

Kishore Kumar Alias Kishore Vs. State of Kerala

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Court : Kerala

Decided On : Jan-24-2001

Reported in : 2001CriLJ2137

Judge : J.B. Koshy and; R. Rajendra Babu, JJ.

Acts : [Evidence Act, 1872](#) - Sections 27; Code of Criminal Procedure (CrPC) - Sections 100 and 428; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 300, 302 and 341

Appeal No. : Cri. Appeal Nos. 25 of 1998 and 480 of 1999

Appellant : Kishore Kumar Alias Kishore

Respondent : State of Kerala

Advocate for Def. : S.U. Nazar, Public Prosecutor,; Aysha Youseff and; Jaiji

Advocate for Pet/Ap. : K. Ramakumar, Adv.

Disposition : Appeal dismissed

Judgement :

Rajendra Babu, J.

1. Kishore Kumar (1st accused), Vijayan (2nd accused) and Benny (3rd accused) were tried before the IVth Additional Sessions Court, Ernakulam, in SC 33/96 for

offences Under Sections 341 and 302 read with. 34, IPC. The 1st accused was found guilty of an offence Under Section 302, IPC and was convicted and sentenced to undergo imprisonment for life. Aggrieved by the above conviction and sentence the 1st accused preferred Cri. A. 25/98. Accused 2 and 3 were found not guilty of all the offences and accordingly they were acquitted. The State challenged the above order of acquittal by preferring Cri. A. 480/99. As both the appeals arose from the same judgment, these appeals were heard together and are disposed of by this common judgment.

2. The Circle Inspector of Police, Piravam, filed a chargesheet against the accused, three in number, in Crime No. 288/94 of Mulanthuruthy Police Station for offences Under Section 341 and 302 read with 34, IPC. According to the prosecution there was long standing enmity between the 1st accused and the deceased Biju who was serving in the Naval Force and was on leave. The general body meeting and the election of the office bearers for the administration of the Subramanyapuram temple was convened at the office of the S.N.D.P. Sakha near the above temple on 6-11-1994. Biju, his father Appu (P.W. 3) and his brother Rajeev(P.W. 2) participated in the meeting and by about 7.30 p.m. on that day, according to the prosecution, the accused reached there and forcibly drew Biju to a place near the jack tree in the temple premises and while the 2nd accused was holding Binu, the 1st accused inflicted three stab injuries with M.O.I dagger causing fatal injuries and ran off from the scene when people assembled. It was further alleged that when P.W. 2 tried to rescue his brother, he was obstructed by the 3rd accused and due to the severity of the above injuries, Biju succumbed to the injuries while removed to the hospital. The in-jured was taken to the RCM Hospital, Thrippunithura and P.W. 8 Dr. George Varghese examined Biju at 8.15 p.m. and declared that Biju was dead. As there was no mortuary in the above hospital, the body was taken to the General Hospital, Ernakulam. P.W. 1 Vijayari, who also joined in taking Biju to the hospital, reached the Mulanthuruthy Police Station and lodged Ext. P1 FI Statement on the next day i.e. on 7-11-1994 at 7 a.m. and P.W. 12, the S.I. of Police of Mulanthuruthy Police Station registered crime 288/94 as per Ext P1 (a) FIR. The major part of the investigation was conducted by P.W. 15, the Circle Inspector of Police. At 9 a.m. on 7-11-94 P.W. 15 prepared Ext. P5 inquest report. P.W. 6 Ramakrishnan, a former Panchayat

President witnessed the preparation of inquest and attested in Ext. P5. At 3.30 p.m. P.W. 15 visited the scene of occurrence and prepared Ext. P6 scene mahazar in the presence of P.W. 7 Narayana and others. P.W. 7 attested in Ext. P6. On the same day at 1.30 p.m. P.W. 9 Dr. Satheesh Babu, the District Police Surgeon, conducted the postmortem examination on the body of Biju and issued Ext. P7 certificate. P.W. 11 K.P. Ramakrishnan, the village officer, Amballur, prepared Ext. P 13 plan seeing the scene of occurrence and premises. P.W. 16 Circle Inspector completed the investigation and laid the charge before Court.

