

Kamlesh Vs. State

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Court : Allahabad

Decided On : Nov-19-1998

Reported in : 1999CriLJ1354

Judge : G.P. Mathur and ;K.D. Shahi, JJ.

Acts : Arms Act - Sections 25; [Indian Penal Code \(IPC\), 1860](#) - Sections 109, 302, 303, 307 and 313; Code of Criminal Procedure (CrPC) - Sections 161

Appeal No. : Criminal Appeal No. 493 of 1980

Appellant : Kamlesh

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Rajesh Ji Verma, Adv.

Disposition : Appeal dismissed

Judgement :

K.D. Shahi, J.

1. Appellant Kamlesh has preferred this appeal against his conviction and sentence of life imprisonment under Section 302, I.P.C. recorded by Sri M. G. Godbole, the then Sessions Judge, Jalaun at Orai vide his judgment and order

dated 18-2-1980 in S. T. No. 386 of 1978.

2. The brief facts of the case are that Sri Ram Sewak, informant lodged the F.I.R. under Section 307, I.P.C. on 7-9-1978 at 10.05 a.m. which is Ex. Ka-6, stating therein that on 7-9-1998 at 9.00 a.m. his son Santosh Kumar was attacked by Kamlesh by Tamancha. It is alleged that the informant Ram Sewak was tenant of Nathu Ram Bhatt, a co-accused who had been acquitted. Ram Sewak was residing in the house of Nathu Ram along with his wife and daughter Shanti and other issues. Accused Kamlesh developed love affair with Km. Shanti. Rama Sewak came to know of this about 4 or 5 days before the occurrence, Ram Sewak summoned his son Santosh Kumar, who was working in the office of the Divisional Superintendent, Central Railway, Jhansi, as a telephone operator, with a view that Santosh Kumar should take away Km. Shanti to Jhansi. On 7-9-1978 about 9.00 a.m. Kamlesh called for Santosh Kumar, son of the informant, in his room and asked that he loves Km. Shanti, she should marry with him. The victim Santosh Kumar refused and told that both are of different castes and the marriage is not possible. At this Kamlesh took a Tamancha and fired at Santosh Kumar, Gopal, son of Mangal and Kallu, son of Budhai saw the occurrence. They made an alarm. Kamlesh came out of the room and ran away. Ram Sewak, informant took Santosh Kumar and admitted in the District Hospital, Jalaun at Orai.

3. In the hospital, Dr. S.N. Purwar, P.W. 2 examined the injuries of the victim the same date at 11.45 a.m. The victim Santosh Kumar was admitted in the hospital at 9.30 a.m. but the injuries could not be noted at once due to very low condition. The doctor found the following injuries at the person of the deceased :

Multiple gun shot injuries 8' x 4' on left anterior and lateral aspect of chest below nipple. Size varies from 1/4' x 1/2' in size. No blackening was there, but bleeding was present. The injury was kept under observation and X-ray of chest was advised. The duration appears to be fresh.

4. In the opinion of the doctor the injury was caused from fire-arm.

5. The victim died in the hospital on 15-9-1978 at 1.30 a.m. and the case was converted under Section 303, I.P.C.

6. On 7-9-1978 itself at 1.25 p.m. the dying declaration of the victim was recorded by Sri Panch Bahadur Singh, Dy. Collector, Mainpuri, P.W. 5. Before recording the statement the Magistrate got the victim examined by Dr. N.P. Singh, Deputy Chief Medical Officer who had given a certificate that the victim was in a fit condition to give the statement. In dying declaration Santosh Kumar had stated 'that he was in service in the office of the Divisional Superintendent, Central Railway, Jhansi, as a telephone operator. He went in the room of Kamlesh accused to talk. Accused Kamlesh took out his country made pistol and fired at him. He further stated that Kamlesh told that he loved Km. Shanti and wanted to marry her. Santosh Kumar told that he is Agarwal and accused Kamlesh is Brahmin. How this marriage can be performed. He stated that grandfather and grandmother or Kamlesh were also present in (he house.' After the victim died his dead-body was sealed and sent for postmortem. Dr. S. Chaturvedi conducted the postmortem of the dead-body. He found the following injuries at the person of the deceased.

