

**Kailash Vs. State of Rajasthan**

**Kailash Vs. State of Rajasthan**

**SooperKanoon Citation :** [sooperkanoon.com/769239](http://sooperkanoon.com/769239)

**Court :** Rajasthan

**Decided On :** Dec-06-2005

**Reported in :** RLW2006(1)Raj794

**Judge :** V.K. Bali and; Shashi Kant Sharma, JJ.

**Acts :** Evidence act - Sections 114 and 133; Indian Penal Code (IPC) - Sections 302; Code of Criminal Procedure (CrPC) - Sections 164 and 313

**Appeal No. :** D.B. Criminal Appeal No. 446 of 2002

**Appellant :** Kailash

**Respondent :** State of Rajasthan

**Advocate for Def. :** B.N. Sandu, P.P.

**Advocate for Pet/Ap. :** Ravi Kasliwal, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**V.K. Bali, J.**

1. Ankit Bansal, a child of four years, studying in nursery, as per prosecution version was done to death by the appellant Kailash Bansal, real brother of father of the hapless child. Put to trial, the offence committed by him was held

established vide judgment recorded by the learned Additional Sessions Judge (Fast Track) No. 2, Ajmer dated 15.3.2002 vide which he has been held guilty for offence Under-Section 302 IPC and sentenced to undergo R.I. for life and to pay fine of Rs. 1,000/-, and in default of payment of fine, to further undergo RL for three months.

2. Prosecution in its endeavour to secure conviction against the appellant, relied upon statement made by PW-26, accomplice of the appellant in the commission of crime who turned approver and circumstantial evidence details whereof shall be given in the forthcoming paragraphs.

3. In this appeal filed against the order of conviction and sentence dated 15.3.2002 learned Counsel appearing for the appellant contends that the approver is unworthy of credence and for sustaining conviction the Court must look for some corroboration to the statement made by him and reject his testimony out rightly as he has not come up with truth at all and further that the so called chain of evidence based on circumstances is all a made up affair. Learned Public Prosecutor, however, joins issues with the learned Counsel appearing for the appellant on the two points referred to above. Before, however, we may answer the two fold questions posed in this appeal, it will be relevant to make a mention of bare minimum facts of the case.

4. The occurrence leading to death of Ankit was stated to have been taken place on 4.10.1999. Sri Narain Bansal (PW-1), grand-father of the child, lodged written report (Ex.P.1) on the basis of which formal FIR (Ex.P.4) came to be recorded on 5.10.1999. While lodging FIR, Sri Narain Bansal stated that his grand son Ankit son of Chandra Prakash Bansal, aged four years, a student of junior K.G. in Happy Montessori School, Ajmer, would come back at home from the school with his mother as usual at 11.15 a.m. Today, when his mother went to take him, the child was not found in the school. It became known from the Headmistress that the child had been taken by a boy aged 18-19 years who from his walk was lame. His grand son had not come home till that time. A search may be made for him and after he is found, he be given custody of the child. He gave description of his grandson as four years of age, height 2', fair complexion, physically fit, having a

bunch of hair on his head, an injury mark on the left eye, speaks Hindi and wearing brown colour half pant and check shirt. He was wearing black shoes. The first informant handed over a photograph of his grand son to the police. On 5.10.1999, police while making search of the child, however, stumbled across a dead body with the same description of a child as given by the first informant Shri Narain Bansal, from an abandoned house. It was identified to be dead body of the missing child Ankit. It was subjected to post mortem examination by Dr. B.K. Mathur on the same day at 1.45 p.m. The doctor, who was examined as PW-18, stated that the child had died within a period of 24-36 hours from the time post mortem was conducted. The dead body of the child was found to have following injuries:-

1. Contusion around Lt. Eye including both eye lids.
  2. Contusion with super, abrasion on lower lip.
  3. Abrasion 2 x 2 cm on Lt. Eibow.
  4. Crush injury on Lt. Index Finger distal phalanx.
  5. Crush injury on Lt. Thumb distal phalanx.
  6. Abrasionon lat. ap. Rt. Eye 1x1/2 cm.
  7. Contusion 1 x 1 cm on Left side face. All above injuries fresh in nature.
  8. Partly healed injury 1 x 1 cm on Lt. Knee - about 10-15 days old.
  9. Rat bite on Lt. Fore arm, medial side of Lt. Thigh upper part - post mortem in nature.
5. In the opinion of the doctor, the child had died due to asphyxia caused by ligature around neck.
6. Hemant examined as PW-26, who had facilitated appellant in kidnapping the child and handed the child over to him stated that on 3.10.1999 he had gone on the roof of his house. The appellant Kailash was also standing on the roof of his

