

**Kali Charan and ors Vs. State**

**Kali Charan and ors Vs. State**

**SooperKanoon Citation :** [sooperkanoon.com/14](http://sooperkanoon.com/14)

**Court :** Delhi

**Decided On :** Jul-07-2011

**Judge :** Badar Durrez Ahmed; Veena Birbal, Jj.

**Acts :** Indian Penal Code (IPC) - Sections 302, 34, 300, 304; Arms Act - Section 27

**Appeal No. :** CRL.A. No. 346/1997

**Appellant :** Kali Charan and ors

**Respondent :** State

**Advocate for Def. :** Mr Sanjay Lao, Adv.

**Advocate for Pet/Ap. :** Mr Mohit Mathur; Amicus Curiae; Mr Shishir Mathur; Mr S. Singh, Adv.

**Judgement :**

1. Present appeal is directed against the judgment dated 9th April, 1997 passed by the learned Additional Sessions Judge, Shahdara, Delhi, arising out of FIR No.95/89 registered at P.S Nand Nagri u/s 302/34 IPC and u/s 27 of the Arms Act, 1959 wherein appellants, i.e., accused Kali Charan, Om Parkash and Yashpal have been convicted u/s 302/34 IPC. Appellant Yashpal has also been held guilty for an offence punishable u/s 27 of the Arms Act, 1959. The appeal is also directed against the order of sentence dated 15th April, 1997 whereby the appellants have been sentenced to undergo life imprisonment and to pay a fine of

Rs.5000/- each for the offence u/s 302/34 IPC and in default of payment of fine, each would undergo further RI for a period of three months. Appellant Yashpal is further sentenced to undergo RI for one year and to pay a fine of Rs.1000/- for the offence u/s 27 of the Arms Act, 1959 and in default of payment of fine to further undergo RI for one month. The learned Addl. Sessions Judge has also ordered that the substantive sentences of accused Yash Pal would run concurrently, however, the sentences in default shall run one after the other after expiry of the substantive sentences.

2. On 18th April, 1989, DD no.20, Ex.PW 1/B, was got registered in Police Station Nand Nagri on the information of Puspa PW1. A copy of the same was given to ASI Bhoop Singh- PW10 who along with Constable Raja Ram-PW8, Constable Shesh Mani and Constable Ram Behari and Smt. Pushpa, PW-1, reached the place of occurrence, i.e., C- 3/150, Nand Nagri. The complainant Lekh Ram PW-2 was present there and gave a statement Ex.PW 2/A to ASI Bhoop Singh PW-10, to the effect that he was a resident of C-3/169 Nand Nagri. On the night intervening 17th & 18th April, 1989 at about 2 AM, accused Kali Charan who was residing in his neighbourhood, i.e., house no.C-3/150 had come to his house and took away his son Rajbir. When the complainant PW-2, asked Kali Charan as to what was the matter and why his son was being taken away at odd hours of night, Kali Charan replied that he had to talk something important with him. When his son Rajbir did not return for about 15 minutes, he along with his wife Pushpa-PW1 reached the house of Kali Charan and there they saw their son Rajbir having been held by his neck by the accused Om Parkash and accused Kali Charan was giving him fist blows. He immediately sent his wife PW1 to inform the police. In the meanwhile, Kali Charan's another son, Yashpal gave two-three blows to his son with something which he was holding in his right hand. When he went to save his son, accused Yashpal threatened him that he would also meet the same fate as that of his son, as such, he kept standing outside and raised an alarm. His son Rajbir got smeared with blood and breathed his last there. On hearing the noise, people of neighborhood also gathered there. As per complainant, all the three accused persons, i.e., Kali Charan and his two sons Yashpal and Om Parkash had murdered his son Rajbir. He stated to the police that action be taken against aforesaid accused persons. On the aforesaid complaint, ASI Bhoop Singh, PW-10

