

Kamal @ Pappu Vs. State

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Court : Delhi

Decided On : Oct-12-2007

Reported in : 2007(99)DRJ175

Judge : R.S. Sodhi and; B.N. Chaturvedi, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 302; Code of Criminal Procedure (CrPC) - Sections 428

Appeal No. : Criminal Appeal Nos. 878 and 111 of 2005

Appellant : Kamal @ Pappu

Respondent : State

Advocate for Def. : Richa Kapoor, Adv.

Advocate for Pet/Ap. : Purnima Sethi, Adv.; K.B. Andley, Sr. Adv.; M.L. Yadav,

Disposition : Appeal Allowed

Judgement :

R.S. Sodhi, J.

1. Criminal Appeal Nos. 878 of 2005 and 111 of 2005 seek to challenge judgment and order of learned Additional Sessions Judge, Delhi, in Sessions Case No. 126 of 2003 arising out of F.I.R. No. 271 of 2001 registered at Police Station Dilshad

Garden, whereby learned judge vide his judgment dated 14.1.2005 has held the appellants, namely, Kamal @ Pappu and Vijay, guilty for offence punishable under Section 302/34 IPC. Further, vide his order dated 15.1.2005, has sentenced the appellants to imprisonment for life each together with fine of Rs. 5,000/- each under Section 302/34 IPC and in default of payment of fine, further Simple Imprisonment for six months each. Benefit under Section 428 of Code of Criminal Procedure was awarded to both the appellants.

2. Brief facts of the case as have been noted by learned Additional Sessions Judge in his judgment under challenge are as follows: that on the night intervening 14/15.11.2001 between 10:30 p.m. to 7:30 p.m., both the accused in furtherance of their common intention took Rajesh and committed his murder and on the said allegations of the prosecution, they were charged for the offence punishable under section 302/34 IPC vide charge dated 16.04.2002 to which both the accused pleaded not guilty and claimed trial.

3. The Prosecution in order to establish its case examined as many as 16 witnesses. Of these, PW-1, Sheela, is the material witness and has proved her statements Exhibit PW 1/1 and PW 1/2 and clothes of the deceased, Exhibit PW 1/3. PW-2, Nathu Ram, is a formal witness. PW-3, Gaurakh Yadav, is the recovery witness and proved memo Exhibit PW 3/1. PW-4, A.S.I. Sarup Singh, is the photographer and proved photographs Exhibit A-1 to A-5 and their negatives as Exhibit A-6 to A-10. PW-5, Ram Chander, is another material recovery witness. PW-6, Dr. Gaurav Aggarwal, conducted postmortem on the body of deceased Rajesh Kumar @ Satish. PW-7 is Bijender, sweeper, is also the recovery witness. PW-8 is Head Constable Naresh Pal, who proved F.I.R. Exhibit PW 8/A. PW-9, S.I. Mukesh Kumar, is the Draftsman, who prepared site plan Exhibit PW 9/A. PW-10, S.I. Brij Mohan, is also a recovery witness. PW-11, Constable Ashok Kumar, proved copy of DD Exhibit PW 11/A. PW-12, Constable Yashpal, PW-13, Constable Manoj Kumar and PW-14, Head Constable Subhash Chand, are formal witnesses. PW-15, Constable Tilak Raj, is also a recovery witness and PW-16, Inspector Shiv Dayal, is the Investigating Officer.

4. It is contended by learned Counsel for the appellants that in the present case, from the material on record, the Prosecution has not been able to establish that the accused persons met the deceased on the night intervening 14/15.11.2001 and that the deceased was with them for a short time. Learned Counsel contends that this, in itself, even if proved, is not sufficient to bring home the guilt of the accused. It is further contended that the alleged recoveries at the instance of the accused are not trustworthy. He also contends that the nature of injuries on the deceased could not have caused blood to splatter on the shirt and trouser of the appellant, Vijay. According to the counsel, the Prosecution has padded its case by introducing recoveries of clothes at the instance of the accused as also the blood stained clothes on the appellant, Vijay.

5. Learned Counsel for the State, on the other hand, contends that the Prosecution has been able to bring home the guilt of the accused based on the testimony of PW-1, Sheela, mother of the deceased, who has supported the Prosecution's case to a hilt. Learned Counsel contends that the reasoning of the trial court, on evaluation of material on record, cannot be faulted with.

