

Md. Kamal Vs. State

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SooperKanoon Citation : sooperkanoon.com/886434

Court : Kolkata

Decided On : Oct-15-2004

Reported in : 2005(2)CHN81

Judge : Bhaskar Bhattacharya and ;Arun Kumar Bhattacharya, JJ.

Acts : Indian Penal Code (IPC) - Sections 114, 302 and 379; ;Code of Criminal Procedure (CrPC) - Sections 161 and 313; ;Evidence Act - Section 145

Appeal No. : C.R.A. No. 163 of 1996

Appellant : Md. Kamal

Respondent : State

Advocate for Def. : R.R. Biswas and ;Sofia Begam, Advs.

Advocate for Pet/Ap. : S.S. Haque and ;Avijit Kumar Auddy, Advs.

Disposition : Appeal dismissed

Judgement :

Arun Kumar Bhattacharya, J.

1. The hearing stems from an appeal preferred against the judgement and order of conviction and sentence passed by the Id. Sessions Judge, 2nd Bench, City Sessions Court, Calcutta in S.C. No. 11/1989 [S.T. 2(11)/89] on 11.5.1990.

2. The miniaturized version of the prosecution is that the victim Saura Bibi who used to reside at the western side footpath of Chittaranjan Avenue in front of 161, C.R. Avenue with the de facto complainant Rehana Khatun and others, left that place after marrying Maju about 4/5 years back but she used to visit there twice/thrice in a month. On 14.8.1987 at about 12.00 hrs. while the said Saura Bibi was gossiping with the de facto complainant, Hasina, Sukia and Mehera sitting on the footpath near 161, C.R. Avenue, Md. Kamal, the accused, who unsuccessfully tried to establish an illicit relation with Saura, suddenly appeared there, stood behind Saura and after taking out a razor from the pocket of his trouser held Saura by hairs with his left hand and after cutting her throat with the said razor, fled away. Saura on pressing her hand on the throat ran towards north but fell down near Netaji Park. She was removed in a taxi to Medical College and Hospital where she was declared dead. Hence, accused Md. Kamal was charged under Section 302 I.P.C.

3. The defence case, as suggested to P.Ws. and as spelt out from the trend of questions put to D.Ws. 2 & 3, is that no such incident took place. The accused was in Lalbazar Police Lock-up at the relevant time and he has been falsely implicated in this case.

4. Sixteen witnesses were examined on behalf of the prosecution, while three witnesses were examined on behalf of the defence, and after considering the facts, circumstances and materials on record, the Id. Court below found the accused guilty under Section 302 I.P.C., convicted him thereunder and sentenced him to suffer imprisonment for life.

5. Being aggrieved by, and dissatisfied with, the said order of conviction and sentence, the accused has preferred the present appeal.

6. It now requires to be considered is whether the Id. Court below was justified in passing the said order of conviction and sentence.

7. Out of the above witnesses for the prosecution. P.Ws. 3 to 7 being eyewitnesses, P.W. 11 (M.O. of Calcutta Medical College and Hospital), P.W. 10 (Autopsy Surgeon) & P.W. 16(I. O.) are vital, others being formal.

