

Kanhai Vs. the State

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Court : Allahabad

Decided On : Nov-01-1966

Reported in : AIR1967All561

Judge : T. Ramabhadran and ;H.C.P. Tripathi, JJ.

Acts : [Evidence Act, 1872](#) - Sections 32(1); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 529 and 530

Appeal No. : Criminal Appeal No. 1196 of 1966

Appellant : Kanhai

Respondent : The State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : P.C. Chaturvedi and N. Lal, Adv.

Disposition : Appeal partly allowed

Judgement :

Tripathi, J.

1. Appellant Kanhai has been convicted by the Additional Sessions Judge, Farrukhabad, of offences under Sections 457 & 302 I. P. C. and has been sentenced to two years' rigorous imprisonment under the first count and to suffer

death on the charge of murder. He has come up in appeal against his conviction and sentences and the learned Sessions Judge has made the usual reference for the confirmation of the sentence of death inflicted on the appellant.

2. The accusation against the appellant was that during the night intervening 3rd and 4th of September, 1965, at about 2 A.M. in order to commit theft he committed house breaking of Pyare Bhurji's house in village Ghamaich Mau, police station Kannauj, district Farrukhabad and near the aforesaid house committed murders of Phool Chand and Sri Krishna by striking at them repeatedly with a Kanta. The learned Sessions Judge was of opinion that the case of the prosecution relating to the murder of Phool Chandra has not been established against the appellant. Accordingly he acquitted him of that charge but found the charge under Section 302 I. P. C. in respect of the murder of Sri Krishna established against the appellant and convicted and sentenced him as has been stated above.

3. The prosecution story lies in a narrow compass.

4. Appellant Kanhai and Sri Krishna deceased resided in village Ferozpur Taran within the jurisdiction of police station Kannauj. Phool Chand, resident of another neighbouring village, was a cousin of Sri Krishna. On the night of occurrence they went with avowed object of committing theft in the house of one Pyare Bhurji in the neighbouring village, of Ghamaich Mau. Appellant Kanhai made a hole in a wall of the house but none of them dared to enter it as they suspected that some of the householders were still awake. They receded back to the bank of a tank which lay close to the house and waited for the inmates to go to sleep. At about 2 A M appellant Kanhai asked his companions to come with him to effect their entry in the house. Sri Krishna and Phool Chandra had by that time changed their minds and refused to accompany him.

On their refusal appellant got terribly annoyed and attacked Sri Krishna from behind with a Kanta. Sri Krishna fell on the ground and cried for help. Phool Chandra who was taken aback by this sudden tragedy ran for his life. He too was, however, overtaken by the appellant and done to death at the spot. The cries raised by Sri Krishna attracted the notice of a number of villagers who ran to the spot. One of them Mohammad Haneef flashed his torch and saw the appellant

standing with a blood stained Kanta in his hand by the side, of fallen Phool Chandra. Appellant, however, made his escape good on their arrival near him. Sri Krishna who was still alive narrated his tale of woe to Ayub Khan (P W 1) who dictated a birsi information report on its basis and handed over the same at police station Kannauj six miles away during the same night at 3 A. M. In this report he gave the version of the occurrence as he had learnt from Sri Krishna in his own words on the basis of which a case was registered and investigation followed.

5. Sub Inspector Ram Ji Lal (P. W. 8) reached the scene of occurrence at about 4 A. M. and found Sri Krishna lying injured near the bank of the village tank. He immediately recorded his statement Exhibit Ka-7. He also noticed the dead body of Phool Chandra lying at a distance of about 35 paces to the south of Sri Krishna. He held inquest on it and sent it for post mortem examination. He found blood spilt on the ground near the dead body of Phool Chandra and obtained sample of the blood stained earth in a sealed container. Sri Krishna was sent for medical treatment to Sadar. Some of the villagers were interrogated and the appellant was searched for but he was not available.

6. Dr. S. P. Chaturvedi (P. W. 9) medically examined Sri Krishna at the district hospital, Fatehgarh, on 4-9-1965 at 11.15 A.M. and found the following injuries on him :

1. incised wound clean cut clotted blood $12/8'$ x $1/8'$ x skull on the right side of forehead near the inner end of brow
2. Extensive Incised wound clean cut clotted blood transverse $5'$ x $1'$ x bone across the nape of neck at the lower end on either side of midline.
3. Incised wound clean cut transverse $1'$ x $2/8'$ x muscle on top of left shoulder.
4. Superficial scratch transverse $2\ 4/8'$ x $1/8'$ on the left chest across the nipple.
7. Injuries Nos. 1 to 3 had been caused by some sharp-edged and cutting weapon and Injury No. 4 was due to contact with a rough object. The duration of injuries in medical opinion was about half a day and out of them Injury No. 2 was grievous.

