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**(2011) 03 AHC CK 0235**

**In the Allahabad High Court**

**Case No :** Criminal Appeal No. 817 of 2001 (Old No. 01 of 2000)

Kailash Ram alias Kalua

APPELLANT

Vs

State of U.P.(now State of Uttarakhand)

RESPONDENT

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**Date of Decision :** 22-03-2011

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 374  
Penal Code, 1860 (IPC) — Section 201, 302

**Citation :** (2011) 03 AHC CK 0235

**Hon'ble Judges :** Prafulla C.Pant, J and V.K.Bist, J

**Final Decision :** Dismissed

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## **Judgement**

V. K. Bist & Prafulla C. Pant, J (oral)

1) This appeal, preferred under Section 374 of the Code of Criminal Procedure, 1973 (for short Cr.P.C.), is directed against the judgment and order dated 2nd of November, 1999, passed by Sessions Judge, Almora, in Sessions Trial No. 35 of 1995, whereby said court has convicted accused / appellant Kailash Ram under Section 302 of the Indian Penal Code, 1860 (for short I.P.C.), and one punishable under Section 201 of I.P.C. The convict (accused / appellant Kailash Ram) has been sentenced to imprisonment for life under Section 302 of I.P.C., and rigorous imprisonment for a period of three years under Section 201 of I.P.C.

2) Heard learned counsel for the parties and perused the lower court record.

3) Prosecution story, in brief, is that accused / appellant Kailash Ram is resident of village Bhatriya, within the limits of Patwari area Darshani of District Bageshwar. (Earlier District Bageshwar was part of District Almora). Smt. Kamla Devi (deceased) was also resident of same village. On 15.04.1995, she (Kamla Devi) had gone to collect fodder and firewood from the jungle of Timilia Tok, where she was found lying dead. P.W. 5 Khim Singh, Village Pradhan of village Bhatriya gave a written report (first information report) (Ext. A 1) on 16.04.1995 to the Patwari of the area stating that as per the information received on 15.04.1995, at about noon, Kamla Devi has been murdered by accused /

appellant Kailash Ram, and her body is lying in Bachhe Mari Gadhera (gorge). (In Uttarakhand hills vide U.P. Government Notification No. 494 / VIII 418 16 dated 7th March 1916, certain revenue officials are given police powers). P.W. 5 Khim Singh in the report (Ext. A 1) mentioned that the information was given to him by one Udai Ram of village Doomkote (Dholkhani), a neighbouring village. On the basis of said report, the Patwari prepared check report (Ext. A 4), and registered Crime No. 01 of 1995, relating to offence punishable under Section 302 of I.P.C. against accused / appellant Kailash Ram, and investigated the same. He proceeded to the spot and took dead body of Kamla Devi in his possession, and prepared inquest report (Ext. A 2) in the presence of the witnesses on 16.04.1995, at about 04:00 P.M. Thereafter, he prepared sample seal (Ext. A 5), police form No. 13, and other necessary papers, and sent the dead body for postmortem examination. P.W. 7 Dr. N.D. Punetha along with another Medical Officer Dr. S.S. Pal conducted postmortem examination on 17.04.1995, at 02:30 P.M., and recorded ante mortem injuries on the dead body of Kamla Devi. The two Medical Officers opined in the autopsy report (Ext. A 3) prepared by them, that deceased had died due to asphyxia, as a result of strangulation. After interrogating the witnesses, and preparing site plan (Ext. A 6), the Investigating Officer submitted charge sheet (Ext. A 12) against accused / appellant Kailash Ram, for his trial in respect of offence punishable under Section 302 of I.P.C. Also, the Investigating Officer got statement of witness Narain Singh (P.W. 1) recorded by the Magistrate under Section 164 of Cr.P.C.

