

Kaliya Vs. State of Rajasthan

Kaliya Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/762026

Court : Rajasthan

Decided On : Nov-12-1984

Reported in : 1984WLN(UC)475

Judge : S.K. Mal Lodha and; S.S. Byas, JJ.

Appeal No. : D.B. Criminal Appeal No. 543 of 1979

Appellant : Kaliya

Respondent : State of Rajasthan

Disposition : Appeal dismissed

Judgement :

1. This jail appeal is directed against the judgment of the learned Sessions Judge, Jalore dated October 3, 1979 convicting the appellant Kaliya under Section 302, IPC and sentencing him to imprisonment for life with a fine of Rs. 1000/-, in default of the payment of fine to further undergo six months rigorous imprisonment.

2. The prosecution case is short and simple and briefly stated it is as follows. The deceased Sawada Meena aged about 37 years was living with his wife Mst. Sakuri (PW 2), son Goma (PW

3) and daughter Mst. Keni (PW

4) in village Iepur P.S. Nosara district Jalore. The appellant and his brother Patiya are the real nephews of the deceased Sawada. Their house is situated near that of the deceased-victim. There was a joint field of the deceased and the appellant's father, in which division was made by raising a fence therein. On May 28, 1979 i.e. a day preceding the occurrence, the appellant's brother Patiya (co-accused who was acquitted by the Court below) demolished this fence. At about 8.00 A.M. on May 29, 1979, the deceased was standing at the Falsa of his house while Mst. Sakuri, Goma and Mst. Keni were working in the pole of the house. The deceased asked Patiya as to why he had demolished the fence. On his saying so, Patiya and the appellant came running to the deceased Sawada. The appellant had an axe with him while Patiya had a lathi. The deceased reprimanded them for demolishing the fence. Thereupon the appellant and his brother Patiya started showering abuses on the deceased. The appellant struck a blow with his axe on the head of Sawada, Sawada fell down. The appellant struck another blow of his axe on the chest of Sawada. The appellant's brother Patiya struck a blow of his lathi on the back of Sawada. There was profuse bleeding from the wounds of Sawada and the clothes he was wearing got drenched with it. Mst. Sakuri and her children raised cries. The appellant and his brother took to heels. Mst. Sakuri and her children took Sawada in the Chowk of their house and placed him on a cot. Sawada did not survive, succumbed and passed away within no time. Mst. Sakuri got report EX.P 1 written from a teacher of the school of the village and delivered it to PW 1 Teemiya to be taken to the Police Station. Teemiya (PW

1) took it to Police Station, Nosara and presented it there at about 11.00 A.M. The police registered a case and the SHO Noor Mohammed Khan (PW

6) took up the investigation. He reached the site of the occurrence on the same day. He inspected the site and prepared the site plan. He also prepared the inquest report of the victim's dead body. He seized and sealed blood stained soil from the place of occurrence. The blood stained clothes of the deceased were also seized and sealed. The autopsy of the victim's dead body was conducted at about 5.45 P.M. on the same day by PW 8 Dr. Mathur, the then Medical Officer Incharge. Government Dispensary, Guda Balotan. He noticed the following injuries on the victim's dead body:

External

1. Incised wound, 19 cm. 1.3 cm. brain deep, vertical, extending from the lateral angle of right eye brow upwards and gradually turning medially and posteriorly over scalp including frontal and parietal region. There were some cut hair present in the wound. Skull bone was clearly visible in the wound. Bone was sharply cut in throughout the course of the wound. Brain tissue was visible from the cut part of the bone. The injury was caused by a sharp edged weapon.

2. Incised wound 5 cm. 1.4 cm. 0.5 cm. deep, vertical, on the right anterior side of chest, 4 cm. below and medially to the right side of the mammary gland. It was inflicted by a sharp edged weapon.