8. According to the evidence of P.W. 3 (de facto complainant), who resides at the footpath in front of premises No. 161, C.R. Avenue, opposite to Mahajati Sadan, along with Mahaburnessa, Hasina(P.W. 6), Sukia and another Hasina with their respective husbands, Sarra Bibi used to reside at the footpath with them but after her marriage she went to Kadapara with her husband (P.W. 14) and used to visit them once in 2 or 3 months. On 14th two years back in 1987 (could not remember the month), the said Sarra came to them and while they viz she herself, Mahaburnessa, two Hasina & Sukia were gossiping on the footpath in front of premises No. 161, C.R. Avenue, Kamal came from northern side i.e. Mahajati Sadan side, brought out a razor from his pocket, caught hold the hairs of Sarra by left hand, pushed the blade of razor on her neck and after closing the blade and keeping the razor in his pocket ran away crossing C.R. Avenue. Sarra with profuse bleeding from neck proceeded towards north on pressing her hands on the cut portion of throat and fell down on the road by the side of a park. She wrapped a napkin on her neck, took her to the Emergency Department, Calcutta Medical College and Hospital in a taxi but Sarra expired on way to hospital. She disclosed everything to the doctor (P.W. 11) and told that Kamal killed her. From hospital she went to Jorasanko P.S. and made a statement to Darogababu (P.W. 16) who recorded the same (Ext. 9). To a suggestion put in her cross-examination that as the accused loved her very much, she is deposing against him out of ill-feeling, she has categorically denied it. There is no such suggestion that she did not like him nor was any such plea taken during his examination under Section 313 Cr. PC nor is there any evidence in this regard on his behalf. If the accused really loved her very much, why there would be ill-feeling on her part to depose against the accused has not been explained. Accordingly, the above contention of the accused is belied. The above evidence in material particulars is corroborated not only by P Ws. 5 & 6 who resides at the same footpath with P.W. 3 but also P.Ws. 4 & 7. P.W. 4 who looks after the two taxis of his uncle and one taxi viz, WBT 5202 of his mother, after getting the taxi of his mother parked by the side of the park, opposite to Mahajati Sadan at the relevant time was taking cold drinks from a pan-bidi shop by the side of a grocery shop and from a distance of about 5 to 10 cubits witnessed the occurrence up to a woman(P.W. 3) from those sitting there coming, wrapping the injured portion of the throat with a napkin and after taking a taxi

hurriedly proceeding towards South. He identified the accused on dock as the said man and the photograph (Ext. 3/1) of the victim as the woman assaulted. Similarly, P.W. 7 while taking betel by the side of a stationery shop witnessed the same occurrence and after seeing it and blood as he was not feeling physically well, he returned to his residence and after 2/3 days he went to the P.S. out of his own accord and made a statement to the police who recorded the same. He also identified the accused on dock and the photograph(Ext. 3/1) of the victim. He claims to know the accused from before as he used to sell cinema tickets in black in front of Moonlight Cinema. P.W. 11 attended the patient Sarra Bibi, brought by one Rehana Khatun (P.W. 3) at the Emergency Department of the hospital on 14.8.1987 at about 12.15 hrs. and found her dead followed by his issuing a certificate (Ext. 7) to Jorasanko P.S. The history of assault, as stated by the patient party and as reflected in the above certificate, is khun by Kamal on C.R. Avenue near premises No. 161, C.R. Avenue at 12.00 p.m. on 14.8.1987. P.W. 10 on holding P.M. examination over the deadbody of the victim Sarra Bibi on 18.08.1987 at about 4.20 p.m. found incised wound 7' x 1' x 1/2' in the anterior aspect of neck with a tailing 1/2' in the left side. It has started 1/2' below right mastoid process running downwards and from right to left to pass 1/2' below right angle of mandible and then crosses midline 2 1/2' below cheek and 2' above suprasternal notch and then it passes through a point 2' below left angle of mandible and ends by making linear scratch 3 1/2' below left mastoid process. It was seen to cut skin subcutaneous tissues superficial muscle vessels and nervous and right stern mastoid muscle, right external carotid artery and jugular veins of both sides, involving severance of trachea over thyroid cartilage just below thyroid prominence and 1/4' below hyoid and ends at the anterior walls of esophagus by an incised wound 1/4' x 1/8' x 1/16' with extra vession in the tissues of neck directions downwards, backwards and from right to left. There was only one incised wound over the neck. Death, in his opinion, was due to the effect of above injuries anti-mortem and homicidal in nature. The said incised wound might be caused by sharp-cutting razor. In cross-examination, he stated that it is not possible for a person sustaining this type of injury to make any statement but he can very well make gesture and posture to speak something and that the nature of injuries he found could not show that such injury was self-inflicted. On being