house whom he made a request to lend him an amount of Rs. 100/- for getting his pants stitched. The appellant took him on his vehicle M-80 to the shop of a tailor and gave pants to him for stitching. On their way back to his house, appellant told the witness that if he needed money, then he will have to do something, he told him that the witness should bring his nephew Ankit from the school and deliver the child to him near Delhi Gate. He told him that Ankit was a student of Happy Montessori School. In lieu of the work done by him, Kailash promised to give him an amount of Rs.5000/-whereas he would make a demand of Rs. 50,000/- from the parents of the child. The appellant gave him an amount of Rs. 500/- immediately. Next day, he went to the school of Ankit and told his Madam that there was a function (Shradda) at the house of Ankit and therefore, he would be permitted to go home. The child was permitted to go with him. When he was taking the child, on the way his friend Sunit Kashyap met him and enquired from him as to whom the child belonged and where was he being taken. The witness told that he was son of his friend whom he will give the child. When the witness had walked a little distance, then in a street, the appellant met him with his vehicle M-80. When the witness was entrusting the child to Kailash the tailor had also seen. Appellant made the child sit on the front and took him. The witness came back and stayed in the shop of Sunit Kashyap who enquired from him as to whether the person who had taken the child was the same who had come with him at the time of giving his pants for stitching on which the witness replied in positive. He kept on sitting at the shop of Sunit Kashyap up to 2.30 p.m. When he came to his locality, he heard news about the child missing but he went to his house. In the evening, the witness met . grand-father of Ankit and one policeman. He enquired from the grand father as to whether the child had been traced or not. he had enquired from the grand father for the only reason that someone might not doubt him. When he was coming back after taking vegetables, the policeman enquired from him about Ankit. He replied that he knew Ankit. He was taken by the policeman with him for tracing the child. After some rounds, the witness was made to sit at the police post where the school Madan came whose permission he had sought to take the child. The moment Madam saw him and told that he was the person who had taken the child, he started crying in front of Madan as to why she wanted to spoil his life and that he had not taken the child after taking her permission. He was made to sit

outside for sometime and again taken before the Madan but then she stated that the one who had taken the child looked like him but the witness was not that person. He was sent to his house after sometime. He came to know about the dead body of Ankit next day when his family members were crying and he got frightened. In the evening when he was going to participate in the last rites of Ankit, the appellant met him there who told him that if he would tell anyone that he (the witness) had entrusted the child to him, then he along with family members would be finished. He also told him that if he could kill his real nephew, he could kill him as well. The witness told the appellant that he would not tell this to anyone, the witness told him that when he was entrusting the child to appellant, the tailor had seen it. Immediately, he took him to the shop of tailor and started talking to him. When he came back he told him that the tailor would not tell this to anyone and that he should also not tell to anybody, he then came to his house. Thereafter, he started remaining sick. Four months thereafter, he was called at the Police Station. He was told there that the appellant Kailash had told everything to the police and that he should also come out with truth. When confronted, he told the whole truth to the police. He was arrested by the police. He proved the statement made by him before the Magistrate (vide Ex.P. 18). In the cross-examination adverted to him, he stated that the police had taken him to police post on 4th October and at that time, the appellant had not threatened him. He did not tell truth to the police on 4th October as the police had not enquired anything from him in that regard. Police had of course asked him about the deceased Ankit Bansal. He admitted that in the police station, he was shown to the lady teachers who in turn were asked as to whether Ankit was taken by him. At that time, he did not admit that he had taken Ankit Bansal. He volunteered to state that when the lady teachers had identified him, then he told them as to why they wanted to spoil his life. He admitted that he had not narrated the incident to his parents. Before addressing the letter Ex.P. 19 to S.P. he had told truth to the police in the police station. To a question put to him by the defence counsel on showing of a slip as to whether the same was in his hand-writing, he replied that the same was written by him. But he volunteered to state that when he had come to the lock up, at that time, the slip Ex.D. 2 was given to him by Kailash who had told him that if he would not make writing on the same, then he will see to it that his (witness)

relations would not be able to come to meet him.