Internal

1. There was a linear fracture of skull 19 cm. x 0.3 cm. throughout the course of the incised wound on the scalp and forehead including right side of frontal bone and right parietal bone of skull. The fracture ends of bones were deeply-stained with blood and not washed out with water.

2. All the brain membranes were cut sharply throughout the course of the incised wound of scalp and forehead. There was effusion of blood clots above and below the membranes of the brain were present.

3. Brain was also sharply cut throughout the wound of scalp and forehead. Depth of the cut is 0.5 cm. There was effusion of blood and clots around the cut of the brain. Very small pieces about 0.2 x 0.2 cm. of skull bones were present in the cut brain-tissue.

3. Dr. Mathur stated that all these injuries were caused by a sharp edged weapon like axe. He further stated that in his opinion, the cause of death of Sawada was coma due to fracture of skull and extensive injuries to brain. He further stated that both the injuries and particularly injuries No. 1 and consequent internal injury to the brain and fracture of skull were sufficient in the ordinary course of nature to cause death. The appellant and his brother Patiya were arrested. In consequence of the disclosure statement made by the appellant on May 30, 1979, during

investigation, axe (EX. 7) was discovered, which is alleged to have been used by him in the commission of the offence. The appellant, at the time of his arrest, was wearing a shirt, on which blood stains were noticed. That shirt was also seized and sealed by the Investigating Officer. The various articles were sent for chemical examination to the State Forensic Science Laboratory, Rajasthan, Jaipur. Blood was detected on the clothes of the deceased, the shirt of the appellant and the axe recovered at his instance. On the completion of investigation, the police submitted a challan against the appellant and his brother Patiya in the Court of Munsif & Judicial Magistrate, Jalore, who in his turn committed the case for trial to the Court of Sessions. The learned Sessions Judge framed a charge under Section 302 against the appellant and a charge under Section 302/34, IPC against his brother Patiya, to which they pleaded not guilty and demanded the trial. According to them, they have been falsely implicated. They denied their complicity in the commission of the murder of Sawada. It was suggested by them during trial that the victim's wife Mst. Sakuri (PW 2) was having illicit intimacy with one Okhiya. It was Okhiya who had committed the murder of Sawada. They have been falsely substituted in place of the real culprit Okhiya. In support of this fact, its case, the prosecution examined eight witnesses and filed some documents. In defence, the accused adduced no evidence. On the conclusion of trial, the learned Sessions Judge found no incriminating material as against accused Patiya. Though his presence was taken as established and proved on the place of occurrence, it was not taken as proved that he had caused any injury to the deceased. The learned Sessions Judge found no material to extend Section 34, IPC to him. Patiya was consequently acquitted of the offence as he was charged with. The prosecution story as regards the appellant Kaliya was taken as substantially true and proved. He was, therefore, convicted and sentenced as mentioned at the very cut set. Aggrieved against his conviction and sentence, accused Kaliya has taken this appeal.

4. We have heard the learned amicus curiae and the learned Public Prosecutor. We have also gone through the case file carefully.

5. Mr. Singhvi, the learned amicus curiae appearing for the appellant did not challenge the cause of death of Sawada nor the evidence relating to it. We have

carefully read the statement of Dr. Mathur (PW 8), who had conducted the autopsy of the victim's dead body. We find no reasons to distrust his opinion relating to the cause of death of Sawada. There is, therefore, no difficulty in agreeing with the Court below that the death of Sawada was not natural or suicidal. It was homicidal.