(i) Gun shot wounds nine in number in an area of 10 cm. x 6 cm. left side, chest 8 cm. below the left nipple, 18 cm. above and to the left of umbilicus. Each largest wound was 2 cm. x 1.5 cm. and the smallest 1.5 cm. x 1.5 cm. and three wounds are chest cavity deep. Left seventh rib was fractured below the injury. The margins of the wound were blackened. There was no tattooing.

(ii) Incised wound 3 cm. x 1.5 cm. Abdominal cavity deep left side abdomen 19 cm. from umbilicus.

(iii) Stitched wound 17 cm. long 13 stitches left side of the mid line upper abdomen and lower chest 5 cm. above umbilicus pallel to the mid line on removing the stitches the margins were clean out with granulation tissue at the base.

(iv) Stitched wound 9 cm. left side, upper abdomen 6 stitches, 6 cm. below injury No. 1 at right angle to injury No. 3 and 10 Cm. above umbilicus on removing the stitches the margins were clean cut with granulation tissue at the base.

(v) Lacerated wound 1.5 cm. x 1.5 cm. x muscle deep left side chest in posterior auxiliary line, 9 cm. left side to injury No. 1.

(vi) Stitched wound 2 stitches 2 cm. long medial side right leg 3 cm. above medial malleolus transversely placed on the removing stitches margins were clear cut and under vein tied up.

(vii) Stitched wound 2 cm. long; 2 stitches left leg medial side lower part 3 cm. above medial malleobus on removing stitches margins were clean cut and under line vein was tied up.

(viii) Internal examination disclosed fracture of seventh rib left side under injury No. 1 pleura was congested on left side with three punctured wound 1.5 cm. x 1.5 cm. x through and through. Left pleural cavity contained 1 pound blood. Left lung was congested; one punctured wound 1.5 cm. x 1.5. cm. on the anterior surface of the lung. Heart 2.50 cm. left side was empty right side contained small quantity of blood. Stomach was empty. Small intestine contained small quantity of pasty material. Large intestine contained small quantity of faecal matter. Liver was 1200 cms. Spleen was absent. Kidneys both 225 cms. Bladder contained 30 ex. of urine. In the opinion of the doctor death was due to shock as a result of injury No. 1.

7. After the investigation was complete the Investigating Officer submitted the charge-sheet in the Court against Kamlesh and Nathu Ram, grandfather of Kamlesh. Nathu Ram was charged under Section 302 read with Section 109, I.P.C. and Section 25 Arms Act, while Kamlesh was charged punishable under Section 302 I.P.C. In proof of its case P.W. 1, Ram Sewak stated that Santosh Kumar, his son, was serving in the office of the Divisional Superintendent, Central Railway, Jhansi. He further stated that he was residing in the house of Nathu Ram as tenant. He loved Km. Shanti (daughter of the informant). When the informant knew this fact, he called for Santosh Kumar who went in the room of Kamlesh to have a talk and when Santosh Kumar refused to marry Km. Shanti, Kamlesh took country made pistol and fired at Santosh Kumar. On hearing the fire the informant ran towards Santosh Kumar, who stated entire facts of the informant. Thereafter, the informant wrote the F.I.R. (Ex. Ka-1) and lodged it at the police station, on the basis of which chick report (Ex. Ka-6) was registered.

8. P.W. 2, Dr. S.N. Purwar had proved the injuries of the victim and examined the victim in the District Hospital Orai at 9.30 a.m. He stated that the injuries were fresh and bleeding. He proved the injury report (Ex. Ka-2). He also proved the bed head ticket of the victim in the hospital which is (Ex. Ka-19).