7. Prosecution examined Chandra Prakash Bansal and Smt. Vaishali as PW-1 and PW-5, father and mother respectively of the deceased. Chandra Prakash Bansal (PW-1) stated that on 4.10.1999 he had left his son Ankit Bansal at Happy Montessori School at 8.10 a.m. At 10.15 a.m. when his wife Vaishali had gone to take his son, the child was not found in the school. On enquires made from the school, it came to be known that someone had taken Ankit. Everyday, he used to leave the child in the school whereas his mother Vaishali used to go to fetch him. It came to his notice at about 12 that someone had taken the child from the school. Thereafter, he went along with his father to lodge the report. Report was lodged by his father. They kept on searching the child at night. His elder brother Surya Prakash and younger brother Kailash also associated them in searching the child. Next day at about 10 a.m. in a small room built in a plot at Link Road they found dead body of the child. One Kamlesh Kumar told them that Hemant who indulged in bad deeds could reveal something about the child. His statement under-Section 164 Cr.P.C. was recorded by the Magistrate. He had told about doubts entertained by them or Hemant. It was on the asking of the police that he had expressed that they doubted their brother Kailash. He had talked to the teacher with regard to his son who had told him that a body aged 18-19 years had taken him. This witness, on permission sought by the Public Prosecutor was declared hostile and was cross-examined wherein he admitted that he had made statement Under-Section 164 Cr.P.C. before the Magistrate but he had not told the Magistrate that the appellant used to take liquor. He, however, admitted portion 'C' to 'D' contained in his statement Under-Section 164 Cr.P.C. wherein it is recorded that after death of the child, the appellant had indulged in abusing. He admitted portion 'E' to 'F' of his statement Under-Section 164 Cr.P.C. but stated that he had made the said statement on the asking of the police. He admitted other portions of his statement made Under-Section 164 Cr.P.C. as well but qualified the said admissions by stating that he had got the statement recorded as told to him by the police. He, however, admitted that on 4th January, appellant had quarrelled with him and that he had lodged report against the appellant on 5th January. It is significant to mention here that in his statement made before the Magistrate Under-Section 164 Cr.P.C. PW- 1 Chandra Prakash bansal had stated that he was married on

6.12.1994 and was blessed with a son and a daughter. They were four brothers, the eldest being Surya Prakash. His other brothers were Kailash and Mahesh. His parents were alive. His father, brother Suray Prakash and the witness Chandra Prakash himself were all doing business of cycle. Kailash and Mahesh were also running Shri Ram Guest House which is on the first floor of the shop. Ankit, his son, had already died in the occurrence which took place on 4.10.1999 which date he had left him in Happy Montessori School at 8.10 a.m. His mother had gone to take him at 11.15 a.m. but came to know that someone had already taken him. They made enquiries from the neighbourhood but found no clue of the child. After leaving his child at the school, he had gone to his shop. At 10.15 a.m. when his elder brother Surya Prakash came, he (the witness) along with his nephew Sourabh had gone to pay electricity bill. At about 11.30 -11.45 a.m. when he came back at the shop, his elder brother Surya Prakash told him that some had taken Ankit from the school. He went to the school and Madan told him that at 9.15 a.m. someone had taken the child. He was told that some relation of the child had taken him. With regard to the appellant, he stated that he was not on speaking terms with him for the last 8-10 years. Kailash used to consume liquor since beginning. Kailash after consuming liquor had abused him on number of occasion. Two-three months prior to his (Kailash's) marriage, Kailash had told him that Chandiya and others were miscreants of no consequence, let his marriage be over, he would show how miscreants (Dadagir) should live. For last 5-6 months, Kailash was trying to come near the child Ankit. On number of occasions, he had taken the child for giving him sweet or biscuits. He had taken the child to Pushkar also. After murder of his child when the whole family was depressed, Kailash celebrated Diwali by cracking fire. His wife also did the same. After death of Ankit, he came to him on a number of occasions after consuming liquor and shouted with loud voice that he had finished Ankit and that he should call police and further that the police shall not be able to do anything against him. He used to fight after consuming liquor. On 4th January also he had quarrelled regarding which report was lodged by the witness on 5th January. The witness also stated that he fully doubted Kailash and his neighbour Hemant for killing his son Ankit. They were continuously enquiring from them as to whether child was found or not. He also stated that nobody had demanded ransom from him.