8. Dr. Chaturvedi also held autopsy on the dead body of Phool Chandra on the same date at about 5.15 p.m. and found three incised cutting wounds one on the head, one on the face and one on the left side of neck. On internal examination the right parietal and frontal bones were found cut through and through under injury No. I and brain was also cut. Death was due to shock and haemorrhage on account of injuries to head and neck.

9. As the condition of Sri Krishna was found serious his statement (Exhibit Ka 4) was recorded by Sri R K. Saksena, Magistrate First Class, (P. W. 3) on 4-9-1965 at 2.15 p.m. in the district hospital. Fatehgarh, in the presence of Dr. S. P. Chaturvedi who had certified that Sri Krishna was in a fit mental state to give his statement. Sri Krishna was subsequently transferred to K. P M. Hospital, Kanpur. on 20-9-1965 for advanced medical treatment but he expired there on 5-10-1965 at 7.40 p. m.

10. The Post mortem examination on the dead body of Sri Krishna was performed by Dr. P. N Avasthi (P. W 10) on 6-10-1965 who found a swelling on the right side of the head, one incised wound $3\frac{1}{2}' \times 1' \times$ bone deep transverse on the back of the chest and another incised wound $7' \times 5'$ into bone deep on the middle of the gluteus region All the injuries were ante mortem which had resulted incutting the spine and thoracic vertebrae. Death was due to paraplegia resulting from shock and haemorrhage due to external injuries which in medical opinion were sufficient to cause death in the ordinary course.

11. At the trial, appellant had pleaded not guilty to the charges. Before the court of the committing Magistrate he denied to have caused injuries to Phool Chandra and Sri Krishna and attributed his false implication on account of enmity with the witnesses. He, however, did not give any details of his alleged enmity with them Before the court of sessions he denied the prosecution allegations and asserted that Sri Krishna had named him as his assailant in his dying declaration at the instance of his brother Jai Ram and that the witnesses had deposed against him because they wanted to save their co-villagers from the harassment which would have otherwise been caused to them. One Bulaki Ram, resident of Ferozpur, was examined in defence.

12. Bulaki Ram stated that Jai Ram and Sri Krishna were real brothers, that in Jeth last their residential house was set on fire and when the witness reached the spot both of them told him that they had suspected the appellant and other Kabars of the village as responsible for putting the house on fire. The witness has added further that a few months after Sri Krishna and Jai Ram had quarrelled with appellant Kanhai and one Puttoo on account of intervening ridge in their fields and when the witness had reached the place of occurrence during the night he had found Sri Krishna lying injured and unconscious and the dead body of another person lying at some distance. According to the witness a number of villagers were standing there. The witness had remained there for about an hour but no report was scribed in his presence. In cross-examination he admitted that eleven or twelve years before he had fought a case in his capacity of village Pradhan against Jai Ram in respect of a field.

13. The case of the prosecution rests on the testimony of Mohammad Hanif (P. W. 2) who claims to have seen the appellant standing with a Kanta in his hand near the dead body of Phool Chandra at the time and place suggested by the prosecution and on three statements made by deceased Sri Krishna at various stages first to Ayub Khan at the bank of the tank, then to Sub Inspector Tomar during the same night and again to Sri R. K. Saksena, Magistrate first Class, in the hospital at Kannauj on the next morning at about 12.15 p.m.

14. The learned Sessions Judge on an assessment of evidence reached a conclusion that Bulaki Ram (D. W. 1) was a got up witness and the story narrated by him was unreliable and that the three dying declarations of Sri Krishna recorded at different stages by different persons were all free from blemish and inspired complete reliance and connected the appellant unmistakably with his murder and also about his having committed an attempt to commit lurking house trespass in the house of Pyare Bhur.ji. Accordingly he convicted and sentenced him as has been stated above.

15. Having heard the learned counsel for the appellant at length and having considered the evidence and circumstances appearing on the record we are of opinion that the prosecution has succeeded in bringing the charge of murder home

to the appellant and he has been rightly convicted and sentenced by the trial court for that offence.

16. Ayub Khan (P. W. 1) is the Pradhan of the village. He says that while he was sleeping outside his house he heard cries of some person coming from the side of the tank. He rushed towards that side and found a dead body lying to the west of the house of Pyare Bhurji on the bank of the tank and another injured person crying and writhing in pain about 35 paces away from the dead body. It was a dark night but some of the villagers who had arrived had torches with them and in the flash of those torches he enquired from the injured as to what had happened to him and whatever he stated he got the purport of it reduced in writing then and there by one Mohammad Rhalil in his words and then went to the police Station and handed over the report at 3 a.m. during the same night. In this report it is clearly mentioned that Sri Krishna had told the witness that he had been struck by the appellant with a Kanta and that Phool Chandra too had been slain by him.

