

Mahinder Kumar Vs. the State

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Court : Delhi

Decided On : Mar-14-1996

Reported in : 1996CriLJ2945; ILR1996Delhi131

Judge : P.K. Bahri and; Mohd.Shamim, JJ.

Acts : [Evidence Act, 1872](#) - Sections 138; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 154

Appeal No. : Criminal Appeal No. 145 of 1992

Appellant : Mahinder Kumar

Respondent : The State

Advocate for Pet/Ap. : Neelam Grover, amices Curiae and; M.S. Butalia, Adv

Judgement :

Mohd. Shamim, J.

(1) The convict-appellant (hereinafter referred to as the applicant for the sake or convenience) challenges through the present appeal, judgment and order dated May 6, 1992 passed by the learned Additional Sessions Judge, Delhi, whereby he was found guilty under section 302 of the indian Penal Code and sentenced to undergo dangerous imprisonment for life with a fine of Rs. 500. In case of his failure to clear the fine, he was further directed to undergo rigorous imprisonment

for six months.

(2) Brief facts which led to the presentation of the present appeal are As under : that one Smt. Devki (Public Witness 10) was putting up at House No. 2461, Katra Banwari Lal, Along with her sons and daughters, excluding the appellant, who also happens to be her son, as a tenant on a monthly rent of Rs. 2.50 since the time of her forefathers. The appellant, who is married, has been living separately from the members of his family in a house at Jheel, Snahdara, Delhi Along with his wife and children.

(3) The bone of contention in between the appellant and his mother and other brother was the above said tenanted accommodation. Smt. Devki wanted to vacate the said house and to deliver the possession over the same to any one who was ready to pay the premium and the amount so secured was to be paid to the son who would look after her. The appellant was opposed to the above view. He insisted that in case the aforesaid house was vacated and someone was inducted as a tenant in that eventuality he should be given his due share in the premium so collected.

(4) The appellant on February 19, 1988, at about 8.15 a.m. came to the above said house. Smt. Devki (Public Witness 10), her Son Surinder deceased, her daughter Smt. Shakuntla (Public Witness 12), Kirpal i.e. her son (Public Witness 5), Smt. Rashmi wife of the deceased were also present at that point of time. Immediately after his arrival he started abusing his mother Public Witness 10 and other brothers. A whereupon Surinder deceased (hereinafter referred to as deceased) intervened. He told the appellant that there was no occasion for him to pick up a quarrel with the mother on the said score as she was the tenant in the house and she could as such, deal with the house in any manner she liked. It led to a flaming row in between the appellant and the deceased. The appellant told the deceased in no uncertain terms that he was siding with the mother and he would teach him a lesson for doing so as soon as he came out of the house. Both of them thereafter went outside the house towards the Community Centre. They were followed by Smt. Devki (Public Witness 10), Kirpal (Public Witness 5) and Smt. Shakuntla (Public Witness 12).

(5) The appellant threatened the deceased with dire consequences. He whipped out a dagger from the right side pocket of his pant and hit the deceased twice on the left side of his chest. Public Witness 5 Kirpal Singh and Public Witness 13 Mangal tried to come to the rescue of the deceased and to have him from his clutches. However, he threatened them also that whosoever would come in between him and the deceased would also meet the same fate. After having stabbed the deceased he flew away from the made good his escape.