6. Before dealing with the contentions of the learned amicus curiae, we may point out that the prosecution has examined three ocular witnesses of the incident. They are PW 2 Mst. Sakuri, PW 3 Goma and PW 4 Keni, The first is the widow while the remaining two are the children of the deceased-victim. Goma was eleven years of age while Mst. Keni was 13 years of age when the incident took place. Mst. Sakuri and Goma wholeheartedly supported the prosecution case, but PW 4 Mst. Keni turned hostile and refused to state anything against the appellant. PW 1 Teemiya is the person who took the FTR EX. P 1 to the Police Station and presented it there. PW 4 Mst. Keni gave altogether a new story which she did not disclose during investigation. The new story given by her during trial was that her mother and brother had gone to bring tiles while she was working in the pole. Her father (the victim) raised cries 'Mare re Mare re'. She went running towards him and saw Okhiya running away with an axe in his hand. When her mother returned and asked her who had killed her father, she disclosed the name of Okhiya to her. PW 1 Teemiya disclosed that he, Sakuri and her son Goma had collected at the house of one Diniya potter to take tiles. When they came back, they found Sawada lying dead. Mst. Keni was standing near him. Mst. Keni told them that she had seen Okhiya running away with an axe in his hand. Thus, PW 1 Teemiya and PW 4 Mst. Keni lent no support to the prosecution and introduced altogether a new version during trial.

7. We may also notice here that PW 2 Mst. Sakuri and PW 3 Goma have lent full support to the prosecution. According to them Sawada asked the appellant's brother Patiya as to why he had demolished the fence standing in their field. The appellant and his brother Patiya came to the deceased. The appellant had an axe while Patiya had a lathi in their hands. Sawada reprimanded them for demolishing the fence. Thereupon the appellant Kaliya struck a blow with his axe on the head of Sawada, Sawada fell down. Thereafter the appellant struck one more blow with his axe on the chest of Sawada. There was profuse bleeding from the wounds of

Sawada and the clothes he was wearing got drenched with it. He fell down. The appellant and his brother Patiya made good their escape. Sawada did not survive and succumbed to the injuries within some minutes.

8. It was vehemently contended by the learned amicus curiae that the Court has two versions about the incident, viz. (1) one deposed by PW 1 Teemiya and PW 4 Mst. Keni and (2) the other deposed by the victim's widow Mst. Sakuri (PW 2) and his son Goma (PW 3). It was argued that when two versions are there before the Court, one that goes in favour of the accused should be accepted. Developing this argument, it was contended by the learned amicus curiae that though PW 1 Teemiya and PW 4 Mst. Keni have been declared hostile, that is no reason to discard or ignore their testimony altogether. It was argued that the testimony of a hostile witness does not stand completely wiped of or discarded. It should be read and scanned as that of any other witness.

9. We have examined the contention and find considerable force in it. The law relating to the testimony of a hostile witness is now well settled. Simply because a witness has been declared hostile, his whole testimony does not ipso facto become worthless or incredible. His evidence should be evaluated like that of any other witness, keeping, of course, the label of his hostility in view. It is always open to Court to accept a part of his testimony or to reject it in toto. The rule of prudence, however, requires that if a hostile witness is a thoroughly discredited witness, whole of his testimony should be rejected. In *Satpal v. Delhi Administration* : 1976 CriLJ295 , their lordships observed:

In a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed of the record altogether. It is for the Judge in fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record that part of his testimony

which he finds to be credit worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process the witness stands squarely and totally discredited, the Judge, should, as a matter of prudence, discard his evidence in toto.

10. The same view was reiterated in *Bhagwan Singh v. State of Hariyana* : 1976 CriLJ203 .

11. The pertinent question, therefore, which arises in the instant case is whether the story stated by PW 4 Mst. Keni can be accepted. According to her police statement Ex. P 6, with which she was confronted she deposed that it was appellant Kaliya who struck two blows with his axe on the chest of her father, resulting in his instantaneous death. She denied to have given the aforesaid statement in Ex. P 6. During trial, she stated that she had seen Okhiya running away with an axe in his hand. The suggestion was that it was Okhiya (and not the appellant), who had caused the murder of her father. In her cross-examination, she admitted that she did not disclose this fact of her seeing Okhiya running away with an axe in his hand to anybody. She further admitted that she had disclosed this fact relating to Okhiya for the first time during trial. She also admitted in cross-examination that she is not living with her mother. She is living with her grand-mother. While assessing her testimony, we should not forget that her grand-mother is also the grand-mother of the appellant. It appears that she adopted a hostile attitude due to the influence of her grand-mother on her. The grand-mother has already lost her son Sawada (father of the witness). She, therefore, does not want to lose her grand-son i.e. appellant. It was why, this witness has been made to adopt a hostile attitude in an attempt to save the appellant. It appears that this witness was acting at the behest of her grand-mother who naturally is interested in protecting her grand-son i.e. the appellant.