3. P.W. 9, Dr. Satheesh Babu, the District Police Surgeon, conducted the postmortem examination on the body of Biju and issued Ext. P7 postmortem certificate. He noticed the following ante mortem injuries :

(1) Vertical incised stab wound 4 x 1 cm. in the left side of back just behind the armpit. Direction of the wound was towards right and slightly upwards. Depth of the wound was 7 cms. The wound completely cut the axillary artery.

(2) Vertical incised stab wound 3 x 1.5 cm. on the left side of Abdomen 15 cm. below the left nipple at 5 O'clock position. The wound just entered the abdominal cavity.

(3) Oblique incised wound 2.25 x 1 x 2 cm. on the right side of back 2 cms. outer to midline from a point 30 cms. below the root of neck.

In all the above incised wounds both ends appeared sharply cut.

(4) Horizontal linear abrasion 8 cm. long 13 cm. below the right armpit.

P.W. 9 had given evidence that injury Nos. 1 to 3 could be caused by stabbing with a sharp cutting weapon like M.O. 1 and injury No. 4 could be sustained by a fall and injury No. 1 was sufficient to cause death in the ordinary course of nature and death was the consequence of injury No. 1. In fact, no contention was raised regarding the cause of death of Biju. He sustained the stab injuries by about 7.30 p.m. and on the way to the hospital he succumbed to the injuries and when he was examined by P.W. 6, the doctor, at 6.15 p.m. he was found dead. Due to the severity of the injuries inflicted on him, Biju died. The evidence would establish

that the death was as a result of the severity of the stab injuries inflicted on Biju.

4. P.W. 1 Vijayan had gone to the Mulanthuruthy Police Station by about 7 a.m. on 7-11-94 and lodged Ext. PI F.I. Statement. His version to the police was that he heard some tumult near the jacktree in the temple compound and found 3-4 persons engaged in a tussle and Biju was found held by the 2nd accused and while so the 1st accused inflicted 2-3 stab injuries on Biju. It was further stated that the 3rd accused was found standing there and Biju fell down crying aloud and the people rushed to the scene and the accused ran off from there. When he was examined before Court, he had given a go-by to the above version. His version before Court was that he did not see the accused inflicting the injuries on the deceased, but he rushed to the scene hearing the cry of Biju and when he reached near the jacktree in the temple premises, Biju was lying with bleeding wounds and he asked how it happened and the injured Biju informed P.W.1 that the 1st accused inflicted the stab injuries on him while the 2nd accused was holding him. The F.I. Statement also disclosed that Biju made such a version to him immediately after the incident. The evidence of P.W. 1 would further reveal that he, along with P.Ws. 2, 3 and 4, rushed Biju to the hospital, yet he succumbed to the injuries before reaching the hospital. As P.W. 1 did not support the prosecution case in accordance with his version before the police, he was declared hostile by the prosecution and was cross-examined. The circumstances as brought out would indicate that he had the occasion to witness the incident as it occurred when he had come out from the office of the S.N.D.P. Sakha. The evidence would further reveal that he reached near the injured immediately after sustaining the injuries and he was told by the injured that the 1st accused inflicted the stab injuries on him while he was held by the 2nd accused.

5. P.W. 4 Mani was an independent witness. He stated that he also participated in the meeting held in the office of the S.N.D.P. Sakha and while so by about 7p.m. he heard a tumult outside and he got out of the office and found Biju lying wounded near the jacktree in the temple premises and he, along with P.W. 1, took him to the tempo for removing him to the hospital. He further stated that P.W. 1 asked Biju as to how he sustained the injuries and Biju had informed that the 1st accused inflicted the stab injuries while he was held by the 2nd accused. Though

P.W. 4 was cited further to prove that he found the accused running away from the scene with the knife, he did not support that part of the prosecution evidence and hence he also was declared hostile by the prosecution.