reported by Rehana Khatun (P.W. 3) residing on the footpath of premises No. 161, C.R. Avenue, Calcutta, that one Kamal came at about 12.00 hrs. on that date and assaulted one Saura Bibi with a razor on her neck on the footpath in front of premises No. 161, C.R. Avenue and she removed the injured Saura Bibi to Calcutta Medical College and Hospital where she was declared dead by the doctor of the hospital, P.W. 16(I.O.) recorded the information vide G.D. Entry No. 1578 at 12.40 hrs. on 14.08.1987 followed by recording her statement (Ext. 9) and filling up formal F.I.R. (Ext. 10). He had been to the spot, found blood scattered in two places on the floor and after placing a constable for guarding, he went to Emergency Department of Calcutta Medical College and Hospital, found the deadbody of the victim, collected death certificate of Saura Bibi (Ext. 7), returned to the P.O., seized blood scattered at two places on the footpath as also blood in front of Munsii Sarauddin Lane near south-east of Netaji Park under a seizure list in presence of witnesses Shambhu Ram Chourasia (P.W. 8), Bhagat Singh(P.W. 9) and Md. Sheikh, examined witnesses, deposited the seized alamt with P.S. Malkhana and before returning to P.S. he unsuccessfully searched for apprehending the accused. He arranged for taking photographs of P.O. as also of the deadbody of the victim through the photographer of D.D., Calcutta(P.W. 2), prepared a sketch plan of the P.O. through the plan-maker, D.D., Calcutta (P.W. 1) and collected FSL Report and submitted chargesheet under Section 302 IPC against the accused on 28.02.1988 showing the accused as an absconder. The accused was subsequently arrested in connection with a snatching case of Park Street P.S. and on the strength of warrant of arrest already issued by Id. A.C.M.M., Calcutta, he prayed to the Court for showing the accused arrested in this case.

9. The evidence of P.W. 4 that while trying to cross the gali the victim fell down by the side of a house on the gali and that of P.W. 7 that while the victim was proceeding towards Netaji Park she fell down on the footpath and could not cross the road for going to Netaji Park do not appear to be in consonance with the above testimony of P.W. 3. As a matter of fact, whether the victim after proceeding to certain distance fell down on the road or footpath is not the determinant factor nor the above discrepancy which is too minor can undo the effect of evidence otherwise sufficient on record. As discussed earlier, on seeing the occurrence and blood, P.W. 7 felt physically unwell for which he had to return to his residence. So,

in such a situation he cannot be expected to recollect too minor details. Moreover, they were deposing after about 2 years 4 months of the occurrence. Power of observation, memory and recapitulation differs from man to man and memory is apt to be blurred in the passage of time and so photographic picturisation of the co-lateral and subsidiary fact cannot be expected from them nor can it be any ground for holding any doubt regarding their presence at the P.O. at the relevant time. As crime took place in the broad daylight on the footpath of a thickly populated place like Central Calcutta, the said two witnesses being passers-by, they are natural witnesses and as such they cannot be disbelieved.

10. Indubitably, there is no earlier statement under Section 161 Cr.P.C. on behalf of P.W. 4 that he saw a woman placing a piece of cloth or napkin on the cut portion of throat of the victim, or on behalf of P.W. 7 that he saw the accused to sell tickets in black market in front of Moonlight Cinema or on behalf of P.W. 3 that she wrapped a napkin on the cut portion of the throat of the victim and the victim expired in the taxi on way to hospital, as is evinced from the cross-examination of I.O. (P.W. 16). If a witness is sought to be contradicted with reference to his previous statement, his attention is to be drawn to the said statement followed by questioning the I.O. whether the said statement or portion thereof was made to him by the witness concerned (section 145 of the Evidence Act). Here, the above procedure having not been followed, the said omission on the part of P.W. 3 and P.W. 7 is not becoming of any aid to the defence. That apart, statements to police are meant to be brief and omission amounts to contradiction when it is in respect of a vital point : 1981 CriLJ740 . None of the above statements being on vital point, it does not amount to contradiction due to omission.

11. A glance at the above would reveal that there are as many as five witnesses who saw the accused to commit the crime and it is buttressed by medical evidence too. The name of the accused as assailant was reported to the doctor (P.W. 11) within 15 minutes and F.I.R. was lodged within 40 minutes of the occurrence. Chargesheet was submitted against the accused showing him as an absconder and long thereafter he was shown arrested in connection with this case on the prayer of I.O. It is worthwhile to mention in this connection that identification in Court is substantive evidence, but such identification in Court at the time of trial for

the first time without being preceded by T.I. Parade is of very weak character : 1983 CriLJ689 . Considered from the above aspect, identification of the accused by P.W. 4 and PW. 7 in Court for the first time is very weak piece of evidence. Even if that part of evidence by P.Ws. 4 and 7 is excluded from consideration, it does not at all affect the prosecution story on the face of the said clear and unimpeachable evidence of P Ws. 3, 5 and 6. No animus of those witnesses against the accused having been made out, it improbabilises the hypothesis of their false implication.

