

SUPREME COURT OF INDIA

State of M.P.

Vs.

Kalu Ram

(S.V.Patil and A Kumar JJ.)

10.10.2002

ORDER

1. Heard learned counsel for the parties.

2. The respondent-herein and two other co-accused were tried for offences under Section 302 read with Section 34 IPC in regard to the death of Kantilal and for offences under Section 324 as against the respondent No. 1 - Kalu Ram for causing injury on PW2 - Fakirchand. The trial court, after trial, appreciating the evidence placed on record acquitted the two other co-accused and convicted the respondent Nos. 1 and 2 herein under Sections 324 and 302 IPC respectively. On appeal by the respondents, the High Court set aside their order of conviction and acquitted them. Hence, this appeal.

3. The case of the prosecution in brief was that on 19.4.1983 the mother-in-law of PW2-Fakirchand was admitted in the hospital for operation of her eye. The wife of Fakirchand stayed in the hospital and she had asked Fakirchand to send the wife of brother Kantilal to the hospital. Fakirchand had gone to his house and while he was returning he was surrounded by the accused persons. The respondent No. 2 - Gopal was armed with katar, respondent No. 1 - Kalu was armed with an axe, Shekhar was armed with lathi and Chhotibai had a stone. Respondent No. 1 Kalu dealt a blow by an axe on Fakirchand on his hand. Kantilal suddenly came and intervened to save Fakirchand. At that time respondent No. 2-Gopal, who was armed with katar, assaulted him on the stomach. Kantilal fell down on the ground. The incident was witnessed by Jagdish (PW3), Masoom (PW5) and Gyarsibai (PW4). The cause for the incident was stated to be a trivial one in that Fakirchand's cycle had hit the tail of cow of Gopal. Kantilal was rushed to the hospital at Johara. Fakirchand came to the police station from the hospital and lodged the report of the incident which was exhibit P2. Kantilal succumbed to the injuries in the hospital.

4. The trial court relying on the evidence of eye witnesses including the injured eye witness - PW2, recovery of weapons and blood stained clothes and the medical evidence found the respondent Nos. 1 and 2 guilty of the offences. The High Court in the appeal found that injuries on the accused Gopal-respondent No. 2 herein were not explained by the prosecution which impaired its case on the ground that very genesis of the prosecution case was suppressed. The High Court also felt that the evidence of eye witnesses could not be relied

on as they were interested and related to the deceased. The High Court did not give any importance to the recoveries and also the medical evidence stating that the very genesis of the prosecution case was doubtful because the injuries on the accused were not explained, yet, another reason given by the High Court was that the independent eye witnesses were not examined by the prosecution in support of its case.

5. Learned counsel for the state contended that the High Court was not right in setting aside the order of conviction and sentence passed against the respondents. She submitted that the evidence of eye witnesses P.W. 2, 3 and 5, as appreciated by the trial court, was proper and which evidence supported the earliest version given in exhibit P. 2-F.I.R. The katar was recovered from respondent No. 2-Gopal, at his instance, which was found blood stained. Learned counsel further submitted that the injuries found on respondent No. 2-Gopal, as is evident from the evidence of doctor, were all simple. Under the circumstances, the impugned judgment of the High Court cannot be sustained.

6. On the other hand, learned counsel for the respondents made submissions supporting the impugned judgment of the High Court. He alternatively submitted that at best the respondent No. 2-Gopal could be convicted for an offence under Section 304 part II IPC. As regard respondent No. 1, the learned counsel submitted that the incident is of the year 1983 and he has been on bail, and at this stage the sentence passed against him could be modified and confined to the period already undergone and amount of fine could be enhanced.

7. We have carefully considered the submissions made by learned counsel for the parties.

8. The statements of prosecution witnesses Fakirchand, Jagdish Chand and Masoom in respect of the injuries caused to Kantilal and Fakirchand are corroborated by the evidence of Dr. Mishra and Dr. Parasmal Maru and they are also consistent with the earliest version given in exhibit P. 2-F.I.R.

9. It is also clear from the record that the injuries found on respondent No. 2-Gopal were minor. Hence assuming that they were caused in the same incident, their non-explanation by the prosecution, did not affect the prosecution case, as it is otherwise clearly established by the evidence of eye witnesses, corroborated by the medical evidence and further supported by recovery of katar and blood stained clothes.

10. This Court in *Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors.*¹, dealt with the effect of non-explanation of injuries on accused and has observed that before non-explanation of the injuries on the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions; (i) that the injury on the person of the accused was of a serious nature; (ii) that such injuries must have been caused at the time of the occurrence in question.

11. In the present case as already noticed above, the injuries found on the respondent, No. 2-Gopal were minor. Further, the evidence of the eye witnesses, as found by the trial court, was trustworthy. The High Court was not right in disbelieving their evidence, on the ground that

the prosecution failed to explain the injuries on the respondent No. 2. We find that the High Court did not objectively re-appreciate or evaluate the evidence of the eye witnesses, the medical evidence and the evidence of recovery. The trial court had objectively analysed and considered the evidence and rightly found the respondents guilty of the offences.

12. Thus, we find that the High Court committed a serious error in setting aside the order of conviction of respondent Nos. 1 and 2. As regards the submission of the learned counsel for the respondents that looking to the evidence as placed on record, at best the respondent No. 2-Gopal could be held guilty for offence under Section 304 part-II IPC, we may notice that there was no previous enmity between the respondent No. 2 - Gopal and Kantilal - the deceased; there appeared to be no motive for the respondent No. 2- Gopal to commit murder of Kantilal; Kantilal suddenly came to the spot only to intervene and save his brother Fakirchand; he gave only one blow on the stomach of the deceased Kantilal with katar. It is also on record that if proper medical aid was given, Kantilal could have survived. Having regard to these factors, it cannot be said that the respondent No. 2 - Gopal had the intention to kill the deceased Kantilal. In our view the conviction of respondent No. 2 under Section 302 IPC cannot be sustained. The offence committed by him falls under Section 304, part II IPC.

13. Hence, while maintaining the conviction having regard to the nature of offence, we modify the sentence of respondent No. 2-Gopal holding him guilty under Section 304 part II IPC and sentence him for a period of 5 years rigorous imprisonment and to pay a fine of Rs. 2,000/-; in default to undergo rigorous imprisonment for a period of six months. Therefore, we set aside the conviction of Gopal under Section 302. So far as respondent No. 1-Kalu is concerned, we hold him guilty under Section 324 IPC and confine his sentence to the period already undergone while imposing a fine of Rs. 2,000/-; in default of payment of fine, he shall undergo imprisonment for a period of three months. Respondent No. 2-Gopal shall be taken into custody to serve the remaining period of sentence. Appeal stands disposed of accordingly.

¹*JT 2001 Supp.1 SC 415*