(6) Brother of the deceased took him to the L.N.J.P. hospital. He was examined over there by Dr. Ajay Behal. He opined him unfit for making the statement vide Ex. Public Witness 4(A. Public Witness li Laxman p Prasad who was on duty at the hospital informed the Police Station Chandni Mahal in regard to the admission of the deceased in the hospital. The said information was recorded vide D.D. No. 9vide Ex. Public Witness 15(A). A copy of the said D.D. was hand- ed over to Asi Om Prakash (Public Witness 15). On receipt of the same he immediately left for the L.N.J.P. hospital. He secured there- ' from injury report in respect of the deceased. However, he met over there Kirpal Singh (Public Witness 5). He recorded his statement (Vide Jbx. Public Witness 5)A) and sent the same to the police station for registration of a formal F.I.R. vide his endorsement Ex. PW15jB through Constable Niranjana Singh Whereupon the criminal F.I.R. was recorded (vide Ex. Public Witness 2[A) by Si Tabal Raza. However, in the meanwhile, Sho, Shri R. K. Sharma (Public Witness 16) -also reached there at the hospital. He made enquiries with regard to the condition of the deceased from the doctor on duty who opined that he was in a critical cond'tion. Consequently i Public Witness 16 Shri R. K. Sharma took over the investigation from Pw 15 Asi Om Prakash. Sho, Shri R. K. Sharma (Public Witness 16) Along with Asi Om Prakash (Public Witness 15) left for the place of occurrence. A search was made for the appellant. Subsequentlly, the appellant was arrested from his house on February 19, 1988 vide personal search memo Ex. Public Witness 14[C.

(7) During the course of investigation the appellant made a disclosure Statement vide Ex. Public Witness 15/B to the effect that he could get the knife recovered from behind the godown of Municipal Corporation of Delhi at Ram Lila Ground. In pursuance to the said disclosure Statement the appellant led the police to the

place where the knife was hidden and he got the same recovered from underneath a big stone near the Mcd godown. The said knife is Ex. P I. The said knife was, seized vide Ex. PW151E and sea lad with the seal of 'RKS'. The sketch of the knife is Ex. Public Witness 15/F.

(8) The Investigating Officer (Public Witness 16) summoned the crime team and got the place of occurrence photographed. He also himself prepared a rough site plan (vide Ex. Public Witness 16 [A]). He lifted the blood from the place of occurrence. He took and covered them into three separate packets and seized the same vide Ex.-PW5fB. He recorded the Statements of prosecution witnesses, namely, Kirpal Singh and Man-gal Singh. Hs got sent. the case property to CfsI for Chemical analysis. The reports of the expert are Ex. Px and Ex. PY. He moved an application for the purposes of post-mortem on the dead body of the deceased vide Ex. Public Witness 16/D. The post-mortem was conducted by Dr. P. C. Dixit, Maulana Azad Medical College. The report of the post-mortem is Ex. Public Witness 141B. After completing the investigation a charge-sheet Was submitted before the concerned Magistrate who later on committed the case to the court of Session as the same was exclusively triable by the Said court.

(9) The prosecution in order to bring home the guilt to the appellant examined Kirpal Singh as Public Witness 5. He has deposed to the fact that the appellant hit the deceased twice on his chest with the dagger (Ex. P1). To the same effect are the Statements of Pw 10 Smt. David and Public Witness 12 Smt. Shakuntla.

(10) Learned counsel for the appellant Ms. Neelam Grover while animadverting on the Statements of the above-named witnesses has contended with great zeal and fervour that no reliance can be placed on the Statements of the said witnesses inasmuch as PW5 Kirpal Singh is the brother of the deceased where as Public Witness 10 Smt. Devki is the mother of the deceased Similarly, Public Witness 12 Smt. Shakuntla is the sister of the deceased. Thus they are highly interested witnesses. Hence it was not safe for the lower court to have placed reliance on their Statements and to convict the appellant.

(11) The contention of the leamed counsel we feel to say the least, is puerile. While so arguing the leamed counsel is obvious of the feet that the appellant

herein is also the brother of Public Witness 5 Kirpal Singh and Public Witness 12 Smt. Shakuntla and son of Public Witness 10 Smt. Devki Thus there is absolutely no reason whatsoever as to why they should have made a false Statement against a person who is their own flesh and blood.