9. Santosh Kumar was shifted to Railway Hospital, Jhansi, where he was admitted at 6.06 p.m. on 7-9-1978. Dr. U.D. Mathur, P.W. 3, conducted the operation of the injuries of the victim and prepared the report (Ex. Ka-3).

10. P.W. 4, Dr. N.P. Singh, Deputy Chief Medical Officer, Orai examined the victim before dying declaration of the victim was recorded. He had been examined to prove that the victim was in full mental consciousness and was fit to give his statement.

11. P.W. 5 Panch Bahadur Singh, Deputy Collector was posted as extra Magistrate at Orai on 7-9-1978. He got the information about the injuries of the victim and further he has to record the dying declaration of the victim. He proceeded to the hospital, called for Dr. N.P Singh. Dr. N.P. Singh examined the victim and gave a certificate that the victim was in a fit condition to give his statement. Thereafter, Sri Panch Bahadur Singh recorded the statement of Sri Santosh Kumar. He stated that he wrote what had been stated by the victim. He proved the dying declaration as (Ex. Ka-5).

12. P.W. 6, B.D. Sharma, Sub Inspector, Police Station Kotwali Orai had proved the police papers as well as investigation of the case. He also recorded the statement of the victim under Section 161, Cr.P.C. to which the prosecution had tried to prove as dying declaration after the death of the victim.

13. P.W. 7, Dr. S.C. Chaturvedi, Medical Officer in District Hospital, Jhansi had done the post mortem of the dead-body of the victim.

14. The statement of Kamlesh as well as Nathu Ram under Section 313, I.P.C. was recorded by the learned Sessions Judge. In his statement Kamlesh had admitted that Ravi Sewak was residing in his house as a tenant. He had denied the other allegations. After hearing the learned counsel for the parties the learned

Sessions Judge acquitted Nathu Ram because there was no evidence against him. The State did not prefer any appeal against the acquittal of Sri Nathu Ram and his acquittal, therefore, became final.

15. Being aggrieved by the aforesaid conviction and sentence under Section 302, I.P.C. the accused Kamlesh preferred this appeal which was registered as Appeal No. 493 of 1980.-He was allowed bail by this Court. The appeal came up for hearing on 31-1-1995 before the Court. The learned counsel for the appellant stated that he had tried to contact the appellant but he did not respond. The counsel for the appellant further stated that he had got no instruction. The Court cancelled the bail of the appellant on 31-1-1995 and, thereafter, non bailable warrant was issued at his Orai address. The appellant could not be arrested. The orders to cancel bail bonds and sureties were also issued. The orders were also issued to Superintendent of Police , Jalaun to arrest the accused. The Sub Inspector of the concerned police station reported that the appellant had left Orai and went to Delhi before 12 years. Amar Singh, Sub Inspector was directed to get the appellant arrested at Delhi. Several opportunities were given to the prosecution agency to produce the appellant in the Court, but they could not succeed. Lastly, on 10-11 -1998 Sri Ram Milan Dubey and Sri Amar Singh, both Sub Inspectors, posted at Orai filed their affidavits stating therein that they have taken all possible efforts to arrest appellant Kamlesh, but even at Delhi he could not be arrested.

16. For more than 2-3 years efforts have been made to arrest Kamlesh, but he could not be arrested. In these circumstances, we have got no opinion, but to hear the appeal on merits and to decide the appeal on merits with the aid of the State Counsel.

17. We have heard the A.G.A. Sri V.B. Singh and examined the records at length and gone through the judgment recorded by the learned Sessions Judge.

18. As stated above, Nathu Ram has been acquitted by the learned Sessions Judge and his acquittal has become final. Even otherwise, there is no allegation against him in the F.I.R. and there was absolutely no evidence against Nathu Ram. We have only to examine the case against the present accused appellant.

