention of the appellant. As noticed above, the CFSL report (Exhibit PW-15/A) opines that the two cartridges EC1; (which was found at the place of occurrence) and EC2; (which was found in the pistol) were fired from the pistol in question, which was recovered at the behest and upon the disclosure of the appellant. The said report states that the two cartridges were empty fired cartridges and had been fired through the said country made pistol. The said opinion was given after examining individual characteristics of firing pin marks, breech face marks and the chamber marks present on the two fired cartridges as well as test fired cartridge, which were examined and compared under microscope. The marks were found to be identical. The FSL report was proved by Punit Puri (PW-15), who had conducted the said examination and had made a similar deposition in the court. The empty cartridge EC1 was marked

Exhibit P-3 and the empty cartridge EC2 found in the country made pistol was marked Exhibit P-2. The pistol itself was marked Exhibit P1.

12. Inspector Ramesh Singh (PW-14) was the first person, who had identified Exhibit P-3. In his examination on 9th October, 2009 one parcel sealed with the seal of FSL was opened and the empty cartridge was shown to him and identified by him. This cartridge Exhibit P-3, as noticed above, was seized at the place of occurrence and as per the seizure memo the cartridge number was KF8mm 00. However, in the court deposition Inspector Ramesh Singh (PW-14) has stated that at the bottom of the empty cartridge, number KF8mm 86 was inscribed, i.e., the number, which was mentioned on the empty cartridge EC2 found in the pistol as per the sketch (Exhibit PW-3/A). Similarly, Constable Ashok Kumar (PW-13) in his court deposition recorded on 18th February, 2010 had identified the dead cartridge EC1 found at the spot and had stated that on the bottom the number KM8mm 86 was inscribed.

13. In view of the aforesaid position, the contention raised by the appellant was that there has been interpolation or change of the cartridge, which was allegedly recovered from the spot, i.e., cartridge Exhibit P-3 or EC1 and, therefore, the FSL report cannot be accepted and cannot be a ground to convict the appellant.

14. At the outset, we notice that this ground was not raised and argued before the trial court. Before the trial court, the appellant had filed written arguments but no such contention or argument was raised in the written arguments. The judgment of the trial court does not record and refer to any such argument. However, in view of the plea raised, we directed the Additional Public Prosecutor to call for the original exhibits from the malkhana today itself. The original exhibits have been produced before us and seals were broken and the exhibits examined by us and the counsels. The empty cartridge EC1 or P3 at the bottom has the alphabet KF8mm 00 inscribed thereon. The empty cartridge EC2 or P2 has the alphabet KF8mm 86 inscribed thereon. Thus, there is no discrepancy and the prosecution version is correct. It is apparent that during the court depositions, errors were made and this may have happened because the Public Prosecutor did not take care and caution to examine the documents and articles and the witnesses possibly got confused.

None of the witnesses, i.e., Constable Ashok Kumar (PW-13), Inspector Ramesh Singh (PW-14) and ACP Harpal Singh (PW-18) were not cross-examined on the said discrepancy and, therefore, no occasion or cause arose for them to clarify. As already noticed above, no such argument was raised before the trial court and, therefore, this aspect was not clarified or examined by the trial court also. Statement of ACP Harpal Singh (PW-18) and Constable Ashok Kumar (PW-13) were recorded on the same day, i.e., 18th February, 2010.

15. There cannot be any dispute as to the empty cartridge (Exhibit P- 3/EC1), which was found at the spot in view of the seizure memo (Exhibit PW-13/B) and the sketch of the empty cartridge (Exhibit PW13/A), which specifically mention the number/alphabet inscribed on the empty cartridge as KF8mm 00. The said number is also mentioned in the malkhana register (Exhibits CW-1/A and 1/B) (at page No.74 of the compilation). The deposit of the cartridge Exhibit P-2/EC2 found in the pistol is recorded in the malkhana register, i.e., register No.19 (at page No.76 of the compilation). The sketch of the empty cartridge Exhibit P-2 recovered and found in the country made pistol as per the sketch (Exhibit PW-3/A) had the alphabet/numbers KF8mm 86 inscribed on it.

16. We also reject the contention that the recovery should be disbelieved because ACP Harpal Singh (PW-18) and Constable Ashok Kumar (PW-13) had incorrectly stated that the cartridge found from the spot had the alphabet/number KM8m 00 instead of KF8mm 86 inscribed thereon. This is a mere and small error in their court depositions. The court deposition to this extent will not override the contemporaneous documents, which were prepared at the time of the seizure, which specifically refer to the number inscribed on the cartridge as KF8mm 00.

17. We record that the CFSL expert had specifically mentioned and described the two cartridges as EC1 and EC2 and, therefore, there cannot be any confusion or doubt or debate regarding cartridge found at the spot Exhibit P-3 and the cartridge, which was found in the pistol Exhibit P-2. The words EC1 and EC2 have been written with hand on the two cartridges. Thus, the number/alphabet inscribed on the two cartridges tally with the seizure memos/sketch plan in which alphabet/numbers are mentioned. Thus, the contention of the appellant has to be rejected.