(12) Furthermore, there is no such law that the statements of the witnesses who happen to be the relations should be flung to the winds simply on that score. More often than not it has been observed that quite a good number of crimes are committed at the residence of victims and at odd hours when none but the relations can be expected to be present. Thus if the statements of the relations are to be discarded simply on the ground that they are close relation in that eventuality it would be well nigh impossible to prove the guilt of an accused. However, the rule of caution, whereby the Courts are to be guided require that the Statements of such witnesses should be scrutinised with greater care in comparison to that of an independent witness. We are supported in our above views by the observations of their Lordships of the Supreme Court as reported in Darya Singh & Ors. v. State of Punjab. Air 1965 Sc 378. . . ' 'There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal Courts must examine the relatives of the victim, very carefully. But a person may be interested in the victim being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce. any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal Courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence. Courts naturally .begin with the enquiry as to whether the said witness ever chances or whether they were really present on the scene of the offence. If the offence has taken place. .as in the present case. in front of the house of the victim. the fact that on hearing his shouts. his relations rushed out of the house cannot be ruled out as being improbable. and-so. the presence of the three eye-witnesses cannot be properly characterised as unlikely.....'.

(13) The above view was again reiterated by the Hon'ble Supreme Court in *Sarwan Singh & Ors. v. State of Punjab*, : 1976 CriLJ1757 .. 'It is true that this witness is the brother of the wife of the deceased and was living with the deceased for quite a few years But that by itself is not a ground to discredit the testimony of this witness, if it is otherwise found to be consistent and true'

(14) To the same effect are the observations of their Lordships of the Supreme Court as reported in *Kartik Malhar v. State of Bihar*. : 1996 CriLJ889 ,. We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dilip Singh Case* 1984 Scr 145:AIR 1983 Sc 364 in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the bar that relatives were not independent witnesses. Speaking through Vivian Bose, J., the Court observed : 'We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are 'unable to concur. This is a fallacy common to to many criminal cases and one which another Ranch of this court endeavored to dispel in *Rameshwar v. The State of Rajasthan* : 1952 CriLJ547 :AIR 1050 Sc 54 we found however. that it unfortunately still persists. if not in the judgment of the courts, at any rate in the arguments of counsel.'

(15) Learned counsel for the appellant has then contended that the occurrence in the instant case took plac outside the house no 2461 katra Ranwari Lal masjid near the community centre. Thus the occurrence must hav been witness by a large number of members of the public. hence they should have been examined. Thus the learned counsel wants this court draw an advance inferenc.

(16) We are sorry we are unable to agree with the contention of the learned counsel. the occurrnace in the instant case took place on February 19, 1988 (vide Ex. Public Witness 2/A) at 8.15 am. The month of February admittedly is one of

the coldest months of the year and it must have been all the more so at 8.15 a.m. when the Sun is not visible on account of fog and mist till late sometimes even by 10.00 a.m. The people thus usually do not come out of their houses on account of chilly weather and biting cold early in the morning. Thus we feel it unlikely that the incident would have been witnessed by a large number of persons.] The only natural witnesses in the above circumstances would have been the close relations i.e. mother, brother and sister who on finding the two brothers fighting pursued them and intervened to separate them. The presence of the said witnesses at the spot cannot be doubted by any stretch of imagination inasmuch as Public Witness 4 Kirpal Singh is alleged to have sustained injuries at the hands of the appellant as is manifest from the injury sheet dated February 19, 1988 placed on the file vide Mlc NO. 16136. Similar is the case with Smt. Devki (Public Witness 10). She is also alleged to have sustained injuries at the hands of the appellant vide Mlc No. 16132 dated February 19, 1988 (vide cross-examination of Public Witness 5 Kirpal Singh and examination-in-chief of Public Witness 10 Smt. Devki).