had put his endorsement Ex.PW10/A and sent ruqqa to police station through Constable Raja Ram PW-8 and got registered FIR Ex.PW 7/A. In the meanwhile, SHO Raghubir Singh PW- 15 had also reached the spot. The scene of crime was got photographed. The blood sample was seized from the spot after completing necessary formalities in this regard vide memo Ex.PW10/B. The site plan Ex.PW 10/C was got prepared. ASI Bhoop Singh (PW10) also made an inquest report Ex. PW10/D and the dead body was sent through Constable Raja Ram-PW8 to mortuary. The search of the accused persons was done. Accused Kali Charan and Om Parkash were apprehended on the same day from park no. B-6, Nand Nagri and, on interrogation, they made disclosure statements Ex. PW10/E and Ex.PW10/F respectively. The T shirt which accused Kali Charan was wearing and the shirt which accused Om Prakash was wearing were having blood stains and the same were also seized after doing necessary formalities, vide seizure memo Ex.PW10/G. Both the accused persons were arrested vide memo Ex.PW 10/H & Ex. PW10/J respectively. On 27th April, 1989, accused Yashpal was apprehended from Gagan Cinema. On interrogation, he had also made a disclosure statement Ex.PW10/K. Thereafter, he was arrested vide memo Ex.PW10/L. Pursuant to his disclosure statement, accused Yashpal led the police party to his house and got recovered his shirt having blood stains, which was also seized after completion of necessary formalities, vide memo Ex.PW10/M. Thereafter, he led the police party to a canal near Nand Nagri and at his instance, a knife was recovered. The sketch of the said knife was prepared which is Ex.PW10/N. The said knife was also seized vide seizure memo Ex.PW10/O after completing the necessary formalities in this regard. After completion of investigation, a report u/s 173 Cr.P.C was filed against the accused persons before the Metropolitan Magistrate, Delhi. Thereafter, it was assigned to the court of Ld. Addl. Sessions Judge, Delhi. The Charges were framed against the accused persons for having committed offence punishable u/s 302/34 IPC. A separate charge was framed against accused Yashpal for having committed offence punishable u/s 27 of the Arms Act. All the accused persons pleaded not guilty in respect of charges framed against them and claimed trial.

3. The prosecution, in all, had examined 15 witnesses, out of which Smt. Pushpa PW-1 and Sh. Lekh Ram PW-2, are parents of the deceased Rajbir. As per prosecution story, Sh. Lekh Ram PW-2 was the eye witness to the alleged

occurrence whereas Smt. Pushpa PW-1 has partly seen the occurrence. PW-5 Dr. L.T.Ramani had conducted the postmortem of the deceased. Remaining witnesses relate to police and medical evidence.

4. The accused persons in their respective statement u/s 313 Cr.P.C had denied incriminating evidence against them and stated that they were innocent persons and had been falsely implicated. Accused Kali Charan had stated that on the day of occurrence, he was sleeping outside his house and his son Om Parkash was sleeping on the roof. His daughter Pushpa DW-1 was sleeping inside the room which had an opening towards the road. At midnight, he heard cries of Pushpa DW-1. He went inside the room and found deceased Rajbir there. His daughter Pushpa DW-1 had told him that deceased Rajbir had tried to commit rape upon her. By then, his son Om Praksh had also reached there. He and his son Om Prakash had apprehended the deceased. The mohalla people also gathered there and gave beatings to Rajbir. Accused Yashpal was not present in the house. Accused Om Parkash had claimed innocence. He had taken the same stand as was taken by his father Kalicharan. Accused Yashpal had stated that he was not present at the spot and had gone to Samai Pur Badli on that night.

5. In defence, accused persons had examined DW-1 Smt. Pushpa, who is the daughter of accused Kalicharan and sister of accused Om Parkash and Yashpal, who had deposed that on the night intervening 17th -18th April, 1989, she was sleeping in her room and deceased Rajbir came there and tried to commit rape upon her and when she cried, her father and brothers came. Mohalla people also gathered there and deceased was given beatings by those persons.