18. At this stage, it would be now appropriate to notice the manner in which the investigation had proceeded. The prosecution version is that the deceased Kusheshwar was married to Urmila (PW-5). This is accepted. The deceased Kusheshwar used to work in a factory at Noida as a Supervisor and used to come back home at Nangloi on Saturday and remained there till Sunday. Crl.A.389/2011 He used to go back for work on Page 15 of 20 Monday morning. The prosecution had alleged that the appellant- Arvind Kumar had illicit relations with Urmila (PW-5). Urmila (PW-5) in her court deposition had accepted that the appellant belonged to the native village of her husband but claimed that the appellant never visited their house and she did not know where he lived. She had stated that the appellant used to live in the village of her husband and, therefore, she knew that the appellant was related to him, being from the same village. It is, however, noticeable that the appellant was arrested on 3rd May, 2006 vide (Exhibit PW-14/F) from Delhi. Urmila (PW-5) was declared hostile and was cross-examined by the Additional Public Prosecutor but she did not accept that she had illicit relations with the appellant or was deposing falsely to help the appellant. Vinod Kumar Bhardwaj (PW-2) in his court deposition had stated that he knew the deceased and he had a wife and two children. The deceased was working at Noida in a private company and he used to come and stay in his home on Saturday and Sunday. He used to leave for work on Monday morning. Children of PW-5 and the deceased were young. He accepted that appellant-Arvind had a confectionery shop at Nihal Vihar and Kusheshwar had suspicion on Arvind. He also accepted that there was some quarrel between Arvind and the deceased. PW-2, however, claimed that the quarrel had taken place three-four months before the death of Kusheshwar as they had a little argument and nothing happened in his presence. He did not know if the appellant had made any specific statement in his presence. PW-2 claimed that he did not know date of death of Kusheshwar or seen the appellant-Arvind in the area of Nihal Vihar. PW-2 was also declared hostile and was crossexamined by the Public Prosecutor but did not change his position on several aspects and claimed that he did not know why appellant-Arvind used to visit the house of Kusheshwar. He denied suggestions given to him by the Public Prosecutor. PW-2 was cross-examined on behalf of the appellant and in the cross-examination, he went to the extent of stating that he did not know Kusheshwar

personally and had come to know his name only at the time of death, though he was his neighbour. PW-2 denied that he had never spoken to him or had stated that the deceased had suspicion on the appellant. The last assertion was contrary to what PW2 had stated in his examination in chief in some detail.

19. Having considered the statement of PWs-2 and 5, we are clearly of the opinion that their depositions in the court have to be read with care and caution. It can be derived and inferred from the deposition of PW-2 that there was something amiss between the appellant and the deceased. There was quarrel and reason and cause for dispute between them. The two witnesses have, however, not supported the prosecution version on the nature of the said dispute. The appellant certainly knew the deceased. It is also clear that the deceased used to work in a factory at Noida and used to come to Delhi and stay with his family at Nihal Vihar on Saturday and Sundays.

20. The present case is of a deliberate and pre-meditated criminal action to eliminate Kusheshwar by killing him with a fire arm. The occurrence in question had taken place on Friday late evening at about 9.30 P.M., when the deceased was coming to his residence. The person, who had committed the said offence, had specifically targeted the appellant for personal reasons and animosity. It is not a case of robbery or a mistaken identity, which resulted in death of Kusheshwar. It is on the basis of the said clues that the Investigating Officer proceeded and consequent upon the detention/arrest of the appellant, disclosure statement was recorded and then weapon of offence was recovered. The empty cartridge recovered from the place of occurrence as per FSL report was fired from the said weapon of offence. The aforesaid evidence led by the prosecution clearly proves that the appellant alone was the perpetrator of the crime in question and no third person was involved. The chain is complete and rules out any other person being the perpetrator of the offence in question.

21. We have also examined the statement made by the appellant under Section 313 Cr.P.C., but do not find explanation/reason in the answers given by the appellant to exonerate or otherwise dent the prosecution version. In response to question No.10, the appellant has stated that he was arrested from his house in

Durga Park and he was forced to sign some blank papers. In question No.10, it was suggested that he was apprehended on 3rd May, 2006. In his statement under Section 313 Cr.P.C., the appellant claimed that he did not know the deceased Kusheshwar, he was innocent and had been falsely implicated. He also claimed that there was no quarrel between him and the deceased Kusheshwar and he had never threatened the deceased. In his statement under Section 313 Cr.P.C. recorded on 25th October, 2010, the appellant had stated that the katta had been planted on him and at the time of his arrest on 3rd May, 2006, the police officers at Police Station were discussing that they had placed the katta at aam wala bagh and they had recovered the same from the place of incident and the same could be shown as recovered at his instance. As noted above, there is ample and reliable evidence in form of statements of Constable Ashok Kumar (PW-13), Inspector Ramesh Singh (PW-14) and ACP Harpal Singh (PW-18). They have not stated that any pistol or deshi katta was recovered at the spot. Similar are statements by SI Lalit Kumar (PW-10) and Head Constable Vijay Kumar (PW-17) from the crime team. In fact, they were never confronted and it was not suggested that a pistol or deshi katta was recovered from the spot.

22. In view of the aforesaid position, we do not find any merit in the present appeal and the same is dismissed. We affirm the conviction of the appellant and also affirm the order on sentence imposing life imprisonment and fine of Rs.10,000/- and in default of which, the appellant has to undergo Simple Imprisonment for a period of six months. The appeal is dismissed. SANJIV KHANNA, J.

**G.P. MITTAL, J.**

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