

Krishna Kumar Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Oct-16-1986

Reported in : 1987WLN(UC)31

Judge : Shyam Sunder Byas and; Jas Raj Chopra, JJ.

Appeal No. : D.B. Criminal Appeal No. 844 of 1975

Appellant : Krishna Kumar

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. B.R. Purohit

Disposition : Appeal allowed

Judgement :

S.S. Byas, J.

1. Accused Krishna Kumar has come up in appeal and challenges the correctness of the judgment passed on November 13, 1975 by the learned Sessions Judge, Sri Ganganagar convicting and sentencing him as under:

Offence	u/s	Sentence
Awarded		

302, IPC Imprisonment for life ;(2) 27, Arms Act Six months' rigorous imprisonment ;(3) 25(1)(a), Arms Act Six months' rigorous imprisonment.

2. Briefly stated, the prosecution case is that PW 13 Mam Kauri was married to Basti Ram and from him she gave birth to three sons Ugmi Ram, PW 3 Asha Rare, PW 5 Hajari Ram and one daughter Mst. Chando. PW 2 Rustome Hind, aged about 11 years (in October, 1975) is the son of PW 3 Asha Ram. The appellant Krishna Kumar is the son of Smt. Chando and thus grandson of PW 13 Smt. Mam Kauri. Smt. Mam Kauri left her husband Bastiram and started living with the deceased victim Khan Mohammed as his keep. Khan Mohammed adopted Rustome Hind as his son. Rustome Hind, thus, was living with him. Khan Mohammed migrated from Sri Ganganagar to Anoopgarh, where he purchased some land for cultivation. The appellant was not happy with Khan Mohammed as he was keeping his maternal grandmother (Smt. Mam Kauri) as his keep. On March 22, 1974, Khan Mohammed and Rustome Hind came from Anoopgarh to Sri Ganganagar, and remained there through out the day. In the evening on that day, Khan Mohammed and Rustome Hind went to the Railway Station, Sri Ganganagar to board a train to go to Anoopgarh. They had purchased tickets for the journey. At about 8.30 p.m. while they were standing on the platform and the train was just to arrive, a shot was fired at Khan Mohammed, which hit him on the lateral aspect of the left side of his chest. Khan Mohammed fell down. The culprit took to heels. The Police Constables of Railway Police, viz., PW 1 Sri Kishan Head Constables, PW 9 Mohan Lai, PW 11 Harisingh and PW 12 Gurudayal Singh, who were there on patrolling duty on the platform, became active. PW 11 Harisingh and PW 12 Gurudayal Singh ran after the culprit. The culprit, while fleeing away, dropped a pistol on the platform. Both these constables ran after the culprit upto the market situate out-side the railway station, but could not catch him. The culprit mounted on the front bar of a bicycle which the other culprit had kept ready for his escape. Both the culprits thereafter paddled the bicycle and disappeared. Police Constable Harisingh and Gurudayal Singh returned to the platform and found Khan Mohammed lying in an injured condition with blood oozing out from his wound. PW 1 Sri Krishna and other police constables took Khan Mohammed to the General Hospital, but before they could reach there, Khan Mohammed passed away. Shri

Kishan drew up report Ex. P. 1 of the occurrence and sent it through PW 11 Harisingh to the Railway Police Station, Hanumangarh. He also informed the Station House Officer, Hanumangarh on telephone of the incident. The S.H.O. Jugrajsingh (PW 14). arrived at Police Station Ganganagar at about 5.00 a m. on March 23, 1974. He inspected the site and prepared the site plan. He also seized and sealed pistol (Article 1) lying a few feet from the place of incident. The postmortem examination over the victim's dead body was conducted by the Medical Jurist Dr. Goyal (PW 15). He noticed the following injuries on the dead body:

External

(1) Gun shot 1' x 1/2' x oblique in direction on the mid of lateral aspect of left side of chest posteriorly;

(2) Gun shot 1/4' x 1/4' x of same size six wounds were there around injury No. 1;

Internal

Thorax-There was fracture of 6th and 7th ribs on the left side;

Left Lung-Lacerated wound on left side of size 2' x 1-1/2' x full depth found and there corks collected from the lung tissue;

Pleurae and Pericardium were ruptured at the place of the injuries;

Heart was containing a lacerated wound of size 1' x 1/8' x anterior wall back, total six wounds were 'found. Both sides were empty and whole of the chest was full of blood;

Liver-Six wounds of size 1-1/4' x 1/4' x full depth of the liver tissue. Three shots collected from the liver and three sheets just on the interior aspect of the liver.