Not only this, even the fact that the appellant pretended to sit for passing urine and then suddenly turned round and attacked the deceased Sri Krishna from his back side with a Kanta is also mentioned in this report as having been spoken to him by deceased Sri Krishna. Ayub Khan has added that the Sub-Inspector reached the village in his company at about 4 a.m. and interrogated Sri Krishna in his presence. There is nothing on the record to suggest that Ayub Khan had any particular affinity with the deceased or entertained any animosity towards the appellant both of whom were the residents of another village. He says that Mohammad Hanif had told him that he had seen the appellant standing with a Kanta in his hand near the dead body but he did not mention it in the report probably because he was too much upset on finding the dead body of Phool Chandra and Sri Krishna, lying in an injured condition. We have read the statement of this witness with care and we find no reason to discard his testimony. We are, therefore, satisfied that the report which he lodged with the police contained the version of the occurrence as given to him by deceased Sri Krishna.

17. Mohammad Hanif (P. W 2) has stated that he ran towards the pond on hearing the cries coming from that side and when he was a few steps away he flashed his

torch and found the appellant standing armed with a Kanta near Phool Chandra who was lying on the ground. He also saw Sri Krishna in an injured state lying on the ground 35 paces away from Phool Chandra. He denied the suggestion that he had not reached the place of occurrence and was deposing falsely so that he himself or his other co-villagers may not get entangled in the murder case. He stated that although he informed some of the other villagers that he had seen the appellant standing near the dead body of Phool Chandra he did not give this information to Ayub Khan and thus contradicted Ayub Khan who stated that he had received this information from him. The learned Sessions Judge was of opinion that as the fact of Mohammad Haneef having seen the appellant standing by the dead body of Phool Chandra has not been mentioned in the first Information report it is not possible to accept, his testimony.

We are unable to agree with this reasoning. Mohammad Hanif is a resident of the village. The tank is at a distance of only 30 to 50 paces from his house. There is no wonder if he heard the cries during the stillness of night coming from the side of the tank and went towards it. He is an independent and natural witness and had no particular reason to speak falsely against the appellant. It may be that during the excitement created by the sudden discovery of a dead body on the bank of the tank and one person almost approaching death he did not inform Ayub Khan that he had seen the appellant standing near the dead body or even that he had informed him but Ayub Khan forgot to mention it in the first information report as he was more concerned with giving a version of the occurrence as he had learnt from Sri Krishna and not from other source. We find ourselves unable to agree with the observations of the trial Judge that the testimony furnished by Hanif is of a doubtful character. On the other hand we are of opinion that he is a witness of truth and there is no reason why the statement made by him be not taken into account in assessing the guilt of the appellant.

18. The statement of Sri Krishna recorded by Sub-Inspector Ram Ji Lal (P. W. 8) and one recorded by Sri R. K. Saxena, Magistrate First Class, at the premises of the district hospital are substantially to the same effect as the first information report lodged at his instance by Ayub Khan (P. W 1). In Exhibit Ka 4 Sri Krishna (deceased) stated that Kanhai attacked him from behind with a Pharsa and he fell

down and when his companion Phool Chandra cried out Kanhai chased him and gave him a Pharsa blow killing him at the spot. It will be noticed that in the first information report also it has been clearly mentioned that deceased Sri, Krishna was attacked from behind a fact which finds powerful corroboration from the medical evidence which shows that both the incised wounds were found on the back of the deceased. Substantially to the same effect is his statement Exhibit Ka 7 recorded under Sec. 161 Cr. PC. by Sub Inspector Ram Ji Lal wherein also it has been categorically stated that Sri Krishna was attacked from behind with a Kanta by the appellant and given blows felling him down on the ground and when Phool Chandra cried out and ran for life he was pursued and killed at the spot. Thus the story put forward by Sri Krishna in the three statements is almost uniform and consistent wherein the salient facts of the tragedy have been given in an unvarnished manner.

19. Learned counsel for the appellant has argued that the testimony of Bulaki (D W 1) shows that Sri Krishna and his brother Jai Ram were on inimical terms with the appellant as they had suspected him of having put their house on fire a few months before the occurrence. Learned counsel contends that it was therefore highly improbable that Sri Krishna would have accompanied the appellant to another village for committing theft and it may be that Sri Krishna was attacked by some other person during the stillness of night within the precincts of the neighbouring village but he nominated the appellant as his assailant because of his previous enmity. We find absolutely no substance in this argument for more than one reason.