6. P.W. 2 is the brother of the deceased Biju and P.W. 3 the father. Their evidence would reveal that P.W. 3 was elected as the Treasurer of the Committee for the administration of the temple and P.W. 4 as the Secretary. The evidence would establish the participation of P.Ws. 1, 2, 3 and 4 in the meeting held in the office of the S.N.D.P. Sakha close to the scene of offence. The evidence of P.Ws. 1 and 4 would further reveal that there was electric light near the scene of occurrence and one could see what was going on near the jacktree. The evidence of P.Ws. 2 and 3 also would reveal that the deceased had told them that he sustained the injuries at the hands of the 1st accused while the 2nd accused was holding him. P.W. 2, in fact, was cited to prove that he found his brother being drawn near the jacktree by all the accused, that he had witnessed the 1st accused inflicting the stab injuries while the deceased was held by the 2nd accused. He had a further case that while he was trying to rescue his brother, the 3rd accused obstructed. Though he had given such a version, the Sessions Judge had not placed reliance on that part of the evidence as the circumstances would indicate that he reached near the injured only after P.Ws. 1 and 4 reached near him. According to the prosecution P.W. 3 got out of the hall hearing the cry and then he found the accused running away and the 1st accused was holding the weapon. This part of the evidence of P.W. 3 also was not totally relied on by the Court below. Yet the Court found that the deceased had informed them that it was the 1st accused who inflicted the injuries on him while the 2nd accused was holding him. Thus the evidence of P.Ws. 1 to 4 would establish that immediately after the incident, they reached near the injured and the injured informed them that it was the 1st accused who inflicted the stab injuries on him while the 2nd accused was holding him. This part of the evidence was accepted by the Court below as dying declaration made by the deceased immediately after the incident and that was the main piece of evidence relied on by the Court below in entering a conviction on the 1st accused. In *State of Rajasthan v. Bhup Ram*, (1997) 1 JT (SC) 479 the Supreme court held :

If the dying declaration recorded by PW5 judicial magistrate is reliable, there is no legal hurdle in basing a conviction on it even without any supporting material.

The above decision would further reveal that it need not be recorded in the same words used by the deceased. It was held:

We bear in mind that it is not unusual that Courts record evidence in the language of the Court even when witnesses depose in their own language. Judicial officers are used to the practice of translating the statements from the language of the parties to the language of the Court. Such translation process would not upset either the admissibility of the statement or its reliability, unless there are other reasons to doubt the truth of it.

The consistent evidence let in by P.Ws. 1 to 4 regarding the dying declaration made by the deceased immediately after he sustaining the injuries is reliable and a conviction can be based on the same.

7. The learned counsel for the 1st accused argued that P.Ws. 1 and 4, the independent witnesses, had turned hostile to the prosecution and as such much reliance cannot be placed on their evidence. It was further argued that P.Ws. 2 and 3 are interested witnesses and hence no reliance can be placed on their evidence also. In *Gura Singh v. State of Rajasthan*, 2000 AIR SCW 4439: (2001 Cri LJ 487) the Supreme Court held that the evidence of a hostile witness need not be entirely discarded as unworthy of consideration, but part of the testimony of such witnesses, if that part of the deposition is found to be creditworthy, can be relied on. There it was held (Para 11 of AIR, Cri LJ):

It is a misconceived notion that merely because a witness is declared hostile, his entire evidence should be excluded or rendered unworthy of consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the Court of the fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the Court can rely upon the part of

testimony of such witness if that part of the deposition is found to be creditworthy.

Hence in view of the above decision, the evidence led in by P.Ws. 1 and 4 who were declared as hostile to the prosecution need not be discarded in toto, but their evidence regarding the version given by the deceased immediately after the incident as to the cause of the injury can be safely relied on. In *State of Rajasthan v. Hanuman*, 2000 AIR SCW 4300 : 2001 Cri LJ 485 the Supreme Court held that the evidence of witness cannot be totally discarded merely on the ground that those witnesses are closely related to the deceased. There it was held (Para 8 of Cri LJ):

The position is well settled that evidence of eye-witnesses cannot be discarded merely on the ground that they are relatives of the deceased. Normally close relations of the deceased are not likely to falsely implicate a person in the incident leading to the death of the relation unless there are very strong and cogent reasons to accept such criticism. Further, from the testimony of the two ladies Smt. Badam and Chhoti whose presence at the spot was not disputed by the defence it is clear that they have described the incident in a clear and graphic manner.

The presence of P.Ws. 2 and 3 near the injured shortly after the incident and their presence for the meeting held in the nearby office of the S.N.D.P. Sakha had been established beyond reasonable doubt and their evidence cannot be discarded on the ground that they are closely related to the deceased. The Court below has considered the entire evidence in its proper perspective and placed reliance on their evidence that the deceased had informed them as to the manner in which he sustained the injuries. Even though the above witnesses were cross-examined at length by the defence counsel, nothing could be brought out to discredit that part of their evidence and the Court below was fully justified in placing reliance on their evidence.