The doctor was of the opinion that Khan Mohammed had died on account of injury to heart and acute shock due to bleeding. The post-mortem examination report prepared by him is Ex. P 1. The appellant Krishna Kumar and Deshraj were arrested on March 26, 1974. They were lodged in judicial lock-up where their test

identification was conducted on March 27, 1974 by the Tehsildar Mr. Amilal (PW 17). Both the accused persons were correctly identified by the Railway Police Constables PW 11 Hari Singh and PW 12 Gurudayal Singh. The recovered pistol was sent for examination to the State Forensic Science Laboratory, Jaipur. An empty cartridge was found in its barrel. On examination, it was found in working order and the cartridge case found in its barrel to have been fired from it. On the completion of investigation, the police submitted a challan in the Court of the Chief Judicial Magistrate, Sri Ganganagar, who, in his turn, committed the case for trial to the Court of Sessions Judge Sri Ganganagar. The learned Sessions Judge framed a charge under Section 302/114, IPC against accused Deshraj and under Section 302, IPC and Sections 27 and 25 of the Arms Act against accused Krishna Kumar. Both the accused pleaded not guilty and claimed to be tried. They denounced the whole prosecution story as false and fabricated piece of concoction and claimed absolute innocence. In support of its case, the prosecution examined 17 witnesses and filed some documents, while in defence, no evidence was adduced. On the conclusion of trial, the learned Sessions Judge found no incriminating material against accused Deshraj. He was, therefore, acquitted. The charges were taken as duly proved against accused Krishna Kumar. He was, therefore, convicted and sentenced as mentioned at, the very out-set.

3. We have heard Mr. B.R. Purohit learned counsel for the appellant and the learned Public Prosecutor Mr. L.S. Udawat. We have also gone through the case file carefully.

4. Before proceeding further, it would be proper to briefly analyse the evidence which the prosecution adduced in order to establish the charges against the appellant. The evidence adduced consists of the following sets:

- (1) Direct evidence of PW2 Rustome Hind who was standing with the deceased-victim Khan Mohammed;
- (2) the conspiracy hatched by the appellant and accused Deshraj to murder Khan Mohammed;
- (3) the extra-judicial confession alleged to have been made by the appellant;

(4) the report of the Forensic Science Laboratory in respect of pistol (Article 1); and

(5) the direct evidence of PW 11 Harisingh and PW 12 Gurudayal Singh, who chased the appellant and saw him fleeing away.

5. The learned Sessions Judge found the evidence relating to conspiracy and extra judicial confession wholly unreliable and worth of no credence. He, therefore, rejected these two sets of evidence as they furnish no incriminating material against the appellant. PW 2 Rustome Hind, who was standing hand in hand with the deceased victim Khan Mohammed lent no support to the prosecution. He deposed that while he and Khan Mohammed were standing on the platform, a shot was fired which hit Khan Mohammed. He got frightened and ran away to his father Asha Ram (PW3). He categorically stated that the appellant Krishna Kumar is the son of his father's sister and he knew him before hand. Accused Krishna Kumar is not that person who had fired the shot. He was declared hostile and was confronted with his police statement Ex. P 5. It is interesting to notice that even in his police statement Ex. P 5, he did not state that it was accused Krishna Kumar who had fired the shot at Khan Mohammed. He was, thus, unnecessarily declared hostile. However, there is his categoric statement that the fire was not shot at Khan Mohammed by the appellant Krishna Kumar. His testimony, thus, in no way, assists the prosecution.

6. The learned Sessions Judge put reliance on the testimony of PW 11 Harisingh and PW 12 Gurudayal Singh. According to them, they had seen the appellant dropping the pistol and running away from the plat-form. He also sought help from the report of the State Forensic Science Laboratory that pistol (Article 1) was in working order and the empty cartridge found in its barrel was fired from it.

