

Kailash Vs. State of U.P.

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Court : Allahabad

Decided On : Mar-31-2004

Reported in : 2004CriLJ3551

Judge : U.S. Tripathi and ;M. Chaudhary, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300, 302 and 304

Appeal No. : Crl. A. No. 1703 of 1981

Appellant : Kailash

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : S.K. Misra, ;S.P. Singh and ;H.P. Yadav, Advs.

Judgement :

M. Chaudhary. J.

1. This is an appeal filed by the accused appellant from judgment and order dated 25th of July 1981 passed by Sessions Judge Mirzapur in Sessions Trial No. 263 of 1980 State v. Kailash convicting the accused under Section 302 IPC and sentencing him to undergo imprisonment for life thereunder.

2. Brief facts giving rise to this appeal are that at 6.30 p.m. on 3rd of September 1980 Deep Nath, brother of the deceased lodged an FIR at police station Pannu Ganj District Mirzapur alleging that in the month of Asarh (July) that very year he along with his father Lalman and brother Hern Nath taking their cattle shifted to the jungle of village Chichlik from their village Jai Mohini; that at that very time Kailash, uncle of Deep Nath taking his cows came to village Chichlik and leaving his cattle there he went back to village Jai Mohini for getting paddy crop sown. In the month of September, 1980 Balram, younger brother of Deep Nath also came to village Chichlik taking their oxen. Hovel of Deepnath was situate at a considerable distance from that of Kailash at the outskirts of village Chichlik. There was also an embankment of bamboo in the eastern side of the hovel and Deep Nath used to tether his cattle at that place. At about 8.00 a.m. on 3rd of September 1980 Balram was standing at the opening of the said 'gher' (embankment of bamboo) that Kailash taking his gun reached there and asked Balram that cattle stock was not distributed between them justifiably and he would have all the she-buffaloes with him. Thereon Balram replied that partition of cattle had already taken place between them and they would not give any she-buffalo to him. Immediately Kailash fired a shot at Balram with his gun hitting him at his neck and sustaining the fatal injury Balram died on the spot instantaneously. The police registered a crime against the accused under Section 302, I.P.C. accordingly and made an entry regarding registration of the crime in the general diary.

3. S. I. Har Narain Yadav to whom investigation of the crime was entrusted recorded the statement of Deep Nath, the first informant at the police station itself and then proceeded to the scene of occurrence. He took halt at village Nauva Sota in the night as the village Chichlik was situate at a distance of about twenty three miles from the police station and the way to village; Chichlik was quite tedious through the jungle and there were streams, drains etc. on the way and there was no conveyance available as one had to go there either on foot or on bicycle. Next morning on reaching at the scene of occurrence the investigating officer inspected the site and prepared its site plan map (Ext. Ka 9). He also collected blood stained earth and simple earth from the site and prepared their recovery memo (Ext. Ka 10). He also picked up an empty cartridge lying near the dead body and prepared its memo (Ext. Ka 11). Then he drew inquest proceedings on the dead body of

Balram and prepared the inquest report (Ext. Ka 12) and other necessary papers (Exts. Ka 13 to Ka 15) and entrusted the dead body in a sealed cover along with necessary papers to constables Ghanshyam Rai and Shiv Mangal to be taken to Roberts Ganj mortuary for its post mortem. He also recorded statements of the witnesses of 9th of September, 1980. Subsequently investigation of the case was entrusted to Station Officer P. N. Ojha under the orders of the Circle Officer.

4. Autopsy on the dead body of Balram was conducted by Dr. Ramji Pandey Medical Officer District Hospital Mirzapur on 6th of September, 1980 at 12.15 noon as the Medical Officer at Roberts Ganj mortuary reported that sweeper was not available there as he was on leave due to illness. The autopsy revealed an ante mortem forearm wound of entry 2.5 c.m. x 2.5 c.m. with margins inverted on right side upper part base on lateral part of neck just above right middle collar bone. Blackening and tattooing was found present and direction obliquely and anterior posteriorly and then towards left. On an internal examination upper lobe on right side and left lobe were found congested and right carotid artery lacerated. The doctor recovered 31 small pellets and three wadding pieces from back of chest left side. The doctor opined that death was caused due to shock and haemorrhage as a result of ante mortem injury about three days ago.

5. It appears that accused Kailash surrendered in the Court along with his gun on 10th of September, 1980 and was sent to jail, and his licensed gun was kept in the Sadar Malkhana.