12. Coming to the testimony of PW 1 Teemiya, we have stated above that according to him, PW 2 Mst. Sakuri and PW 3 Goma came to the Potter's house. He was also present there. The three came to the deceased's house together. There Mst. Keni (PW 4) told that she had seen Okhiya running away. Now, he was confronted with his police statement Ex. P 2, recorded during investigation. In Ex.

P 2, he did not state that he went to the deceased's house or that PW 2 Mst. Sakuri and PW 3 Goma had met him at the Potter's house. All these things are conspicuously absent in Ex. 2. Not only so, when he presented written report Ex. P 1 at the police station, he was asked to state if he knew anything in addition to what has been mentioned in Ex. P1. He expressed his complete ignorance, An endorsement was made to that effect on the back of Ex. P1. It would be proper to refer to what he stated in this portion A to B on the back of Ex. P 1:

okds ds eqryhd eq>s bye ugh gS A

13. Thus, the whole story of going to the Potter's house, his meeting the prosecution witnesses Mst. Sakuri and Goma there, the coming of all of them together to the deceased's house and Mst. Keni's stating then that she had seen Okhiya running, is not there in EX.P 1 and endorsement marked A to B on the back of EX.P 1. In cross-examination, he admitted that he did not disclose this aforesaid story before police when he presented EX.P 1. He further admitted in his cross-examination that he has not disclosed all these facts till now to anybody. It was for the first time during trial that he came with a new story.

14. Thus, on a careful analysis of the testimony of these two witnesses PW 1 Teemiya and PW 4 Mis. Keni, we are told to state that both of them have no regard for truth and the story disclosed by them for the first time during trial cannot be accepted. The first contention raised by the learned amicus curiae, therefore, fails.

15. It was next argued by Mr. Singhvi that the testimony of PW 2 Mst. Sakuri and PW 3 Goma has been wrongly relied upon by the Court below in convicting the appellant. It was argued that the conduct exhibited by PW 2 Mst. Sakuri shows that she is not a witness of truth and at any rate it would not be free from risk in maintaining the conviction of the appellant on what she testified. It was argued that she raised cries, but none of the neighbours arrived on the spot. That shows that she had not seen the occurrence. We find no force in the contention. PW 2 Mst. Sakuri stated that she raised the cries, but none of the peesons living in the vicinity came there. The reason is that none of them was present there. According to her, the persons of the vicinity had gone to their fields. We find nothing wrong in it. Her

testimony does not become untrustworthy simply because the persons living in the vicinity did not gather around her on hearing the cries.

16. It was also argued that the scribe of FIR Ex. P 1 has not been examined by the prosecution and that speaks heavily against it. The argument is preposterous. The statement of the scribe would have assumed some importance in case Mst. Sakuri (PW 2) denied her authorship of Ex. P1. She stated that the entire matter written in Ex. P 1 was dictated by her. As such, the non-examination of the scribe of the FIR has no material significance and renders no help to the accused.

17. PW 2 Mst. Sakuri and PW 3 Goma are the widow and son of the deceased. Both of them have been shown to be eye witnesses in the FIR Ex. P 1, which was lodged promptly without any delay. The occurrence had taken place at their house. The presence of both of them at their house at the time of occurrence is most natural and is not open to any doubt. Their claim to have seen the occurrence, therefore, cannot be thrown away on imaginary ground. Though they are the close relatives of the deceased-victim, that does not detract from the value to be attached to their testimony. It is difficult to imagine that they would leave the real culprit and substitute the appellant in his place. The learned Sessions Judge has accepted the testimony of these two witnesses. The learned amicus curiae could not subscribe cogent and convincing reasons before us so as to induce us to take a view different from that of the learned Sessions Judge.