4) The Magistrate, on receipt of the charge sheet, after giving necessary copies to the accused, as required under Section 207 of Cr.P.C., committed the case to the court of sessions for trial. On 14.08.1996, Sessions Judge, Almora, after hearing the parties, framed charge of offences punishable under Section 302 and 201 of I.P.C. against the accused / appellant Kailash Ram, who pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Narain Singh (eyewitness); P.W. 2 Saruli Devi (sisterinlaw of the deceased); P.W. 3 Km. Bimla (declared hostile); P.W. 4 Km. Pushpa (declared hostile); P.W. 5 Khim Singh (informant); P.W. 6 Pan Singh; P.W. 7 Dr. N.D. Punetha (who conducted postmortem examination); and P.W. 8 Shyam Dutt (Patwari of the area, who investigated the crime). The oral and documentary evidence was put to the accused under Section 313 of Cr.P.C., in reply to which he pleaded that the evidence adduced against him is false. No evidence in defence was adduced. The trial court, after hearing the parties, found that prosecution has successfully proved charge of offence punishable under Section 302 of I.P.C., and that of one punishable under Section 201 of I.P.C. against accused Kailash Ram, and convicted him accordingly. Thereafter, the parties were heard on sentence, and the trial court sentenced the convict to of November 1999, passed by Sessions Judge, Almora, in Sessions Trial No. 35 of 1995, the convict preferred this appeal before the Allahabad High Court on 3imprisonment for life under Section 302 of I.P.C., and rigorous imprisonment for a period of three years under Section 201 of I.P.C. Aggrieved by said judgment and order dated 2nd rd of January 2000.

The appeal is received by this court under Section 35 of the U.P. Reorganization Act, 2000 (Central Act No. 29 of 2000), for its disposal.

5) Before further discussion, we think it just and proper to mention here the ante mortem injuries found on the body of Kamla Devi by the team of two doctors, namely Dr. N.D. Punetha (P.W. 7) and Dr. S.S. Pal, who conducted postmortem examination on 17th of April 1995. The ante mortem injuries mentioned in the autopsy report (Ext. A 3) are being reproduced below:

i) Contusion 3 cm X 1 cm present on the left side of zygomatic process.

ii) Contusion 3 cm X 1 cm present on the left side of zygomatic process lateral to the injury No. (i).

iii) Ligature mark 12 cm X 2 cm present on the neck extending from left side of neck to below 2 cm below angle of mandible across from the neck over the cricoid cartilage to the right side of the neck at the level of angle of mandible. The ligature mark is red congested base is parchment like.

iv) Contusion 2 cm X 2 cm present on the left side of the submental region.

Apart from the above ante mortem injuries, postmortem injuries are also observed by the team of two Medical Officers. The same are reproduced as under:

Multiple contusions 2 cm X 2 cm, 2 cm X 2 cm, 1 cm X 1 cm, 1 cm X 1 cm present on the left side of thigh anterior aspect in the middle.

The two Medical Officers opined that deceased had died of asphyxia, as a result of strangulation. They have observed in the autopsy report (Ext. A 3) that the dead body was about two days old. P.W. 7 Dr. N.D. Punetha has stated that the ante mortem injuries suffered by the deceased could have been caused on 15.04.1995, at about noon. He has further stated that injury No. (iii) could have been caused by pressing the neck with a DHOTI, and injury Nos. (i), (ii) and (iv) could have been caused by impressing the neck. The above medical evidence on record establishes that Kamla Devi had died a homicidal death on 15.04.1995. Now, we have to see whether the accused / appellant Kailash Ram committed murder of Kamla Devi, or not, and caused disappearance of the evidence by throwing her body in gorge to save himself from the clutches of law.

6) P.W. 1 Narain Singh is the only eyewitness of the incident, who has stated that on the day of incident it was around noon, when he had gone to Timilia Tok to graze his goats. He further told that Kalua (accused / appellant Kailash Ram) and three women, namely Kamla (deceased), Bimla and the third one whose name he did not recollect, had also gone there. He further states that after taking grass, the deceased was on her way back to her village, when he heard her shrieks. P.W. 1 Narain Singh further states that when he turned towards the place from where the shrieks were heard, he saw that accused had caught hold of hairs of the deceased by one hand and was holding the neck by another. Kamla (deceased) was shouting "CHHOD CHHOD" (leave ! leave), in reply to

which the accused stated "TU NAHIN MAANEGI TO MAIN NAHIN CHODUNGA" (Till you agree, I am not going to leave you). The witness further states that he thought that the two are joking. After about an hour, he saw accused Kailash Ram taking Kamla on his shoulders towards a gorge. P.W. 1 Narain Singh stated that he told about the incident to Pan Singh (P.W. 6) and went to his home. He further states that during investigation his statement was recorded by the Magistrate under Section 164 of Cr.P.C. The statement of this witness gets corroborated from the medical evidence on record, already discussed above.