6. After completing the investigation the police submitted charge sheet against the accused.

7. Licensed gun of the accused and empty cartridge picked up from the scene of occurrence were sent to Forensic Expert for opinion if that shot was fired with that very gun. The Forensic Expert reported that since the cap of the empty cartridge was broken comparison was not possible due to absence of individual characteristics on the empty cartridge.

8. Blood stained earth and clothes were sent to Forensic Science Laboratory UP for chemical examination if those articles contained human blood and if so of the

same blood group. According to the Serologist's report blood stained earth and clothes contained blood stains.

9. After framing of charge against the accused the prosecution examined Deep Nath (PW 1), Lalman (PW 2), Shahadan (PW 3) and Jawahar (PW 4) as eye witnesses of the occurrence. Testimony of the remaining witnesses is more or less of formal nature. PW 5 HC Ali Haider who prepared the check report and made entry registration of the crime in the general diary has proved these papers (Exts. Ka 2 and Ka 3). PW 6 CP Ghanshyam Rai to whom dead body of Balram was entrusted for being taken to Roberts Ganj mortuary for its post mortem stated that since sweeper was not available there it was referred to District Hospital, Mirzapur where autopsy was conducted on the dead body. PW 7, Dr. Ramji Pandey the then Medical Officer, District Hospital, Mirzapur who conducted autopsy on the dead body proved the post-mortem report. PW 9 S. I. Har Narayan Yadav who investigated the crime in main has proved the police papers. PW 8 Station Officer, P. N. Ojha to whom investigation of the case was transferred under the orders of the circle officer on 9th of September, 1980 and who after completing the investigation submitted charge sheet has proved the same.

10. The accused denied the occurrence altogether admitting that prior to one year of the alleged occurrence he and his cousin Lalman used to rear their cattle and do cultivation jointly and every year at the start of the rainy season they used to shift from village Jai Mohini to village Chichlik for 8 months. He also stated that livestock had already been divided between him and his cousin Lalman. He also stated that he was got implicated in the case falsely on suspicion.

11. On an appraisal of the evidence on record the learned Sessions Judge believed the prosecution case and held the accused guilty of the charge levelled against him and recorded his conviction under Section 302, I. P. C. sentencing him to imprisonment for life thereunder.

12. We have heard learned counsel for the appellant and the learned AGA for the State as well.

13. Out of four witnesses examined by the prosecution PW 3 Sahadan has not supported the prosecution case against the accused. He is resident of village Panaura situate in immediate east of village Chichlik. He stated in his examination-in-chief that at about 8.00 a.m. the alleged morning he was sitting in the hovel of Lalman with him and Deep Nath was tethering the calves in the embankment made of bamboo in front of the hovel and Balram was standing in the 'Gher' that Kailash reached there and some altercation took place between them over division of cattle; that he went away to graze the cattle and that at about 12.00 noon that very day he learnt that Balram died. He was declared hostile and cross-examined by the prosecution with the permission of the Court to no use. However this witness Sahadan stated in his cross-examination that he used to graze the cattle of one Maharaj who was quite intimate with Kailash.

14. However, PW 1 Deep Nath, brother of the deceased and the first informant deposed all the facts of the incident from the beginning to the end as stated above. PW 2 Lalman father of the deceased and PW 4 Jawahar corroborated him stating likewise. Admittedly at the alleged time Lalman and his sons Deep Nath, Balram and Hem Nath were residing in the hovel built in the jungle of Chichlik. Ocular testimony of all the three eye witnesses coupled with medical evidence and the fact that the investigating officer found blood inside the embankment made of bamboo where dead body of Balram was lying and recovered an empty cartridge at a distance of some 3-4 paces from the place where dead body was lying go to establish that Balram was done to death at the time and place and in the manner alleged by the prosecution. We have carefully examined ocular testimony of the eye witnesses and we see no plausible reason to discard their testimony. All these three eye witnesses were subjected to searching and rambling cross-examination by the defence counsel but nothing tangible to discredit their testimony could be brought on the j record.

15. PW 1 Deep Nath is the real brother of the deceased and PW 2 Lalman is his father. Presence of these two witnesses at their hovel (Madhaiya) at the time of occurrence is quite natural. Accused appellant Kailash admitted in his statement recorded under Section 313 of the Code of Criminal Procedure that in the month of Asarh Lalman along with his sons Hem Nath and Deep Nath taking his cattle went

to Chichlik and 'lived there raising a 'Madhaiya' and at the time of alleged incident Balram was also with his father in the jungle of Chichlik. Explaining his presence in the 'Madhaiya' of Lalman at the alleged time PW 4 Jawahar stated that he used to graze the cattle of Lalman earlier but for the last two months prior to the occurrence on the request of Sita Ram resident of Chichlik Lalman asked him to serve Sita Ram and graze his cattle; that since then he used to graze the cattle of Sita Ram and that the alleged morning he left the cattle for grazing in the jungle and due to heat of sun he went to Lalman and was sitting with him in his 'Madhaiya' when the incident occurred.