6. Learned trial court found the evidence of parents of deceased, i.e., Smt. Pushpa PW1 and Sh. Lekh Raj PW2, trustworthy and rejected the defence version and held that the prosecution had established its case beyond doubt and convicted the accused persons under Section 302/34 IPC and Yashpal was further held guilty for having committed the offence under Section 27 of the Arms Act vide impugned judgment dated 9.4.1997 and sentenced them vide an order dated 15.4.1997 as is stated above.

7. Mr. Mohit Mathur, Amicus Curiae has contended that evidence of Puspa PW1 and Lekh Raj PW2 i.e. parents of deceased could not have been relied upon by the learned Additional Sessions Judge. It is contended that they are not eye witnesses to the alleged occurrence. It is contended that it is clear from the evidence of Smt. Pushpa PW1 that she was sent from the spot by Lekh Raj-PW2 for informing the police as such she has not seen the material occurrence. It is further contended that reading the entire evidence of PW2-Lekh Raj, it can't be said that he had seen the alleged occurrence. It is contended that as per evidence on record, the deceased had died in the house of appellants at the wee hours of the night and at that time Puspa DW1, the daughter of accused Kali Charan and sister of accused Om Prakash and Yashpal was also inside the house. The trial court ought to have given credence to the evidence of Puspa DW1 who has categorically deposed in the defence evidence that at the time of incident she was sleeping inside a room of her house. Her father Kali Charan was sleeping outside on the road and her brother Om Prakash were sleeping on the roof. It has also come in her evidence that deceased Rajbir was trying to commit rape upon her. Thereupon, she raised hue and cry. On hearing her cries, the accused persons, i.e., Kali Charan and Om Prakash came in the room. The persons of Mohalla also came inside and had given beatings to the deceased due to which he died. It is contended that in view of above evidence, the learned Additional Sessions Judge has erred in holding that the accused persons were guilty in the present case. It is contended that appellant Yashpal was not present at the spot and has been wrongly convicted by the learned Additional Sessions Judge. It is further contended that assuming accused Kalicharan, Om Prakash and Yashpal had caused the alleged occurrence, in that event, in any view of the matter, the provisions of Section 302 IPC are not attracted in the facts of the present case. It is contended that seeing the act of the deceased, they lost self control and out of grave and sudden provocation, committed the alleged occurrence, as such, they are entitled to benefit of Exception 1 of Section 300 IPC.

8. On the other hand, it is contended by the respondent/State that there was no provocation sufficient enough to invoke the Exception 1 under Section 300 IPC. The appellants have been rightly convicted under Section 302/34 IPC and their case is not covered under Section 304 IPC as is contended and the appeal is

liable to be rejected.

9. The material witnesses of the prosecution are Smt. Pushpa PW1 and Sh. Lekh Raj PW2, parents of deceased Rajbir. Smt. Pushpa PW1, had deposed that on 17.4.1989 she along with her husband Lekh Raj PW2 and son Rajbir were sleeping outside their house. At about 2 a.m. appellant Kali Charan came there and called her son Rajbir who got up from the cot. When he was taking her son Rajbir, she and her husband - PW2, got up and they asked Kali Charan as to where he was taking their son. Kali Charan replied that he had an important thing to talk to him. When her son did not return back for about 15-20 minutes, they both i.e. PW1 and PW2 went to the house of appellant Kali Charan which is at a distance of 45-50 steps from their house in another street, in the same locality. When they entered the house of Kali Charan they saw Rajbir lying on the floor and accused Om Prakash had caught hold of his neck and Kali Charan was giving fist blows. Yashpal was also there. Her husband told her to immediately call the police. Accordingly, she rushed to Police Station Nand Nagri and got recorded D.D. report Ex. PW1/B. Lekh Raj PW2 has also deposed in the same manner as is deposed by PW1 about taking of their son Rajbir by Kali Charan to his house and that when their son did not return for 15-20 minutes then they rushed towards the house of Kali Charan. There he saw that Om Prakash had caught hold of his son Rajbir from his neck and Kali Charan was giving fist blows with something in his hand and he sent his wife to the Police Station. He also saw Yashpal who had stabbed deceased Rajbir 2-3 times in his abdomen with something in his hand. As per evidence of Pushpa PW1, she has not seen the material occurrence as she was sent by her husband PW2 to inform the police where she lodged a report Ex. PW1/B. In the said report Ex.PW1/B, she has not stated that Kali Charan had come and had taken her son to his house. As regards the material occurrence, Lekh Raj PW2 has deposed that Yashpal had stabbed Rajbir 2-3 times in the abdomen of deceased Rajbir whereas as per post mortem report Ex. PW5/A, there is no injury on the abdomen of deceased. The said report shows that there are two incised stab wounds i.e one on the chest and the other on the scapular region. Had Lekh Raj-PW2 seen the occurrence, he would have described the seat of injuries correctly. It has also come in the evidence that the incident had occurred inside the house of Kali Charan in a room. Smt. Pushpa-PW1 has stated in her