8. Smt. Vaishali (PW-5) like her husband, supported the prosecution case with regard to missing of her son but resiled from part of her statement involving appellant in the commission of crime. She too was declared hostile and was cross-examined Ex.P.5. Some portions of the statement she admitted having made but qualified by saying that the same were got recorded at the instance of the police. Some portions of her additional statement were, however, admitted having been made. She denied the suggestion that she had resiled from her earlier statement as she wanted to save her brother-in-law.

9. Smt. Kaushalya (PW-3) stated that she was working in Happy Montessori School since 1975. She was teaching Nursery class. She knew Ankit Bansal who was a student of Nursery. On 4.10.1999, a person aged about 20-21 years, who was lame, came and took the child. Ankit saw him, recognised him and they sent him with that person. When the time of school was over, mother of Ankit came to take him and when she enquired from her, she told that one body had taken him. Mrs. Krishna Mathur Teacher was also present at that time. She too had seen the body taking Ankit with him. She had told them that she could recognise the person who had taken Ankit if he was to be presented before her. She identified Hemant as the same person who had come to take Ankit. She had also identified him in the identification parade held for the purpose. In cross-examination, she stated that the boy who had come to take Ankit on 4th had also come earlier and taken the child. They had permitted Ankit to go with him as the child had identified him and had gone with him of his own free will. Mrs. Krishna Mathur who appeared as PW-4 made similar statement as made by Mrs. Kaushalya (PW-3). PW-16 Vishnu Dutt Sharma stated that on 14.2.2000 he was posted as Additional Chief Judicial Magistrate No. 3, Ajmer, On the orders of Chief Judicial Magistrate, he recorded statement of Hemant Under-Section 164 Cr.P.C. Before recording his statement, he had satisfied himself that Hemant was making statement of his own free will. Before recording the statement, he had properly explained it to him that he was not bound to make statement. Satya Narayan Vyas who was examined as PW-30 stated that on 24.1.2000 he was holding the post of Judicial Magistrate No. 4, Ajmer. On that day, ASI Rajpal singh presented an application on the orders passed by the Chief Judicial Magistrate before him. The same was for recording statements of Chandra Prakash, Mrs. Vaishali and Sunil Kashyap. Before



recording statements of the witnesses, they were explained that they were free to make statement and they could make statements according to their choice and free will. He then recorded statements of Sunil Kashyap, Vaishali and Chandra Prakash. Bhanwar Dan, S.I. examined as PW-29 and Haidar Ali Zaidi C.O. examined as PW-32 deposed with regard to the steps that they had taken while investigating the case.

10. When questioned Under-Section 313 Cr.P.C. the appellant besides denying incriminating material put to them pleaded innocence and false involvement in the case. Ex.D. 1 and 2 were produced by him in defence. Nothing based upon Ex.D. 1 has however been urged before this Court.

11. From the facts as detailed above, what emerges is that the prosecution in order to secure conviction against the appellant relied upon evidence of Hemant, accomplice of the appellant in commission of crime, who turned approver as also circumstantial evidence.

12. Contention raised by the learned Counsel appearing for the appellant kailash is that it may be legal to base conviction upon un-corroborated testimony of an accomplice but since an accomplice is unworthy of credence his statement has to have corroboration in material particulars. In the present case, the approver has come up with complete falsehood and even if there may be some corroboration, his testimony should be rejected outrightly. There is however no corroboration to the statement made by the approver and inasmuch as the Court has to look in for corroboration, and therefore, even if statement made by the approver is accepted, the appellant would still be entitled to acquittal, further contends the learned Counsel. Learned Public Prosecutor, per contra, however states that the approver has come up with complete truth and his statement alone is sufficient to sustain conviction of the appellant. He further contends that there is sufficient evidence available on the records of the case that corroborates the statement of the approver.