12. As regards motive of the accused it is immaterial if the occurrence is proved : 1976 CriLJ1568 . In other words, absence of motive does not disprove a prosecution case if the prosecution succeeds in proving the same. Moreover, the prosecution is not to prove motive for it is known only to the accused : 1981 CriLJ714 . Proof of motive satisfies the judicial mind about likelihood of the authorship but its absence only demands deeper search and cannot undo the effect of evidence. In the case in hand, it is the evidence of P.W. 3 that before marriage when Sarra used to stay with them, Kamal went to enjoy her but Sarra refused and so out of grudge Kamal stabbed Sarra on the date of occurrence with blade of razor which more or less gets support from the testimony of P.W. 5 who deposed that the accused went to outrage the modesty of Sarra but she somehow managed to escape, and there is no denial of it in their cross-examination. So since the accused wanted to enjoy the victim and the latter avoided him, the motive being active, the pique against the victim is understandable.

13. Mr. S. S. Haque, Id. Counsel for the appellant, by referring to the evidence of P.W. 2 (photographer) contended that identity of the victim is disputed since he on being identified by constable E. 120 P. Singh took photograph of the dead-body of one Sagarika Pal and he verified the same on seeing the ticket of Sagarika Pal hanging on the neck of the deadbody. The evidence is to be read as a whole and not in piecemeal adopting the process of etymological dissection and after taking words or sentence out of their context to proceed to construe it. Here, it is the specific evidence of P.W. 2 that he took photograph of the deadbody of Sarra Bibi at the Calcutta Police Morgue and identified the negative and enlargement thereof (Exts. 3 & 3/1). It is the definite case of the prosecution that the victim Saura or

Sarra Bibi was murdered by Kamal, and all the above P.Ws. deposed in this behalf. P.W. 11 declared the victim Saura Bibi as brought dead to the Emergency Department of Calcutta Medical College and Hospital, and P.W. 10 on being identified by constable Jorasanko-120 P. Singh held P.M. examination over the deadbody of said Saura Bibi. So the question of dispute relating to identity of the victim is out of the way, and as such the above contention of Mr. Haque appears to be more captious than substantial. What for P.W. 2 on recall by the prosecution deposed as above regarding his taking the photograph of the deadbody of Sagarika Pal or how far it has nexus with the case on hand could not, however, be explained by Mr. R.R. Biswas, Id. Counsel for the respondent.

14. Mr. Haque next argued that his client could not be connected with the alleged crime as he was in police lock-up at Lalbazar at the relevant time. Onus to prove alibi is on the accused as it is a matter within his special knowledge (AIR 1972 SC 1109; : 1975 CriLJ1201), and plea of alibi when taken by an accused must be proved by him (: 1981 CriLJ714 ; : 1984 CriLJ4). He must lead evidence to show that he was so far off at the moment of the crime from the place when the offence was committed and that he could not commit the offence. In the present case, plea of alibi as attempted to be disclosed for the first time through the defence witnesses, but it was never suggested to any P.W. nor any such plea was taken during examination of the accused under Section 313 Cr. PC. However, D.W. 2 arrested the accused in connection with another case viz section 'E' (Park Street P. S.) Case No. 633 dated 24.10.1988 under Section 379/114 IPC (snatching) and prayed before Id. C.M.M., Calcutta on 6.12.1988 for showing him arrested in connection with this case. He was in police custody in connection with the said section 'E' case till 13.12.1988. The evidence of D.W. 3 reveals that the lock-up register of Lalbazar dated 13.08.1987, 14.08.1987 and 15.08.1987 do not show that the accused was in lock-up or in custody in connection with any case whatsoever which totally belies the defence story of the accused being in police custody on the relevant date.

15. In the premises, in the light of the above discussion, the prosecution can be held to have brought home the charge against the accused beyond all reasonable doubt.

16. Accordingly there being no material to interfere with the findings of the Id. Court below, the appeal be dismissed on contest. The impugned order of conviction and sentence passed by the Id. Court below is hereby affirmed.

17. Alamats, if any, be destroyed after the period of appeal is over.

18. Let a copy of this judgment along with the L.C.R. be sent down at once to the Id. Court below.

Bhaskar Bhattacharya, J.

19. I agree.

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