cross-examination that neither she nor her husband had entered the room where the incident had taken place. It has also come in the cross-examination of Lekh Raj PW2 that he could not describe the weapon with which accused Yashpal had caused injuries to Rajbir. By reading the entire evidence of PW2, it can't be said with certainty that he had seen the material occurrence. It has also come in the cross-examination of PW2 that deceased Rajbir was not on visiting terms with the accused persons. The suggestion has also been given to Lekh Raj PW2 that deceased used to tease his daughter Pushpa-DW1. Under these circumstances, it is also not believable that Kali Charan would go and call Rajbir for an important talk and that PW1 and PW2 would allow their son Rajbir to accompany Kali Charan in the late hours of the night. The evidence of PW1 and PW2 to this effect is also not believable.

10. It is an admitted position that deceased Rajbir had died in the house of the accused persons in a room on the ground floor. It has also come out in the evidence that after the incident there was blood in the room which was seized from the spot by ASI Bhoop Singh PW10 after doing necessary formalities vide memo Ex.PW10/B. In cross- examination of PW2, suggestion is given to Lekh Raj PW2 that on the day of incident at about 2 a.m. accused Om Prakash had returned home after watching govt. video which was being shown in the street and he saw deceased Rajbir in the room of Pushpa who was crying at that time and had told her brother i.e. accused Om Prakash that Rajbir was trying to rape her. Further suggestion is given that on hearing the noise, Kali Charan and Yashpal who were sleeping outside their house also came inside the room. By giving such a suggestion to Lekh Raj-PW2, the accused persons have virtually admitted their presence in the room of Pushpa-DW1 as well as that of deceased Rajbir at the time of incident. The stand of the appellant Yashpal that he was not present at the spot stands demolished by aforesaid suggestion to PW2.

11. As per post mortem report Ex. PW5/A, death is homicidal. Injuries as per report Ex. PW5/A on deceased are as under:-

"External injuries: 1.An incised stab wound placed almost vertically on the left side front of chest 1.5 CM away from mid-line. Size of the wound was 2.5 CM x 1 CM x

(depth to be ascertained). The margins were regular and lower end was more acutely cut.

2. Incised wound 2 CM x 0.8 CM x (Depth to be ascertained) present transversally on the left scapular area, 2 CM to the left of mid-line. This injury was spindle shape.

Internal examination:

The scalp tissues were normal. Skull bones were intact. The brain was pale.

Neck tissues : Normal, trachea-NAD.

Chest : The injury no.1 on exploring were found to have entered left chest cavity, after cutting 6th coastal cartilage. The injury continued on the pericardium (heart covering), interior wall of left ventricle through and through and was chamber deep. The total depth of the injury was 9 CM from the body surface. Injury no.2 was found communicating with left chest cavity through 7th inter-coastal space. The injury was seen on the hilar region of the lung, peri-cardium and posterior wall of left ventricle. The total depth of injury no.2 was 10 CM from body surface. Left chest cavity was full of blood. So was peri cardiac cavity. Left lung was partially collapsed.

Abdomen : Stomach contained 6 ounces of digested food material and other abdominal organs were normal.

Opinion

The injuries were ante mortem caused by sharp edged weapon and were individually sufficient to cause death in the ordinary course of nature. The death was due to haemorrhagic shock consequent to injuries. Time since death was about 8 hours."

