

Kailash Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Apr-07-1995

Reported in : 1995CriLJ3111

Judge : V.S. Kokje and; V.G. Palshikar, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 201 and 302

Appeal No. : D.B. Criminal Appeal No. 211/88

Appellant : Kailash

Respondent : State of Rajasthan

Advocate for Def. : R.S. Rathore, Public Prosecutor

Advocate for Pet/Ap. : Bhagwati Prasad, Adv.

Disposition : Appeal allowed

Judgement :

V.G. Palshikar, J.

1. Both these appeals are directed against the judgment dt. 27th April, 1988 passed by the Additional Sessions Judge No. 2 Hanumangarh Camp Suratgarh in sessions case No. 2/87 convicting and sentencing both the accused under Section 302 and 201 read with Section 34 of the IPC for imprisonment for life. He

proceeded to convict them under Section 201 read with Section 34 for one year RI.

2. The entire case is based on circumstantial evidence and alleged extra judicial Confession made by one of the accused persons. There are no eyewitnesses and the deceased met homicidal death by violent means.

3. Rakesh, Ramnath and Kailash were prosecuted for commission of murder of one Ramesh in the night of 20-10-86. According to the prosecution, deceased Ramesh was killed by three accused persons with the means of bricks and stones. The prosecution claims that in the night of 20th October, 1986, three accused persons killed deceased Ramesh and buried his dead body to conceal the commission of the offence. In support of the prosecution case, as many as 12 witnesses have been examined, none of them is an eye-witness. The conviction is based mainly of the circumstantial evidence of recovery of the dead body at the instance of the accused. Shri Bhagwati Prasad, learned counsel, for the appellants strenuous attacked the order of conviction and pointed out by going through the entire record and evidence that no conviction is permissible in law. Opposing him, the learned Public Prosecutor submitted that the learned Judge has given valid reasons for finding the accused guilty of offences under Sections 302 and 201 read with Section 34 of the IPC. To properly appreciate and decide the rival contentions, re-appreciation of the evidence on record would be necessary.

4. PW 1 Mala Ram is the owner of the hotel where deceased Ramesh and accused Kailash were employed. He heard people say that Ramesh was killed by accused persons. This witness is declared hostile.

5. PW2 Banarasi is owner of another hotel where accused Rakesh was employed, he inquired about Rakesh and was told that he had gone to Suratgarh. This witness is also declared hostile.

6. PW3 is Nanu Khan who saw accused Ramnath and Kailash at the hotel of Banarasi in the evening, he is the person who lodged the report at Suratgarh Police Station. This witness is also declared hostile. It will thus be seen that three witnesses have been declared hostile. All three of them had good acquaintance

with the accused and the deceased.

7. PW4 is Gumana Ram who is an eye-witness to the discovery of the dead body and he has stated that when the accused persons dug out the body, they were in police custody and police was present. According to the learned counsel Shri Bhagwati Prasad, even if this discovery is accepted as correct, it will only mean that the accused persons had the knowledge of the fact that the dead body was buried at that place, it cannot lead to inference that they were the persons, who killed the deceased and concealed the body at that place.

8. PW5 is one Jai Narain who knew the accused, he says that he came to the bus stand at 12 noon, where he saw the mob around the hotel of Banarasi and Mala Ram. He was told by Banarasi that Ramesh was killed by accused Rakesh, Kailash, and Ram Nath. He states that Nanu Khan, Gumana Ram and Mala Ram were also present when Banarasi told him this. The witness then goes on to depose that he asked Kailash as to what has happened, on which Kailash told him that we three killed, Ramesh by stoning and throttling. The testimony of this witness has to be, therefore, carefully scrutinised as the entire convictions hangs on the extra judicial confession reportedly made to this witness. We are unable to accept the evidence of this, witness for the following reasons;

(1) None of the three witnesses, Mala Ram, Banarasi and Nanu mention about this confession being made by Kailash to Jai Narain.

(2) Gumana Ram PW4, is an independent witness who was not declared hostile to the prosecution. Jai Narain has said that Gumana Ram was present when, the extra judicial confession was made and yet no mention of such confession by the accused to Jai Narain is stated by Gumana Ram.

(3) In his cross-examination, the witness agrees that he was present when the police arrived at the scene of the offence and yet he did not inform the police about the extra judicial confession made to him.

(4) There are several other contradictions in the testimony of this witness.

(5) He has admitted in his cross-examination that he was present at the scene of offence even on the second day when the police came back for investigation. Even on that day, he chose not to disclose about the extra judicial confession to the police.

(6) He has further admitted in his cross-examination that he himself voluntarily accompanied the police from the hotel of Mala Ram to the hotel of Banarasi and further to the spot where the dead body was discovered and yet on that occasion also, he has chosen not to tell the police about the extra judicial confession. The testimony of this witness therefore, becomes wholly unreliable for the above reasons. We, therefore, disbelieve this witness.

9. PW6 is Dr. Sahi Ram who conducted the post mortem and proved that Ramesh met homicidal death. PW3 is the police constable. PW8 Chuna Ram is declared hostile. PWs. 9 and 10 are also Police Constables and their evidence is wholly un consequential PW 11 is the Investigating Officer and PW 12 is the Photographer who took the photographs at the instance of the police.

10. It will thus be seen that statement of PW5 regarding extra judicial confession having been disbelieved. The only circumstance which appears against the accused persons is the recovery of dead body at their instance mere recovery, even if, it is accepted is not sufficient to hold that they are the persons who killed the deceased. In the absence of any come evidence and in view of the fact that four of the prosecution witnesses have turned hostile, the entire prosecution story has become unbelievable. In any event it cannot be held that the prosecution has proved the guilt beyond reasonable doubt. In our considered opinion, the learned Judge erred in convicting the accused for the offence under Sections 302 and 201/34 IPC.

11. This is particularly so because learned Judge himself has chosen to acquit accused Rakesh of the offences, if the learned Judge thought it fit to reject the evidence of PW5 regarding extra judicial confession and PW4 regarding discovery of the body in relation to Rakesh, it certainly becomes extremely doubtful to believe that evidence in so far Ram Nath and Kailash are concerned. In our considered opinion, therefore, the learned Judge in convicting Ram Nath and

Kailash while acquitting Rakesh on the basis of this sketchy evidence as produced by the prosecution. In any event both of them were entitled to benefit of doubt.

12. In the result, the appeals are allowed. The judgment and order of conviction is set aside. The accused are acquitted of the offence under Section 302 IPC. Both the accused persons be released forthwith, if not required in any other case.

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