6. We have carefully gone through the material on record with the assistance of learned Counsel for the parties and find that PW-1, Sheela, has deposed that she did not know accused persons prior to 15.11.2001 when they came to her house with a box of sweets. They said that the purpose of their visit was to give Diwali greetings to her son Rajesh. Her son was not present at that time but came later on. On seeing her son coming out of her house, they took her son Rajesh with them saying that they would be back in about two minutes, however, did not return. At that time, the accused had disclosed their names as Kamal and Vijay and that they lived in Janta Colony in the area of Janak Puri. The witness goes on to state that her son Rajesh did not return till the morning and that he usually went for duty at 9 a.m. She then went to the house of the accused persons after making the enquiries about the residential address at Janta Colony and met the mother of the accused, Vijay, who professed that she did not know the whereabouts of Rajesh. Thereafter, the witness claims to have gone in the adjacent lane and found the dead body of her son. At that time, the police was present there. She identified the dead body of her son and took the police to the house of accused

Vijay and Kamal but the accused persons were absconding. She made her statement to the police, Exhibit PW1/1. The witness further states that the police arrested the accused persons, who made a confession statement about killing her son Rajesh. Both the accused pointed to a naalla and got recovered a yellow coloured T-shirt, black coloured baniyan and blue coloured trouser of her son Rajesh in her presence. The witness identified the clothes. She further goes on to state that her son had gone with the accused persons in the intervening night of 14/15.11.2001 at about 10 p.m. She had two children, her daughter was 16 years old and her son, Rajesh, deceased. In cross-examination, the witness states that accused Vijay came to her house 3 or 4 times on that day. He had never come to her house earlier. She admits that she did not know the name or address of the accused persons even on the day of the occurrence. She admits that the deceased had got tattooed the name of Pushpa on his chest. She denies that Rajesh was in love with a girl named Pushpa but claims that Pushpa was her sister-in-law (maami of the deceased). She denied that brother of Pushpa was annoyed at the love affair and had warned the deceased. She also denied that the deceased had gone along with the brother of Pushpa. The witness admits that there was no quarrel with Vijay. She also admits that when she reached the Janta flats, large crowd was present there along with the police and that a dead body was lying which was identified by her as her son, Rajesh. She reiterates that before identification of the dead body, she had gone to the house of Vijay for making enquiries of her son, who had gone with him on 15.11.2001. In her cross-examination, she further states that on seeing the dead body of her son, she took the police to the house of Vijay and that her statement was recorded by the police after the arrest of Vijay. She states that her statement was recorded at 11 a.m. in the police station, after the arrest of accused persons and after recovery of clothes worn by her son at the instance of the accused persons, they were taken to the police station and thereafter, proceedings were done in the police station. She further states in cross-examination that she allowed Vijay to sit in her house, as per customs, and served a glass of water and Diwali sweets when he came to her house on 15.11.2001. She denied the suggestion that Vijay and Kamal had not taken her son on 15.11.2001 and denied that the brother of Pushpa had taken her son' She also admits that after seeing the dead body of her son, she took the

police party to the house of Vijay and the police apprehended both the accused persons from the house of Vijay.

7. Analyzing the statement of this witness, it appears she is adamant and certain that the accused persons came to her house on the evening of 15.11.2001. This date, she repeats over and over again and even denies the suggestion that the deceased did not go with the accused on 15.11.2001. In her examination-in-chief, she states that the accused persons took her son Rajesh with them on seeing him coming out of her house, while in the same breath she claims that her son was not present at that time but came later on. She further states that the accused disclosed their names as Kamal and Vijay when they came to her house with a box of sweets. In cross-examination, she states that even on the day of the occurrence, she did not know the name and address of the accused Vijay. In examination-in-chief, the witness deposes that after identifying the dead body of her son Rajesh, she took the police to the house of Vijay and Kamal but they were absconding. In cross-examination, she states that after seeing the dead body, she took the police party to the house of Vijay, where the police apprehended both the accused persons from the house of Vijay. This witness states that her statement was recorded in the police station at 11 a.m., after the police had arrested Vijay, and that too after the recovery of wearing apparels of her son at the instance of the accused persons and then they were taken to the police station. It is thereafter that all the proceedings were done in the police station. Even, the F.I.R. which was recorded at 10:45 a.m. on 15.11.2001, makes no mention of the accused already in their custody rather it merely suggests that the complainant suspected the hands of Vijay and Kamal @ Pappu in the murder of her son, Rajesh.

8. If we are to believe that before the F.I.R. was registered, the recovery of clothes had already been made and that the accused had already been arrested, surely, the so-called F.I.R., which is registered subsequent to the arrest and recovery, cannot be silent on what has already happened. Obviously, there is more in the preparation of these documents than meet the eye. The witness claims in examination-in-chief that the accused persons were absconding after she had identified the dead body. Yet, she claims that prior to registration of F.I.R., the accused persons were already in the custody of the police and recoveries effected

from them. Besides this, the witness is categorical that the accused came to her residence with a box of sweets in the evening of 15.11.2001 whereas on this date, the dead body was discovered in the morning. The Prosecution has not cared to have the date corrected even when it was pointedly put to the witness that the accused did not take her son from her house on 15.11.2001 to contend that this is a typographical error, would be doing violence to a statement on oath which the Prosecution relies upon as being correct. We also, find that the Prosecution did not take into possession the so-called box of sweets which the accused had supposedly brought as a gift on 15.11.2001 for the deceased. There is no other evidence to corroborate the version set forth by PW-1 of the incident on 15.11.2001 while there is enough in her statement to show that the witness is vacillating. In the F.I.R., of which she is the complainant, she narrates that the accused Vijay had come 3-4 times prior to 15.11.2001 but does not support this in her testimony before the court where she claims that she did not know the accused persons prior to 15.11.2001. It is also interesting to note that the police was already at the spot when PW-1 goes looking for her son, yet no witness has been produced to show that the dead body was recovered naked from the gali or that anyone reported this matter to the police which lead to the discovery of a dead body in the gali. From the testimony of PW-1, it is difficult to hold that PW-1 saw the deceased in the company of the accused persons last, prior to his body being discovered on 15.11.2001.