7) P.W. 2 Saruli Devi, sisterinlaw of the deceased, has stated that on the day of incident, Kamla had gone to the jungle with two girls Bimla and Pushpa. She further states that Pushpa came to her house at about 02:00 P.M., and asked her (P.W. 2) as to whether Kamla has come back, or not. The girl then told the witness that in the jungle a bundle of grass was seen lying where some broken bangles and dig mark on the ground were also seen. After sometime accused Kailash Ram also came to the village and told P.W. 2 Saruli Devi that Kamla has committed suicide by hanging in a gorge, and the rope has been cut by him. Though, this witness is not an eyewitness, but her statement corroborates the fact that her sisterinlaw (deceased) had gone to jungle on that day, and did not return back. The witness further proves that Kailash Ram told her a false story that deceased had committed suicide by hanging with a rope. The story of suicide by hanging appears to be a false excuse made by the accused, as is clear from the autopsy report (Ext. A 3) prepared by the team of two doctors, who have opined that deceased had died of strangulation.

8) P.W. 3 Km. Bimla and P.W. 4 Km. Pushpa did not support the prosecution story and were got declared hostile by the prosecution. P.W. 4 Km. Pushpa in her crossexamination states that if she dared to disclose the correct story, she would be killed by the accused Kailash Ram. That shows that P.W. 4 Km. Pushpa due to the fear of accused Kailash Ram has not supported the prosecution story. P.W. 5 Khim Singh is informant, who is not an eyewitness. He has simply proved the fact the he gave the first information report (Ext. A 1) written and signed by him. The witness has further proved that inquest report (Ext. A 2) was prepared in his presence. P.W. 5 Khim Singh has further stated that when he went to the jungle, he saw broken bangles and bundle of grass also lying there. P.W. 6 Pan Singh has simply corroborated the fact that P.W. 1 Narain Singh did disclose him after the incident that Kailash Ram (accused / appellant) has committed murder of Kamla Devi by strangulating her, and has thrown her body in the gorge.

9) On behalf of the appellant it is contended that Udai Ram, who is said to have disclosed about the incident to P.W. 5 Khim Singh, has not been examined by the prosecution. Having gone through the evidence on record, we find that nonexamination of Udai Ram is not fatal to the prosecution. Neither Udai Ram is said to have been an eyewitness, nor had he lodged the first information report. He is said to be merely a messenger, who reported the matter to the village

Pradhan. Though, P.W. 1 Narain Singh has stated that no one named Udai Ram lives in his village, but the village Pradhan P.W. 5 Khim Singh has explained that Udai Ram was the resident the adjoining village, who gave him the information.

10) Learned counsel for the appellant submitted that the prosecution has not proved the statement of Narain Singh (P.W. 1) recorded by the Magistrate under Section 164 of Cr.P.C. We have considered said argument, and we are of the view that had witness P.W. 1 Narain Singh turned hostile, not proving his statement under Section 164 of Cr.P.C. could have cost the prosecution case dearly. But since, P.W. 1 Narain Singh continues to support the prosecution case, till he was examined by the trial court during trial, nonexamination of the Magistrate, who recorded statement under Section 164 of Cr.P.C. does not shake the testimony of the witness.

11) It is also pointed out on behalf of the appellant that the medical report relating to the fact that accused had also suffered some abrasions etc., which were examined after his arrest, cannot be read in evidence. We are not relying on said evidence as the document is not proved, but even without said document, the charge of offence punishable under Section 302 of I.P.C., and one punishable under Section 201 of I.P.C. is sufficiently proved by the prosecution beyond reasonable doubt as against accused / appellant Kailash Ram. That being so, we are of the opinion that this appeal has no force, and is liable to be dismissed.

12) Accordingly, the appeal is dismissed. The conviction and sentence recorded by the trial court in respect of offences punishable under Section 302 and 201 of I.P.C., is hereby affirmed. The Accused / appellant Kailash Ram is on bail. His bail is cancelled. He shall surrender before the court concerned to serve out the remaining part of sentence awarded by the trial court. Lower court record be sent back to make the accused / appellant serve out the sentence affirmed by this court.