7. In challenging the commission of the appellant, it was contended by Mr. Purohit that the Court below was in error in putting reliance on the testimony of PW 11 Harisingh and PW 12 Gurudayal Singh. Both of them admitted that they had not seen the appellant firing the shot at Khan Mohammed. Though both of them stated that the appellant had dropped the pistol (Article 1) on the plat-form while running, they did not disclose this material fact on their police statement. It was argued that

these two witnesses were not in a position to identify the running man as they had not seen his face. They had seen only the back of the running man. It is impossible that the running man can be identified by his back. Since a shot was fired on the platform and there was a huge crowd there, there was a confusion and commotion. In this confusion and commotion, it was difficult for these two witnesses to correctly identify the culprit. Moreover, according to them, the running culprit remained only three or four steps away from them and thereafter mounted the bicycle. Had these two police constables chased the fleeing culprit, it was not difficult for them to catch him. The fact that they could not catch him shows that they had not chased him and had not seen him. It was further argued that the prosecution is guilty of withholding the material witnesses. The man holding the bicycle, on which the appellant is alleged to have mounted, was standing outside the hotel of Khajachand. Khajachand was, therefore, the best man to depose as to who was that person who had mounted the bicycle. The bicycle was standing in the market outside the railway station. There must be many persons in the market and yet none of them was produced in evidence. Mr. Purohit also contended that the appellant has a big scar mark on his forehead nearly by one inch in dimension. The Tehsildar, who conducted the test identification took no precautions to conceal this prominent mark. It was, therefore, very easy for PW 11 Hari-singh and PW 12 Gurudayal Singh to identify the appellant.

8. It was, on the other hand contended by the learned Public Prosecutor that the testimony of PW 11 Harisingh and PW 12 Gurudayal Singh cannot be discarded or doubted simply because they are police constables. The identification was conducted promptly without any delay after the arrest of the culprits. These two witnesses had no bias or animus against the appellant. As such, there was no reason to disbelieve their testimony. We have taken the respective submissions into consideration.

9. Before dealing with the rival contentions, it would be proper to add a few words about the testimony of PW 2 Rustome Hind. He was adopted as a son by the deceased-victim Khan Mohammed. This adoption was with the consent of his father PW 3 Asha Ram. It is also an established fact that Smt. Mam Kauri deserted her husband Basti Ram and started living with Khan Mohammed as his

keep. Rustome Hind used to address Khan Mohammed as 'BABA' (grandfather). Smt. Mam Kauri had started living with Khan Mohammed many years ago. There was, thus, no bad blood between the sons of Smt. Mam Kauri and the deceased-victim Khan Mohammed. Since Rustome Hind was living with Khan Mohammed from his childhood, he must be very much attached to him-atleast more than the appellant. Rustome Hind was standing hand in hand with Khan Mohammed and the shot was fired from a close range of 3 to 4 feet. Rustome Hind must be presumed to have seen the culprit who had fired the shot. Had he seen the appellant firing the shot, he would have supported the prosecution and must have pointed out the appellant as the person who had fired the shot. He has no soft corner for the appellant. His sympathies were not with the appellant but with the deceased-victim, with whom he was living as his adopted son. The witness Rustome Hind very categorically stated that it was not the appellant Krishna Kumar who had fired the shot at Khan Mohammed. The testimony of this witness plays a vital role-almost a decisive role-to decide the fate of the case. Unfortunately, he stated nothing against the appellant. On the contrary, he has absolved him from guilt.

10. PW 11 Harisingh and PW 12 Gurudayal Singh are the Railway Police Constables, who were deputed for patrolling duty on the platform. They deposed that when they were strolling on the platform, a shot was fired. They saw a person dropping the pistol a few feet away from the injured man and running him away. They chased him but could not catch him as he mounted on a bicycle his companion paddled the bicycle and took him away. We have carefully gone through the testimony of these two witnesses. The learned Public Prosecutor is right that they have no animus against the appellant and their evidence cannot be whittled down simply because they are police employees. But the essential question which arises for deliberation is whether they were in a position to correctly identify the fleeing man and the appellant was that fleeing person. Unfortunately, there are many big lapses in the evidence of these two witnesses which make their testimony highly suspicious about the correct identity of the appellant.

11. Both of them admitted that they had not seen the appellant firing the shot. Both of them stated that they chased him and went upto the hotel of Khajanchand. They remained only three or four paces away that the culprit mounted on the bicycle and managed to escape. We are not impressed by this statement of facts. If these two police constables had really chased the culprit & the culprit remained only three or four paces away from where he could mount the bicycle, it was not at all difficult for them to catch him. After all, a bicycle does not catch the speed as soon as it is paddled. It takes some time. If these two police constable were so near the bicycle, in all probability they must have caught hold of the culprit but they could not. That shows that what they stated is not true atleast not wholly true.