20. We have already held that Bulaki (D. W. 1) is not a witness of truth and the story put forward by him is wholly unreliable. According to him when he went to the bank of the tank he found Sri Krishna lying unconscious and although he waited there for about an hour no report of the occurrence was scribed in his presence. This statement appears to us to be false. The occurrence had taken place at about 2 A. M in the night and the first information report had been lodged at the police station six miles away at about 8.10 A M. None of these facts have been challenged in defence. It is, therefore, obvious that the written report must have been scribed within an hour of the occurrence at the spot as has been alleged by

Ayub Khan Pradhan the author of it.

21. Sri Krishna was found in a fit condition to give his statement by Dr. Chaturvedi even on the next day. The injuries which he had received were on his back and none of them could have affected his brain. It was difficult to believe that Sri Krishna was found unconscious when Bulaki (D. W. 1) had gone to the tank. The appellant in his statement under Section 342 Cr. P. C. did not allege that there had been any quarrel between him on the one hand and Sri Krishna and his brother Jai Ram on the other relating to some intervening mendh between their fields but this witness made such a statement which shows his over enthusiasm to support the appellant.

22. According to the appellant and Bulaki Ram Sri Krishna had suspected that his house had been set on fire not only by the appellant but by several other Kahars of the village. Had it been so and if Sri Krishna who was a young lad of 16 years' age was minded to bring a false charge against his enemies there was no reason why he would have selected the appellant and not some other Kahars of the village against whom according to the appellant and his witness he entertained a similar animosity. We have, therefore, no hesitation in agreeing with the finding of the trial Judge that the defence evidence furnished by Bulaki Ram is wholly unreliable and must be rejected as false.

23. On the other hand it is obvious that the three dying declarations given by the deceased Sri Krishna are free from blemish and inspire complete confidence. They are of such a character which even if uncorroborated can form a basis for a judgment of conviction of the appellant. The statement of Mohammad Hanif referred to above and the medical evidence on the record lend powerful corroboration to the veracity of the story given by the deceased in his aforesaid statements and unmistakably point out that it was the appellant who had committed the brutal murder of deceased Sri Krishna. We are therefore, satisfied that he has been rightly convicted by the trial Judge for an offence under Section 302 I. P. C., for having committed the murder of Sri Krishna.

24. As regards the murder of Phool Chandra, as the appellant has been acquitted of that charge and as no appeal has been filed by the State challenging that

finding we are not called upon to express our opinion in regard to the same.

25. As regards the charge under Section 467 I. P. C we are not satisfied that the evidence on the record is sufficient to hold that the appellant had committed that offence. It will be noticed here that the site plan prepared by the Sub-Inspector can be no evidence of fact that the wall of Pyare Bhurji was found pierced when the Investigating Officer Ram Ji Lal visited the village as he has not stated so in his deposition before the Court.

26. In the end it was argued that as Sri Prayag Narain who was then the District Judge at Farrukhabad had not been validly appointed, he was not competent to transfer this case to the Court of the Additional Sessions Judge Sri R. B. Khandelwal, and Sri Khandelwal could not get jurisdiction, therefore, to try the case. We do not find any substance in this argument. Learned counsel has not placed any facts before us on the basis of which it can be said that Sri Khandelwal, the trial Judge, was not competent to try the case. Moreover as has been held by a Special Bench of this Court in Criminal Revn. No. 1262 of 1966 (All) and other connected cases even if it be assumed that the appointments of Sri Prayag Narain and Sri R B. Khandelwal are invalid the, impugned judgment is not liable to be set aside on that ground inasmuch as 'the de facto colour under which they functioned in office had not been exposed when the impugned judgment was rendered.'

27. Then there remains the question of sentence. The appellant betrayed the confidence of the deceased who had given him no cause for offence, stealthily attacked him from behind with a deadly weapon and caused him several injuries which proved fatal in spite of adequate medical assistance rendered to the victim. It is a brutal murder committed in a cowardly manner and there is no reason why the appellant, be not visited with the extreme penalty of law provided for such an offence

28. In the result this appeal is allowed in part. The conviction and sentence of the appellant as recorded by the trial court under Section 467 I. P. C. are set aside. Appellant's conviction under Section 302 I. P. C. and the sentence of death inflicted upon him thereunder by the trial court are, however, affirmed and the reference

made by the learned Sessions Judge under Section 374 Cr. P. C. is accepted. The sentence of death shall be carried out in accordance with law.

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