16. P. W. 2 Lalman father of the deceased stated that his cousin Kailash, the accused used to treat all the sons affectionately as his nephews. PW 4 Jawahar had no enmity with the accused appellant. There is no reason to doubt the testimony of these three witnesses. It does not stand to reason as to why the blood relations of the deceased would implicate the accused appellant who is closely related to them falsely exculpating the real culprit.

17. Some discrepancies in the statements of these witnesses have been pointed out by the appellant's learned counsel. He contended that PW 1 Deep Nath stated that he did not accompany the dead body of Balram when it was sent from the scene of occurrence for post mortem whereas PW 2 Lalman father of the deceased stated that when the sub-inspector went from the scene of occurrence he took the dead body with him and that Deep Nath also accompanied the sub-inspector. However on carefully examining the statements of these witnesses it appears that there is no material discrepancy in the statements of the two witnesses. PW 7 Jawahar corroborated PW 1 Deep Nath stating that neither Lalman nor any of his family members accompanied the dead body when it was taken in sealed cover by the two constables and four co-villagers. Both PW 1 Deep Nath and PW 4 Jawahar stated that after drawing inquest proceedings and sending the dead body in a sealed cover from the scene of occurrence the sub-inspector recorded statements of the witnesses and then he collected blood stained and simple earth from the scene of occurrence and picked up the empty cartridge lying there and prepared their memos and also site plan of the place of occurrence. In fact PW 2 Lalman also stated that Deep Nath accompanied the

sub-inspector when he returned back from the scene of occurrence. However his statement that the sub-inspector took the dead body with him appears having been given on account of normal error of observation due to mental indisposition as he must have been under shock and horror visualizing the murder of his young son. Otherwise too, it is a matter of common experience that a witness though truthful is liable to be overawed by the Court atmosphere and the piercing cross-examination made by the defence counsel and out of nervousness gets confused regarding sequence of events and sometimes replies the questions put up by the counsel from imagination on the spur of the moment. The discrepancies in the statements of the witnesses have been dealt with by the trial Court and discarded for cogent and convincing reasons.

18. Learned counsel for the appellant further argued that FIR lodged at the police station and GD entry regarding registration of the crime are ante timed; but he could not succeed in substantiating the same. He contended that as stated by HM Ali Haider (PW 5) special report of the crime was not sent to higher authorities the same evening but it was sent next day and constable Sheo Shankar Singh through whom special report was sent returned back to the police station at 10.00 p.m. and therefore it should be concluded that FIR was not lodged on 3rd of September but at some hour next day. It has come in evidence that headquarter Mirzapur is situate at a distance of about 56 kms. from the police station. A perusal of GD entry (Ext. Ka 6) goes to show that special report of the crime was sent to higher authorities the following morning i.e. on 4-9-80 at about 5.00 a.m. as it was raining in the night and there was no means of conveyance. Considering the distance of 56 kms. and the explanation offered by the prosecution we are not inclined to accept the said argument advanced by the learned counsel for the appellant. There is absolutely no plausible reason to doubt the veracity of the GD entry made by the Police Official in the discharge of his official duties. The said argument is therefore repelled.

19. Having carefully considered all the arguments raised by the appellant's learned counsel in the light of evidence and circumstances attending the case we are unable to find any merit in any of them.

20. However coming to the point as to what offence was made out, there is nothing on the record to show that the appellant fired at Balram with an intention to cause his death. The attack was not pre-planned or pre-meditated. It appears that during the altercation the appellant lost his balance of mind and fired at Balram in the heat of moment. However the appellant must be attributed with the knowledge that when he fired at the victim he was likely to cause the death of that person. Hence conviction of the accused appellant is altered from Section 302, I. P. C. to Section 304, Part II, I. P. C. We are also in the judgment that sentence of seven years' rigorous imprisonment to the appellant for the said offence would meet the ends of justice.

21. The appeal is allowed in part and conviction of the accused appellant is altered from Section 302, I. P. C. to Section 304, Part II, I. P. C. and he is sentenced to rigorous imprisonment for seven years thereunder. He is already in jail. He shall serve out the sentence imposed upon him.

22. Certified copy of the judgment along with record of the case be transmitted to the Court below immediately for necessary compliance under intimation to this Court within two months from its receipt.

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