19. This is admitted fact that the informant was residing in the house of the appellant. The appellant had developed love affairs with the daughter of the informant. His son Santosh Kumar was in service as telephone operator in the office of Divisional Superintendent, Central Railway, Jhansi. He was called to take Km. Shanti to Jhansi so that both Kamlesh and Shanti may not remain in contact. Santosh Kumar preferred to have a talk to Kamlesh and went in the room of Kamlesh where he was attacked by Kamlesh with his country made pistol on the victim's refusal to marry with his sister Km. Shanti because both were of different castes. The motive of the attack in the FIR, in the statement of the victim recorded under Section 161, Cr.P.C. in the dying declaration was strong. Motive has also been stated by the informant on oath. This fact is admitted that Santosh Kumar was residing in the house of Kamlesh. This fact is also admitted that Ku. Shanti was his sister. The informant has proved on oath about their love affairs. The motive of this case is very strong and is fully established^ The informant lodged the F.I.R. at Police Station Kotwali Orai at 10. 5 a.m. while the police station is at a distance of 4 furlong from the place of occurrence. Naturally, the informant will first try to save the life of the victim, therefore, he first took the victim in the hospital and, thereafter, lodged the F.I.R. The F.I.R. is very prompt one and is very natural. The time of assault is fully established from the injury report (Ex Ka-2). The victim was hospitalised in the hospital at 9.30 p.m. His injuries could not be noted immediately because his condition was very low. His injuries were examined at 11.15 a.m. The doctor had examined the injuries as well. The injuries were caused by country made pistol.

20. In this case besides statement of the victim which was used as dying declaration, subsequently, after his death, there is also dying declaration of the victim recorded by a Magistrate. The Magistrate examined the victim in the Court and stated that the victim was in full consciousness and was in a fit condition to give statement. Not only this, the Magistrate got the victim examined by Deputy Chief Medical Officer, Dr. N.P. Singh, who gave a certificate to the effect that the victim was in fit mental condition to give his statement.

21. Besides the statements of Dr. N.P. Singh and Deputy Collector, Panch Bahadur Singh a judicial notice of the fact can be taken that the injuries were

caused on 7-9-1978. The victim died on 15-9-1978. The injury was in the chest on the left anterior and lateral aspect. Therefore, ordinarily there should not have been any disturbance in the mental condition of the victim and he could have been in a fit condition to give his statement on 7-9-1978. The statement recorded by the Investigating Officer under Sections 161, Cr.P.C. may or may not be used as dying declaration because it has not been signed by two independent witnesses but the dying declaration recorded by the Magistrate is proved and fully establishes that it is genuine dying declaration.

22. P.W. 1, Ram Sewak, who is the father of the victim has stated the entire prosecution story. There was no other previous enmity between the parties. There was no question of false implication of the grandson of the landlord. The occurrence took place inside the house of Kamlesh. Blood stained and simple earth were recovered from the room of the accused.

23. We have gone through the entire judgment recorded by the learned Sessions Judge. We fully agreed with the judgment and finding recorded by the learned Sessions Judge. We have nothing to differ from his judgment and the appeal is accordingly dismissed.

24. It is painful that the accused appellant could not be arrested by the police although the police could be able to trace out the name of the wife, father-in-law etc. of the appellant. We have to hear the appeal in the absence of the appellant. The appeal is hereby dismissed, therefore, the appellant has to undergo the sentence of life imprisonment. He has to be taken into custody at any rate. The prosecution cannot escape its responsibility by merely saying that the accused could not be arrested. It is , therefore, directed that a copy of this judgment shall be sent to the Chief Judicial Magistrate, Orai, who will have a constant watch over the matter and will report compliance to this Court whenever the appellant is taken into custody to serve out the sentence. A copy of his order shall also be sent to the Senior Superintendent of Police, Orai at Jalaun to get the appellant arrested and to serve out the sentence. A copy of this order shall also be sent to Director General of Police, U.P. and Home Secretary, U.P. to have a watch over the matter and to see that the appellant is arrested as early as possible, and is confined to jail

to undergo the sentence awarded to him by the learned Sessions Judge.

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