

"No Incriminating Evidence Available" : Allahabad HC Acquits Man Convicted U/S 304 (I) IPC Who Spent Over 9 Years In Jail

2022 LiveLaw (AB) 489

HIGH COURT OF JUDICATURE AT ALLAHABAD
DR. KAUSHAL JAYENDRA THAKER; J., NALIN KUMAR SRIVASTAVA; J.
JAIL APPEAL No. 331 of 2021; 13.10.2022
Sagar versus State of U.P.

Counsel for Appellant :- From Jail, Anshul Nigam, Ashfaq Ahmed Ansari Counsel for Respondent :- A.G.A.

1. This appeal has been preferred by the appellant- Sagar against the judgment and order dated 9.5.2013, passed by Additional Sessions Judge, Court No.3, Saharanpur, in Session Trial No.45 of 2012 (*State vs. Sagar son of Rajendra*) arising out of Case Crime No.347 of 2011 under Section 304 IPC, Police Station-Behat, District-Saharanpur, whereby the accused was convicted and awarded sentence under Section 304 IPC for life imprisonment and fine of Rs.10,000/-.
2. The facts giving rise to this appeal are that on 9.9.2011 complainant Shyam Singh has given a typed written-report (Ext. ka-03) at the police station stating that on the day of Rakshabandhan on 13.8.2011 at about 10:00 o'clock when his brother Vinod s/o Peerdiyaa alongwith Sagar had gone somewhere from the home, On the way, they were followed by Sumit. When his brother Vinod did not come back home, he searched for him at the relatives and other friends place. On not being found, information was given at the police station on 17.8.2011. On 25.8.2011 at 6:00 p.m. dead body of Vinod was recovered from the canal which is around 3 km from Baraut Police Chowki. On receiving information, the informant and others reached Baraut and identified the dead body of Vinod. His postmortem was conducted in Baghatpat itself. Thereafter his funeral was conducted. The complainant was fully assure that Sagar had thrown the dead body in canal after committing murder due to enmity. Pappu s/o Rulha and Aman s/o Ridkaram of his village were the witnesses of the said incident.
3. On the basis of this information, chik report was prepared by registering the C.C. No.347/11, u/s 302 IPC on 9.9.2011 at 21:40 o'clock by C/- clerk Shri Ram Kashyap wherein the time of incident has been recorded on 13.8.2011 at 11:00 a.m. The distance of the place of occurrence from the police station has been shown to be 5 Km. away. Entry of this report was made in report no.46 of the GD at the same time and on the same day. The investigation of the case was handed over to investigating officer R.S. Bhagor. The investigating officer on 9.9.2011 recorded copy of chik, copy of report complainant's statement and Sumit's statement. On 10.9.2011 the statement of the complainant was again recorded. Statements of witnesses namely Pappu and Aman were recorded as per Section 161 of Cr.P.C. Site plan and recovery memo of slippers of the deceased were prepared after inspection of the spot. On 15.9.2011, inquest report as well as other documents of the deceased was enclosed with the case diary. The Investigation Officer again recorded the statement of the complainant on 19.9.2011.
4. After completing the investigation, charge-sheet was submitted against accused appellant-Sagar, under Sections 304 IPC. The case being exclusively triable by court of session same was committed to the court of session for trial.
5. Learned trial court framed charges against appellant under Sections 304 IPC. Charges were read over to the accused, who denied the charges and claimed to be tried.
6. To bring home the charges, following witnesses were examined by the prosecution:

1	Shyam Singh	PW1
---	-------------	-----

2.	Aman Kumar	PW2
3.	Rajesh Kumar	PW3
4.	Sumit	PW4
5.	Pappu	PW5
6.	Dr. Ashok Kumar	PW6
7.	SI Rajbeer Singh	PW7
8.	Constable Shreeram Kashyap	PW8

7. Apart from oral evidence, following documentary evidence were produced by prosecution and proved by leading the evidence:

1.	Panchayatnama	Ex. Ka.1
2.	Fard	Ex.Ka.2
3.	Tahreer	Ex.Ka.3
4.	Postmortem report	Ex.Ka.4
5.	Site plan	Ex.Ka.5
6.	FIR	Ex.Ka.7
7.	Site plan	Ex.Ka.8
8.	Charge sheet	Ex.Ka.9

8. After recording of evidence the accused-appellant was examined under Section 313 Cr.P.C. and evidence led by prosecution against him was put to him. Accused stated that false evidence has been led against him. Accused did not examine any witness in his defence.