(17) The learned counsel has then contended that there is an inordinate delay in recording the First Information Report in the instant case inasmuch as the incident is alleged to have taken place at 8.15 a.m. (vide Ex. Public Witness 2/A), yet the FIR was not recorded in the instant case till 10.15 a.m. Thus there was sufficient time for deliberations, fabrications and interpolations in recording the FIR. The learned counsel in support of the above argument has led us through the observations of their Lordships of the Supreme Court as reported in *Tara Chand and another v. State of Haryana*, : 1971 CriLJ1411 (5),... ..'It is true that the importance of a first information report made promptly cannot be minimised. The object of section 154, Criminal Procedure Code is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be embellished or forgotten.'

(18) We are afraid the contention of the learned counsel is to be referred for the purposes of rejection only. Admittedly the occurrence took place as is manifest from above at 8.15 a.m. Thus the first and the foremost duty of the relations of the deceased was to have taken the deceased to the hospital which his brother Public Witness 5 Kirpal Singh in fact did (vide Ex. Public Witness 21A). The deceased

was brought to the hospital at 9.05 a.m. which is manifest from Ex. Public Witness 41A and Ex. Public Witness 181A. The Duty Constable at the hospital Public Witness 11 Lakshman Prashad immediately informed the police station with reward to the admission of the deceased in the hospital vide D.D. No. 9, Public Witness 2 Si Tabal Raza on receipt of the said information recorded the Fir (vide Ex. Public Witness 21CA) at 10.15 a.m. In the above circumstances feel that there was no delay in recording the FIR. Thus no adverse inference can be drawn against the prosecution on the said score.

(19) It has then been urged for and on behalf of the appellant that there was no motive on the part of the appellant to have killed his own brother. According to the learned counsel, a crime is always committed by an accused with a view to achieving and attaining a particular object. An accused has always an axe to grind. The learned counsel thus contends that the appellant in the instant case did not stand to gain anything thereby or to lose anything on the said score. Thus there is, no reason, whatsoever, as to why he should have committed the murder of his own real brother. The learned counsel in support of his aforesaid contention has sought support from the observations of their Lordships of the Supreme Court as reported in *Rajinder Kumar and another v. State of Punjab* : 1966 CriLJ960 . (6)

'The motive behind a crime (in this case one punishable under S. 302, Indian Penal Code) is a relevant fact to which evidence can be given. The absence of a motive is also a circumstance which is relevant for assessing the evidence. '.

(20) There is no dispute with the said proposition of law that motive is a relevant factor in order to show and prove the guilt of the accused and evidence can always be led to the effect that accused was having a motive which led to the commission of the crime. However, the contention of the learned counsel that there was no motive in the instant case is bereft of any force. It is in the statement of Public Witness 5 Kirpal Singh that the appellant opposed his mother who wanted to vacate the house and to deliver the possession over the same to someone after securing premium from him. He, however, wanted that in case the possession over the house was handed over to someone after collecting the premium then in that eventuality he should be given his due share therein. This

controversy led to a flaming row in between the mother i.e. Public Witness 10 Smt. Devki and the appellant. The deceased Surinder Kumar intervened. He told the appellant that admittedly the house was in the name of the mother and as such she was entitled to deal with the house in any manner she liked and he was none to poke his nose in the said matter. This infuriated the appellant. To the same effect is the statement of Public Witness 10 Smt. Devki. Thus we feel that there was sufficient motive and the same stands proved in an abundant measure.

(21) There is another side of the picture. It has been held time and again that in case there is an ocular evidence with regard to a particular crime, in that eventuality the motive loses its importance and it would be in that case asher exercise in futility to look for the motive of the crime. We are tempted here to cite a few lines in support of our above view as reported in *Molu Ram & Ors. v. State of Haryana*, : 1976 CriLJ1895 'It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes however, the motive is shrouded in the mystery and it is very difficult to locate the same. If however, the evidence of the eye witnesses is creditworthy and is believed by the Court which has placed implicit reliance on that, the question whether there is any motive or not becomes wholly irrelevant.'

(22) To the same effect are the observations of the Hon'ble Supreme Court as reported in *Rajinder Kumar's case* (supra),

'The circumstances which prove the guilt of the accused are, however, not weakened at all by this fact that the motive has not been established. It often happens that only the culprit himself knows what moved him to a certain course of action.'