13. We have heard learned Counsel representing the parties and with their assistance examined records of the case. We have also carefully examined the statement of Hemant Singh Rathore (PW-26). The only ground on which it has

been endeavoured by he learned Counsel representing the appellant to hold him wholly unreliable witness is that it has come in statement Under-Section 164 Cr.P.C. of the father of the deceased boy that Hemant was indulging in wrongful activities. There may be, on that count, something stated by this witness in the deposition made by him in the court as well but in the context of facts and circumstances of the case, it is not possible to accept the contention of the learned Counsel. In the first instance, when father of the boy made statement before the Magistrate Under-Section 164 Cr.P.C. there was anxiety on his part of paint Hemant as a person of bad character; it was in all probability to pin him down for the role played by him in the matter of kidnapping of his child ultimately resulting into his death. When, however, father of the boy came to depose in the court, his whole effort was to save the appellant. When the child had died and the appellant, real brother of father of boy, was alive, it appears certain to us that grief of the child with lapse of time had dwindled and to save the brother was his present desire. Normally, parents would not excuse such a drastic act as committed by the appellant but the evidence available on the records, unmistakably suggests that for whatever reason, may be desire of grand father of the child who is still alive to save his son, that the parents of the child have preferred to forget murder of their own child and have rather chosen to save the culprit, who as mentioned above, is also closely related to them. Be that as it may, there is not an iota of evidence on the record to show that Hemant had shady antecedents. There is no mention of any bad deeds ever done by him in the past. Defence did not gather courage to put to him any bad or criminal act in which he might have indulged. By no stretch of imagination, thus it can be said that Hemant was unreliable witness. In fact, far from that, his statement appears to be consistent and truthful, he was a boy of 18-19 years. Greed or need of some money made him commit the crime consequence whereof he, did not know, would be such that the child would be done to death. At the most, he thought that the uncle would take his nephew and in the process, Kailash would get some easy money out of which he too would get something. When, however, he found to his dismay that the child had been killed, he came up with truth even though at a late stage when confronted that the main accused had confessed his guilt. We find no infirmity or embellishment in the statement made by Hemant. It is in fact a case where conviction could be based

on his testimony alone as is indeed permissible by virtue of provisions contained in Section 133 of the Evidence act which reads as follows:

133. Accomplice.--An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

14. It is true that by virtue of Illustration-B appended to Section 114, reproduced below, an accomplice is unworthy of credence unless he is corroborated in material particulars and it is settled law by now that as a matter of prudence and not as a matter of law, the court looks in for some corroboration, which in any case is available in the present case.

114. Court may presume existence of certain Illustration-The Court may presume -

(a) ...

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars.

(c) to (i) ...

15. Statements made by Smt. Kaushalya and Smt. Krishna Mathur, the two teachers in the school, lend corroboration to the statement made by Hemant approver that the child was indeed taken by him from the school at the time as stated by him. The plea raised by the learned Counsel for the appellant that no reliance should be placed upon their statements, as approver was shown to them and the identification parade was only a formality is of no meaning and consequence in the present case as in our considered view Hemant Singh Rathore (PW-2G) was lame, a peculiarity which could not be forgotten by these school teachers. They would have, on account of this peculiarity, certainly identified him. Further, when a small child of tender years is kidnapped from a school, the teachers who might have seen the person who had kidnapped the child, would not forget his face. In the peculiar facts and circumstances of the case, there was no need at all for the prosecution to have arranged test identification parade. That apart, even though declared hostile, Chandra Prakash

and Smt. Vaishali, parents of the deceased, stated before the Magistrate when their statement Under-section 164 Cr.P.C. were recorded that the appellant had confessed his guilt under the influence of liquor. It is true that these two witnesses were declared hostile but it is equally true that the court can always rely upon that part of the statement of even a hostile witness which may support the prosecution case. We have already mentioned that these two witnesses have deposed in their statements made before the police and the Magistrate in so far as role played by Hemant is concerned. In other words, the statement made by Hemant is corroborated by the statements made by Chandra Prakash and Smt. Vaishali. Further, these two witnesses candidly admitted that their statements Under-section 164 Cr.P.C. were recorded by the Magistrate. The Magistrate who appeared as PW-30 Satya Narain Vyas clearly stated that these witnesses had made statements of their own free choice. Once Chandra Prakash and Smt, Vaishali had made statements before the Magistrate Under-Section 164 Cr.P.C. and once these witnesses admitted having made such statements, which is proved to have been made voluntarily, evidence with regard to confession made by the appellant before them has to be accepted. That indeed is also corroboration to the statement made by Hemant that the child was handedover by him on the fateful day to the appellant. The moped of appellant on which he had taken the child when handed over to him by Hemant also lends corroboration to the statement made by the approver. In our considered view, the prosecution has proved guilt of the appellant beyond shadow of doubt. On the basis of evidence, learned trial Judge rightly returned finding of guilt against the appellant. There is absolutely no scope for interference with the judgment of the trial court. The appeal is devoid of merit and the same is accordingly dismissed.