9. PW-3, Gaurakh Yadav, states in examination-in-chief that on 15.11.2001, both the accused persons in custody of the police, pointed out to the site near his shop where they had thrown the clothes of the deceased and that he is a signatory to PW 3/1, the pointing out memo. He is also stated to have witnessed the recovery of the clothes of the deceased from the ganda naalla. However, the witness in his cross-examination claims that he was called by the police after the recovery of the clothes had been made and thereafter, he went to the police station along with accused persons where the proceedings were conducted. He signed the documents at the police station. Analyzing the testimony of this witness, it appears that the recovery had already been made prior to his being summoned by the police, yet the witness had the cheek to be a signatory to the pointing out memo.

10. Coming to the recoveries, we find PW-5, Ram Chander, in his testimony states that both the accused told the police officials in his presence as to where they had thrown/hidden the clothes of the deceased. The witness states that he being a safaa karamchaari in-charge of naalla, went into the naalla and brought out the clothes of the deceased which were then taken into possession by the police. The witness does not state that there was any other person on duty along with him at that point of time.

11. PW-7, Bijender, claims to be the person on duty on 15.11.2001 before whom both the accused persons told the police that the clothes of the deceased lying in the ganda naalla and that PW-7 went into the naalla and took out the clothes of the deceased which were then handed over to the police. He too, does not name PW-5 to be one of the persons on duty along with him on 15.11.2001.

12. Another interesting aspect that emerges from the testimony of PW-7 is that he is stated to have taken out the clothes of the deceased from the ganda naalla on 15.11.2001 at about noon time. Even, PW-5, Ram Chander, talks of having taken out the clothes of the deceased from the ganda naalla on 15.11.2001. Obviously, the statements of PW-5 and PW-7 do not reconcile with the case of the Prosecution nor does it advance the Prosecution's case that the accused made disclosure statement in presence of PW-5, Ram Chander and PW-7, Bijender and pursuant thereto got recovered the clothes of the deceased from the ganda naalla. The so-called recovery of clothes of the deceased at the instance of the accused persons does not stand proved.

13. Examining the recoveries made at the instance of the accused persons of their clothes which, according to the Prosecution, they were wearing at the time of the crime, we find that PW-1, Sheela, does not state that the accused persons were wearing the clothes which were sought to be recovered from them pursuant to the so-called disclosure. On chemical examination, blood on the clothes of the appellant, Vijay, gave negative blood test while blood on the clothes of the appellant, Kamal, showed positive blood test. Further, the blood stains on the clothes of the accused, Kamal and Vijay, were supposedly present when they were taken into possession vide memos Exhibit PW 10/C and PW 10/D

respectively, but the same does not inspire confidence since the injuries suffered by the deceased are only internal and there is no injury which would result in bleeding of the nature so as to cause splashes of blood on the clothes of the assailants.

14. Another aspect of the matter which the Prosecution has left untouched is the motive. In the present case, there is no material on record to show that either of the accused had a motive to cause harm to the deceased. On the contrary, there is material on record to show that the accused persons brought sweets to wish the deceased on the Diwali night. There is nothing on record to show that there was any quarrel, enmity or for that matter any reason for the accused persons to have caused the death of the deceased, Rajesh. The defence has led evidence in the nature of DW-1, Anil Sarin, who states that the deceased was having an affair with a girl named Pushpa, whose name he had tattooed on his chest and used to flaunt it openly. This was being resented by brother of Pushpa, who had on various occasions given out threats to the accused. This aspect of the matter has not been discounted by the Prosecution. The defence, on the other hand, has been able to establish its case that Rajesh was having an affair with a girl called Pushpa which was corroborated with reference to the tattoo on the chest of the deceased. In this event, the possibility of Rajesh being done to death by someone other than the accused persons cannot be ruled out.

15. In these circumstances, we are of the opinion that the reasoning of the trial court in holding the appellants guilty of charges framed, cannot be sustained. The last seen evidence, even if taken to be proved, is merely one circumstance which, in itself, is not sufficient to prove the guilt of the accused. We, therefore, set aside the judgment dated 14.1.2005 and order on sentence dated 15.1.2005. Consequently, the appellants herein are acquitted of all the charges framed. Criminal Appeal Nos.878 of 2005 and 111 of 2005 are allowed. The appellants, who are in jail, shall be set at liberty forthwith unless wanted in any other case.