(23) It has, next been contended by the learned counsel for the appellant that there are contradictions and inconsistencies in the statements of the prosecution witnesses with regard to the seat of the injuries on the person of the deceased. According to Smt. Devk(pw10), the appellant slabbed the deceased with a knife at his abdomen. He then stabbed him twice or thrice at his chest. On being cross-examined she has got this to say on this point that the appellant had already given

a knife blow prior to her arrival at the place of occurrence. Similarly, Public Witness 5 Kirpal Singh states that the appellant had already stabbed his brother with a knife before he reached there. According to him, the first injury was caused near the heart of the deceased. The second blow was given at the abdomen, Public Witness 12 Smt. Shukantla, on the other hand, states that the deceased was stabbed twice by the appellant with a knife. She does not talk as to on which part of the body the injury was caused. The learned counsel contends that the above testimony of the above named two witnesses is contradictory to and inconsistent with the post-mortem report Ex. PW14)B. A close scrutiny of the said report reveals that the deceased sustained only two injuries, both of them were on his chest. Thus according to the post-mortem report there is no injury on the abdomen of the deceased. The learned counsel thus wants that in view of the above clear contradictions no reliance should be placed on the statements of the above said two witnesses.

(24) We are sorry we are unable to agree with the contention of the learned counsel. After going through the statement of Public Witness 5 Kirpal Singh we find that on being cross-examined by the Public Prosecutor he has very categorically stated that both the injuries sustained by the deceased at the hands of the appellant were on his chest. We have already observed above that Public Witness 12 Smt. Shakuntla has asserted that her brother i.e. the deceased sustained two injuries. It was neither put to her by the learned Public Prosecutor nor by the learned counsel for the appellant as to on which part of the body the deceased sustained injuries. Thus, this brings us to the statement of Public Witness 10 Smt. Devki. It is true that she has stated in her averment on oath that the deceased was given a knife blow on his abdomen. It is also true that on being cross-examined she has asserted that two blows were given on the abdomen and the third one was given at the chest of the deceased. However, while scrutinising her evidence we should not lose sight of the fact that she is an illiterate witness and she is the mother of the deceased. The occurrence took place on February 19, 1988. Her statement was recorded in the court on November 29, 1989 i.e. near about two years after the occurrence. Thus when she says that knife injury was caused on the abdomen of the deceased it appears to be nothing but a lapse of language or at the most a lapse of her memory which can be taken judicial notice)

of Human memory is very weak and short. Every thing sinks into oblivion with the passage of time. Nobody is in a position to reproduce every thing in the same way in which he saw it without additions and subtractions there from.

(25) The above view was given vent to by the Hon'ble Supreme Court in Dayaram Singh v. The State of M.P. 1981 CrLJ.530, ..

'The maxim 'false in time falsus in omnibus' is not a sound rule for the reasons that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In such a situation, a cautious scrutiny of the prosecution evidence appears to be necessary and the substratum of prosecution case or material part of the evidence has to be judged to find out whether the disbelieving part of the prosecution version affects the reliability of the main plank of the prosecution version, the remaining part can be believed, there will be no bar to its acceptance.'

(26) In the above-stated circumstances we feel that we can safely place reliance on the statement of Smt. Devki particularly when she happens to be the mother of the appellant. There is no reason as to why a mother should falsely implicate her own son in a case under Section 302, Indian Penal Code and particularly when her statement finds support from the statements of PW5 Kirpal Singh and Public Witness 12 Smt. Shakuntla. In this connection it is also noteworthy over here that when the deceased was taken to the hospital; on being questioned in the doctor, Public Witness 5 Kirpal Singh informed him that he was stabbed by one Mahinder with a knife on the left side of the chest. The fact that the injuries were caused only on the chest and on no other part of the body also finds support from Ex. Public Witness 21A i.e. the statement made by Kirpal Singh before the police.