12. PW 11 Harisingh no where stated that he had seen the face of the culprit (appellant) when he was running away from the platform. He merely stated that he saw him by his back. PW 12 Gurudayal Singh, of course, stated that when the appellant was throwing the pistol and mounting the front bar of the bicycle, he turned his face towards him and he, therefore, saw his face. If it was really so, it was easy for PW 12 Gurudayal Singh to correctly identify the appellant as the culprit who had fired the shot. But, unfortunately, in his police statement Ex. D 3, Gurudayal Singh did not state that he had seen the face of the culprit (appellant) while he was dropping the pistol and mounting the bicycle. It was for the first time during trial that this witness introduced the aforesaid facts. This amounts to a clear improvement on the earlier statement and such an important improvement destroys the credibility of his testimony. PW 11 Hari Singh also did not state that he had seen the culprit (appellant) by his face when he dropped the pistol on the platform. It is, thus, manifest that both these witnesses saw only the back of the culprit (who ever he was) while he was running away. It is virtually impossible for any body to identify a person by his back. It is interesting to note that in the test identification conducted before the Tehsildar, both these witnesses did not state the description of the appellant or his companion Deshraj. They simple stated that they would identify the person who had fired the shot and mounted on a bicycle and the person had paddled the bicycle. These are the facts of the case and not the description of the culprits.

13. Coming to the test identification, it does not inspire confidence. PW 11 Harisingh, in his cross-examination, admitted that there is a prominent mark of scar of the size of 1' on the left fore-head of the appellant, which is above the eye

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PW 7 Mr. Amilal Tehsildar, who conducted the test identification, admitted that there is a scar mark on the fore-head of the appellant Krishna Kumar, but it is not very much prominent. PW 11 Harisingh, however, admitted that the scar mark is prominent and perceptible. In the test identification memo Ex. P 13, column No. 3 is meant for mentioning those marks which have a bearing on the identification of the culprits. In column No. 3 of Ex. P 13, the Tehsildar has not at all mentioned that he took any precaution to conceal the scar mark on the forehead of accused Krishna Kumar. If a person has some prominent and perceptible mark on his forehead of face, then it is very easy for anybody of pick him out in the test identification. The test identification carried out without taking precautions in respect of such prominent and perceptible scar marks on the forehead or face, cannot be said to have been carried out in an impartial and faithful manner. Such a test identification is open to severe criticism and no reliance can be placed on it.

14. The fact that no precaution was taken for covering the prominent and perceptible scar marks on the forehead of the appellant Krishna kumar at the time of identification parade very much detracts from the value of the identification at the parade. In this connection we may make a reference to *Samundra Singh v. State* (1952 RLW 187) decided by a Division Bench of this Court, where the evidence of the test identification was discarded on the ground that the Magistrate who conducted the test identification did not take precaution to cover or conceal the prominent or perceptible marks of the culprit.

15. The evidence of these two witnesses PW 11 Harisingh and PW 12 Gurudayal Singh, when closely scrutinized and sifted, it cannot be positively said that they were in a position to correctly identify the culprit who had fired the shot at Khan Mohammed. Their claim that they had correctly identified the culprit, who was running away and who had mounted on the bicycle was the appellant Krishna Kumar, is open to grave doubt and cannot be accepted. There can be an honest

mistake or an over zealous act on their part in pointing out the appellant Krishna Kumar as the person when they had seen fleeing away from the plat-form. The element of doubt is constantly there and the benefit of that doubt must go to the accused. We are, therefore, unable to maintain the conviction of the appellant on the testimony of these two police constables.

16. The report of the State Forensic Science Laboratory Rajasthan, Jaipur (Ex. P 27) shows that the 12-bore pistol (Article 1) found on the platform, was in working condition and that the empty cartridge found in its barrel was fired from it. But this evidence furnishes no incriminating material against the appellant. It could have furnished a valuable piece of evidence to the prosecution if the prosecution had succeeded to establish that pistol (Article 1) was dropped down or thrown away by the appellant Krishna Kumar. We have already rejected the prosecution story that it was the appellant Krishna Kumar who had dropped down the pistol (Article 1). There is no other evidence to speaking against the appellant, connecting him with the murder of Khan Mohammed.

17. For the reasons stated above, we are unable to maintain the conviction of the appellant.

18. In the result, the appeal of accused Krishna Kumar is allowed. The judgment of the learned Sessions Judge, Sri Ganganagar dated November 13, 1975 is set aside and the appellant is acquitted of the offence s he was charged with. He is already on bail and need not surrender. His bail bonds shall stand discharged.

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