8. Another circumstance relied on by the learned Sessions Judge was the recovery of M.O.1 weapon in pursuance to an information furnished by the 1st accused while he was in police custody. P.W. 15, the C.I. of Police, had given evidence that he arrested the 1st accused and the 1st accused had informed him that M.O. 1 knife had been hidden in the bushes near the temple and he would

show it to the investigating officer if he was taken to that place and accordingly the police was led to the spot where the knife was kept and the 1st accused took the knife and produced same. The same was seized as per Ext. P14 mahazar. P.W. 15 had given evidence that the statement made by the 1st accused also was extracted in Ext. P14 mahazar prepared for seizing the weapon. P.W. 13 Basheerkhan, an attester to Ext. P 14 mahazar, stated that the police took the 1st accused to the place from where the weapon was recovered. According to P.W. 13, it was the C.I. who took the knife from the bushes whereas the version of P.W. 15 was that the 1st accused who took the knife from the bushes and produced same. The difference in the version can only be due to the distance of time as the witness was examined long after the recovery. The recovery was made in pursuance to the information furnished by the accused who was aware of the weapon being hidden in the bushes. An argument was advanced by the learned counsel for the 1st accused that Ext. P14 mahazar has not been attested by independent witnesses of the neighbourhood. The Supreme Court has drawn a distinction between seizure of an article by conducting a search Under Section 100, Cr. P.C. and recovery and seizure of an article Under Section 27 of the Evidence Act in pursuance to the information furnished by an accused in State Govt. of NCI of Delhi v. Sunil, 2000 AIRSCW 4398: (2001 Cri LJ 504). There it was held that the mere absence of Independent witnesses is not a ground to discard the seizure evidence Under Section 27 of the Evidence Act. M.O. 1 was sent for chemical examination and human blood was detected on M.O. 1 knife as evident from Ext. P 12 report. Though it was argued that the entire recovery was artificial and unbelievable no circumstances could be drawn to our attention to accept the above argument. The concealment of the weapon was within the exclusive knowledge of the 1st accused and recovery was made in pursuance to the information furnished by him. The argument that the recovery was made from a public place also is of no consequence in accepting the evidence in view of the decision of the Supreme Court in State of H.P. v. Jeet Singh, (1999) 2 Ker LT (SN) 9 Case No. 8 : 1999 Cri LJ 2025. There it was held:

There is nothing in S. 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the article was made from any place which is 'open or accessible to others'. It is a fallacious notion that when recovery of any

incriminating article was made from a place which is open or accessible to others it would vitiate the evidence Under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. The crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others. It is now well settled that the discovery of fact referred to in S. 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it.

Hence that part of the statement of the 1st accused was admissible Under Section 27 of the Evidence Act. Hence the Sessions Judge was fully justified in placing reliance on the above piece of evidence also for entering a conviction against the 1st accused.

9. P.Ws. 2 and 3 had given evidence that there was enmity between them and the 1st accused. On the previous day there occurred an altercation between the deceased and the 1st accused. Though P.Ws. 2 and 3 were cross-examined at length, nothing could be brought out to discredit their version. The motive also was proved. The evidence and the circumstances would clearly establish that the 1st accused inflicted stab injuries on deceased Biju.

10. Injury No. 1 was a vertical incised stab wound 4 x 1 cm. in the left side of back and it was having a depth of 7 cms. completely cutting the axillary artery. Injury No. 2 was a vertical incised stab wound 3 x 1.5 cms. on the left side of abdomen penetrating into the abdominal cavity. Injury No. 3 was also an incised wound 2.25 x 1 x 2 cms. on the right side of back 2 cms. outer to the midline just below the root of neck. All the injuries were inflicted on the vital parts of the body. The depth of the injuries would clearly indicate the force behind the infliction of such injuries. The nature of the injuries and the number of the injuries inflicted on the vital parts of the body would clearly indicate that the 1st accused inflicted the injuries with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death. The Supreme Court in *State of Andhra Pradesh v. Rayavarapu Punnayya*, 1976 SCC (Cri) 659 : 1977 Cri LJ 1 held (Para 34 of Cri

LJ):

The formidable weapons used by the accused in the beating, the savage manner of its execution, the helpless state of the unarmed victim, the intensity of the violence caused, the callous conduct of the accused in persisting in the assault even against the protest of feeling by standers - all, viewed against the background of previous animosity between the parties, irresistibly lead to the conclusion that the injuries caused by the accused to the deceased were intentionally inflicted and were not accidental. Thus the presence of the first element of clause thirdly of Section 300 had been cogently and convincingly established.