9. We have heard Sri Anshul Nigam, learned Amicus Curiae appearing for the appellant, learned AGA for the State and perused the record.

10. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. He is innocent. The custody certificate would show that the accused is in jail for more than 10 years. In the alternative it is submitted that if the accused is held guilty, he be given sentence of undergone namely twelve years, three months and ten days with remission and the fine be reduced.

11. *Per contra*, learned AGA submitted that appellant is named in FIR . The learned Court below has already shown mercy and has convicted the accused appellant under Section 304 IPC. The dead body was thrown in a canal is proved.

12. Before coming to the conclusion that the accused is the perpetrator, we have to evaluate the evidence on record if he hold him guilty of the commission of offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters.

13. The fact that the evidence which has been on record only shows that the accused was last seen with the deceased. However, except this the chain which the learned Judge has mentioned does not satisfy the test for punishing an accused where the matter hinges on circumstantial evidence. Conviction on the basis of last seen is a very weak piece of evidence. In our case the chain which is set to be pointing the finger at the accused are very feeble. The learned Judge has held that the following are the instances which complete the chain namely the accused and the deceased were habituate to drink liquor. Just because the deceased was seen with the accused and just because his dead body was immediately recognized by the

family members cannot mean that the chain is complete. The judgment in **Jaideep Neogi Vs. State of West Bengal, 2010 (68) ACC 227** which was relied by the counsel for the accused before the court below which would apply in the facts of the case.

14. The chain of events as per the circumstances should point out to the guilt of the accused and the accused alone. The decision of Apex Court in **Kalu @ Laxmi Versus State of Madhya Pradesh, 2019(10) SCC 211** will also have to be looked into. Can a man be convicted for commission of offence under Section 302 of IPC on the basis of last seen together only without any other corroborative evidence.

15. The chain of events which the learned Judge has narrated is not such which would be full proof for Court to concur with the learned Trial Judge about the guilt of the accused. The burden of proof lies on the State which has miserably failed to the adverse interference that the deceased and the accused used the drink of liquor together would not be compelling circumstances on neither is it a chain in the chain of events.

16. There are no other incriminating circumstances against the accused even under Section 27 of Evidence Act, 1872 will not permit this Court to concur with the finding of facts by the learned Judge. There are several inconsistencies and contradiction making it impossible to sustain the conviction. We are supported in our view by the recent judgment of the Apex Court report in **Ravindra Singh Vs. State of Punjab, (2022)7 SCC 581**.

17. Even if we consider the other aspects it is not proved that he was the person who had committed the offence. There is no recovery from the accused. There is nothing incriminating except the confessional statement to one of the witnesses which is not proved to the hilt and could not have been acted upon .

18. In the alternative even if we concur with the court below whether the punishment of life imprisonment is justified for which we will have to go by the facts which we have narrated herein-above. This Court would refer to the following precedents, namely, **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining rehabilitary & reformatory aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology is the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

19. 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

20. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, the Supreme Court referred the judgments in **Jameel vs State of UP [(2010) 12 SCC 532]**, **Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734]**, **Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323]**, **State of Punjab vs Bawa Singh, [(2015) 3 SCC 441]**, and **Raj Bala vs State of Haryana,**

[(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

21. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformatory and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

22. As discussed above, 'reformatory theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

23. The accused is in custody for nine years one month and seventeen days as on date of the report sent by the Office which would mean that the undergone period would be 3507 days and the total sentence including remission is twelve years three months and eighteen days on 23.6.2022 and we are in the month of October, 2022. However, on the scanty evidence he is not required to be confined anymore and the sentence is upturned.

24. The facts that it was homicidal death is the fact from record. The decision cited by learned counsel for accused which was not accepted by the Court below would apply to the fact of this case also. He was last seen by PW-1, 2, 4 and 5. Only on the basis of last seen, he has been convicted for commission of offence Section 304 of IPC for life imprisonment which cannot be sustained.

25. Rs.15,000/- as honorarium be paid by Allahabad Legal Service Committee to learned amicus curiae for his valuable service.

26. Accordingly, the appeal is **partly allowed**, as modified above.