(27) The other argument put forward by the learned counsel for the appellant is that assuming argue do the appellant committed the murder of his brother, the learned counsel argues, he A did so in order to defend himself because it was the deceased who first attacked the appellant with a wooden shaft and hit him on his head. The learned counsel in this connection has led us through the statement of Smt. Devki (Public Witness 10) who has asserted in her statement on oath that the deceased picked up a wooden shaft and hit the same on the head of the appellant.

Similarly, PW5 Kirpal Singh has admitted this fact on being cross-examined that the deceased gave a 'lathi' blow on the head of the appellant. The learned counsel thus wants us to conclude there from that it was the deceased who first of all took the law into his own hands and hit the appellant with a wooden shaft (lathi) on this head. It was there after in order to save himself that the appellant stabbed the deceased. According to the learned counsel an accused in a criminal case is not required to take up the plea of self-defense. A criminal court would be justified in inferring the same from the circumstances of a given case if it is proved on record that the accused caused injuries to a person in his defense. The learned counsel in support of her contention has relied upon the observations of their Lordships of the Supreme Court as reported in *State of U. P. v. Ram Swarup and another*, : 1974 CriLJ1035 . . 'This position, though often overlooked, would be easy to understand if it is appreciated that the Civil Law rule of pleadings does not govern the rights of an accused in a criminal trial. Unlike in a civil case it is open to a criminal court to find in favor of an accused on a plea not taken up by him, and by so doing, the court does not invite the charge that it was made out a new case for the accused. The accused may not plead that he acted in self-defense and yet the court may find from the evidence of the witnesses examined by the prosecution and the circumstances of the case either that what would otherwise be an offence is not one because the accused has acted within the strict confines of his right of private defense or that the offence is mitigated because the right of private defense has been exceeded.'

(28) There is no dispute with the above proposition of law. We find ourselves in perfect agreement with the learned counsel. However, the question which comes to the tip of the tongue is as to whether the right of private defense is available to the appellant in the circumstances of the present case? It is true that PW5 Kirpal Singh during the course of his cross-examination and Public Witness 10 Smt. Devki during her examination-in-chief have admitted that the deceased hit the appellant with a wooden shaft on his head. However, We do not find anywhere even after a close; scrutiny of their statements to have been stated by them--that it was the deceased who first hit the appellant with a lathi'. Furthermore., the appellant has nowhere in his statement under Section 313 Criminal Procedure Code . has taken up this defense that he acted in self- defense and gave the knife

blows to the deceased in order to save his own life as the deceased first had hit him with a lathi on his head. :i

(29) The learned counsel has then taken us to the statement of Mangal (Public Witness 13) made before the police under Section 161 Criminal Procedure Code . (vide Ex. Public Witness 131 A). He has stated therein that it was the deceased who first hit the appellant with a wooden shaft (danda) on his head. It was then that the appellant took out a dagger from the right pocket of his pant and struck him twice on the left side of his chest. The learned counsel thus wants us to conclude there from that it was the deceased who first of all hit the appellant with a 'danda' and it was only then that the appellant acted in self-defense in order to save his own life.

(30) We are sorry we are unable to look into the statement recorded by the police under Section 161 Criminal Procedure Code . as the same is not admissible in evidence. Public Witness 13 Mangal Singh, it is true, appeared before the Court. However, he denied to have seen the occurrence. Consequently the learned Public Prosecutor confronted him with the previous statement made before the police vide Ex. Public Witness 13-[A. However, the leaned Public Prosecutor never confronted him with the above portion of the aforesaid statement with the result that the said portion of his statement was never exhibited. Hence we feel the same is not admissible in evidence and thus cannot be relied upon.

(31) In the above stated circumstances, we do not see any justification to take a view different from the view taken by the learned Additional Sessions Judge. We do not sac any justification to interefere with the impugned judgment and order and the appeal is as such liable to be dismissed. The appeal is accordingly dismissed.

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