12. The evidence on record clearly establishes that Rajbir had died in the house of accused persons. The evidence on record also establishes the presence of accused persons at the spot. Rather, in the cross-examination of PW2, as is noted above, accused persons have admitted their presence in a room where the

incident had occurred. The defence of the accused persons is that Rajbir was given beatings by Mohalla people in their house. However, they have not named a single person of Mohalla who had allegedly given beatings to Rajbir, either to the police or in the evidence before the learned Additional Sessions Judge. They have falsely taken such a stand in order to save themselves. The failure on their part to properly explain as to how Rajbir had died in their house raises a presumption that they were responsible for the death of the deceased. Further the evidence on record shows that after the incident, accused Kali Charan and Om Prakash were arrested on the same day at about 1 p.m. from the nearby park. Accused Kali Charan was wearing kurta Ex.P2 and accused Om Prakash was wearing shirt Ex.P3, both having blood stains, which were seized vide memo Ex.PW10/G. The same were seized by ASI Bhoop Singh-PW10 in the presence of SI Mohlad Singh. The testimony in this regard is not demolished in cross- examination. As per CFSL report Ex. PX, human blood of group B was detected on kurta Ex.P2 and shirt Ex.P3 which is the same blood group as that of the deceased. The shirt Ex.P1 of accused Yashpal having blood stains was also seized during investigation vide memo ex.PW10/M by the IO in the presence of ASI Bhoop Singh-PW10 on 27.04.1989. As per CFSL report, Ex. PX, human blood of group B was detected on the shirt Ex.P1 also. This piece of evidence also supports the case of prosecution.

13. Smt. Pushpa DW1 who is the daughter of appellant Kali Charan and sister of appellants Om Prakash and Yashpal had stated in defence evidence that on the day of occurrence at about 2 AM, deceased Rajbir had entered in her room and tried to commit rape upon her. Her material deposition about deceased Rajbir entering the room and trying to commit rape upon her is not demolished in cross-examination.

14. In view of above evidence appearing on record, it is to be seen whether the accused persons are entitled for benefit of Exception 1 to Section 300 IPC. The necessary requirements of applicability of exception I to Section 300 IPC and as to whether accused can claim the benefit of the same has been dealt in judgment of a Division Bench in the case of Suresh Singhal v. State : 2010 (173) DLT 642, the relevant paras of the same are as under:-

"42. Exception I. In order to bring the case within Exception I, the following conditions must be complied with:

(i) The deceased must have given provocation to the accused;

(ii) The provocation must be grave;

(iii) The provocation must be sudden;

(iv) The offender, by reason of the said provocation, shall have been deprived of his power of self-control;

(v) He should have killed the deceased during the continuance of the deprivation of the power of self-control; and

(vi) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

43. Once the prosecution proves that the act committed by the accused had resulted in the death of a person, it is for the accused, who seeks to reduce the nature of the crime committed by him by claiming the benefit of the Exception to prove that the provocation received by him was grave as well as sudden, was such as might reasonably be deemed sufficient to deprive him of self control and that the act of killing was committed whilst absence of control still existed and can reasonably be attributed to it. This proposition of law is well settled and was reiterated by Supreme Court in the case of Ram Kishan v. State of Rajasthan, JT 2000 (4) SC 350."

In Devku Bhikha vs State of Gujarat : AIR (1995) SC 2171, the appellant therein had admitted having caused the murder of headmaster of a school and had explained the cause as grave and sudden as the deceased in order to help the accused in getting job in his school had asked him to make available his wife at his home for night. The deceased had also called him an impotent. The trial court rejected the plea and convicted him under Section 302 IPC. The High Court, on an appeal, confirmed the conviction and sentence. On an appeal to the Supreme Court, it was held that it was a case where the appellant had lost self control and

out of grave and sudden provocation committed the offence. The Supreme Court scaled down conviction from Section 302 IPC to one under Section 304 Part-I IPC. The relevant paras of judgment are as under:-

"3. It is settled law that the confession of the accused has to be taken as a whole and the exculpatory part cannot be thrown aside. As said before, the case of the prosecution lies solely on the two dying declarations of the deceased. The appellant instead of projecting a plain denial has on the other hand strengthened those dying declarations by his statement in admitting that he was responsible for the death of the deceased.