18. It was next argued that the prosecution has not alleged any motive and the absence of motive is a feature to be taken into serious consideration. There is no force in this submission. PW 2 Mst. Sakuri the widow of the deceased deposed that her husband was previously belaboured by the appellant, the acquitted accused Patiya and one Kistoora, for which they were prosecuted and sentenced. A judgment of the learned Sessions Judge, Jalore is there on the record. Though it has not been exhibited, it shows that the aforesaid three persons were tried for offences under Sections 451, 325, 323 and 342, IPC for causing injuries to the deceased-victim on the earlier occasion. It resulted in conviction. Thus, the relations between the appellant and the deceased had become strained before he was done to death. More over, the absence of motive is only a circumstance to be

taken into consideration. The absence of motive or inadequacy of it becomes insignificant when there; is direct evidence to prove the occurrence. The contention of the learned amicus curiae, thus, has no merit.

19. Lastly, it was argued that the offence made out is not that under Section 302, IPC. It was argued that there was no premeditation. Only one injury was caused on the head. The deceased was the real uncle of the appellant. In these circumstances, the intention to kill should not be readily assumed. It was argued that the offence made out falls within the ambit of Section 304 Part II, IPC.

20. As discussed earlier, according to Dr. Mathur (PW 8), the injury No. 1 of the victim was sufficient in the ordinary course of nature to cause death. He is also of the opinion that both the injuries were sufficient in the ordinary course of nature to cause death. The victim was inflicted two blows with axe, one of the head and the other on chest. It is not a case of single injury. Here the repetition of the infliction of blows was there. Both the blow were inflicted on vital parts of the body. The weapon used was an axe. The injuries, specially the head injury, were found sufficient in the ordinary course of nature to cause death. The case is, therefore, squarely covered by Clause 3rdly of Section 300 and the offence made out is that punishable under Section 302, IPC. There are no circumstances to show that the appellant did not intend to cause the injuries on the head and chest of the victim. These injuries were not caused accidentally by the appellant. He came out from his house with an axe in his hand. It is not the case that that the appellant came empty handed and he took up the axe from the place of occurrence. He had come fully armed with an axe. As such, it can be safely gathered that the intention to cause bodily injury actually found to be present on the victim's body is there.

21. Mr. Singhvi relied upon *Hari Ram v. State of Hariyana* AIR 983 SC 185 and *Jogtarsingh v. State of Punjab* : 1983 CriLJ852 in support of his contention. We have carefully gone through these judgments. None of them is of any help to the appellant. In *Hariram's* case (supra), there was a single blow dealt in heat of altercation. The accused was seen with a Jelly which was lying on the spot. He had not come armed with any weapon. That is not the situation here in the instant case. In *Jagtarsingh's* case, there was a sudden quarrel on the spur of moment

arising out of trivial reason of chance meeting of the parties. There was no premeditation or malice. A single knife blow was caused on the chest of 1 he victim by the accused. The offence was taken to be under Section 304, IPC. Here, again, the facts are otherwise. However, a judgment is to be read in the context of the facts involved in it. Here in the instant case, there was repetition of blows. Both the blows were caused on the vital parts of the victim's body. Both of them, particularly injury No. 1, were sufficient in the ordinary course of nature to cause death. We are, therefore, unable to accept the contention of the learned Counsel that the offence made out is that under Section 304, IPC. In our opinion, the case is covered, on all its wings, by Clause 3rdly of Section 300 and, therefore, the offence made out is punishable under Section 302, IPC. The appellant was rightly convicted and sentenced under Section 302, IPC. No interference is called for.

22. The appeal of accused Kaliya is consequently dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com