The Court below found that the offence would fall within the first limb of Sec. 300, IPC. We do not think that the Court below had committed any error in holding that the injury was inflicted with the intention of causing the death of Biju or with intention of causing such bodily injury as was likely to cause death.

11. An argument was advanced by the learned counsel for the 1st accused that the prosecution could not explain the injuries sustained by the 1st accused and as such an offence Under Section 302 cannot be attracted. When the 1st accused was arrested, he was having the following injuries on his person as evident from Ext. P8 wound certificate prepared by P.W. 9 :

(1) Slightly oblique sutured lacerated wound 1.5 cm. long on the left side of chin 2 cm. below the left corner of mouth.

(2) Horizontal incised wound 1.5cm. long on the inner side of left palm just below the little finger.

(3) Slightly oblique sutured incised wound 3.5 cm. long in between the right thumb and index fingers on the palmar aspect.

All the above injuries are minor in nature. The accused had no contention that he sustained the injuries at the hands of the deceased or in the course of a tussle with the deceased. His version to the doctor was that the injuries were sustained by a fall with the weapon he was holding by about 7.30 p.m. near the Amballur

SNDP temple compound. He did not have a case that the deceased was having any weapon with him and he was attacked and as a result of which he sustained the injuries. The nature of the injuries sustained by the deceased would clearly indicate that injury No. 1 had been inflicted from the back and the other injuries were inflicted by standing in front of the deceased. As the injuries were minor in nature, the prosecution was not bound to explain the injuries sustained by the accused. Reliance was placed on the decision of the Supreme Court in D.V. Shanmugham v. State of A.P., (1997) 5 SCC 349 : 1997 Cri LJ 3129. The evidence let in by the prosecution did not disclose that the deceased was armed with any weapon and there ensued a flight or a tussle between the accused and the deceased. No circumstances are there to infer that the accused was exercising a right of private defence - and he had no such case also. The nature of the injuries on the deceased would clearly indicate that those injuries were inflicted with the intention of causing the death of the victim and as such the Court below was fully justified in finding the 1st accused guilty of the offence Under Section 302, IPC. Hence we do not find any merit in the above argument advanced by the learned counsel for the 1st accused and we find no reasons to interfere with the finding of the 1st accused guilty of an offence Under Section 302, IPC.

12. The learned Sessions Judge found that the prosecution could not establish any common intention among the accused for the murder of the deceased and as such Sec. 34 could not be attracted. On a consideration of the entire evidence and the circumstances, we do not think that the Court below had gone wrong in entering such a finding. The circumstances do not indicate any common intention between the accused and as such Section 34, IPC cannot be attracted. But the evidence would clearly establish that the 2nd accused was holding the deceased while the 1st accused inflicted the stab injuries and as such the 2nd accused committed an offence Under Section 341, IPC. The Court below had gone wrong in acquitting the 2nd accused for an offence Under Section 341, IPC and as such the acquittal of the 2nd accused for an offence Under Section 341, IPC has to be set aside and he is found guilty of an offence Under Section 341, IPC. So far as the 3rd accused is concerned, we find no reasons to interfere with the order of acquitting him of all the offences and the same has only to be upheld.

In the result Cri. A. 25/98 shall stand dismissed and the conviction and sentence imposed by a Sessions Court on the 1st accused (appellant in Cri. A. 25/1998) shall stand upheld. Cri. A. 480/99 shall stand allowed partly. The acquittal of the 2nd accused for an offence Under Section 341, IPC is set aside and he is found guilty of the offence Under Section 341, IPC and is convicted and sentenced to undergo simple imprisonment for a period of one month and also to pay a fine of Rs. 500/- or, in default of payment of fine, to simple imprisonment for a further period of 15 days. He shall be entitled to set off Under Section 428, Cr. P.C. of the period of detention as an under-trial prisoner. The acquittal of the 3rd accused for all the offences is upheld and the appeal as against him shall stand dismissed.

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