Yet, his owning the commission of the crime does not lead to the conclusion that he was guilty of offence punishable under S.302, I.P.C. In his statement as his own defence witness he has narrated the sequence of events by which he was provoked by the deceased. It stands out prominently that the deceased was a member of a high caste and the appellant of a low caste. Unfortunately the appellant was subjected to repeated insults at the end which, when his tolerance broke down, he made use of the knife and inflicted repeated injuries on the deceased who had unabashedly and lecherously asked the appellant to make available his wife to him for immoral purpose. This part of the statement of the appellant cannot be doubted. It is also in evidence that there was a job available in the school of the deceased head master and that the appellant wanted to apply for the same to the headmaster. This may have provided enough opportunity to the deceased to exploit the situation, as the appellant was unemployed in those days when the occurrence took place.

Thus, from this analysis it becomes abundantly clear that the appellant was driven to the crime which was not premeditated and the occasion had sprung up at the moment, gradually leading to the point when the appellant lost his self-control, and due to grave and sudden provocation, inflicted the injuries on the deceased, successively within seconds. We think, therefore, that the offence made out against the appellant is under S. 304 Part I, I.P.C. Accordingly, the offence is scaled down from one punishable under S. 302, I.P.C. to one under S. 304 Part I, I.P.C. for which we impose sentence of seven years' R.I. on the appellant.

Apparently it seems that the appellant has already undergone that sentence. Should there be any difference and he has to be taken back in jail then the law will have its own course. The appeal is, thus, partially allowed with the above result."

It has clearly come in the evidence that the deceased was in the room of Pushpa DW-1 at the time of incident. The evidence also shows that they were neighbours and the house of deceased was at a little distance from the house of accused persons. Puspa DW1 has categorically deposed that deceased was trying to commit rape upon her. Her evidence to this effect cannot be brushed aside especially when the same is not demolished in cross-examination. It has also come in the evidence that when she raised an alarm the accused persons had gone in her room and Pushpa DW-1 told them that Rajbir was trying to commit rape upon her. Accused persons being her father and brothers, it was not at all unusual on their part to lose the power of self control and to attack in those circumstances. The accused persons have succeeded in highlighting the circumstances to show that they were gravely and suddenly provoked, as such it is possible for them to contend that the act was covered by the first Exception to Section 300 IPC. Reference in this regard is made to judgment of Ram Kishan v. State of Rajasthan: (1) 2001 CCR 291 SC.

Evidence on record suggests something unusual which could not be tolerated by the accused persons so they became furious, lost power of control and committed the homicide. We are, therefore, of the view that the case is covered under Exception 1 to Section 300 IPC.

15. In this backdrop, we are of the view that death of Rajbir caused by the appellants amounts to culpable homicide not amounting to murder because it was caused under grave and sudden provocation. As we have not believed the evidence of Lekh Raj PW-1 having seen the material occurrence, the accused Yashpal cannot be held guilty under Section 27 of Arms Act as is held by learned Additional Sessions Judge. The alleged recovery of knife Ex.P4 is also from ganda nala.

16. In view of above discussion, the appeal is partly allowed. The conviction of appellants under Section 302/34 IPC is converted to one under Section 304 Part I

read with section 34 of IPC. The sentence of life imprisonment awarded to them is reduced to 7 years of rigorous imprisonment. The sentence of fine, is, however maintained. Needless to add that they shall be entitled to the benefit u/s 428 of Cr.P.C. The conviction of appellant Yashpal having committed offence punishable under Section 27 of the Arms Act and the order of sentence imposed for the said offence is set aside. The appellants are on bail. Their bail stands cancelled. The appellants be arrested for serving the remainder of their respective sentences.

A copy of the judgment along with record be sent to the Id.trial court for compliance.

The appeal is partly allowed as above.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**