

Sundar Vs. State of U.P.

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Court : Allahabad

Decided On : Dec-16-1994

Reported in : 1995CriLJ3481

Judge : S.K. Jain and ;C.A. Rahim, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 313; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 and 394

Appeal No. : Criminal Appeal No. 75 of 1988

Appellant : Sundar

Respondent : State of U.P.

Advocate for Def. : D.G.A.

Advocate for Pet/Ap. : Ram Niwas Sharma, Adv.

Judgement :

S.K. Jain, J.

1. This criminal appeal by Sundar, son of Bhikhari Harizan, resident of Parikshat Garh, P.O. Parikshatgarh, District Meerut, is directed against the judgment of conviction and order of sentence both dated 24th December 1979 passed by the IV Additional Sessions Judge, Meerut, vide which the co-accused of the appellant,

namely, Rajendra and Surendra were acquitted of the offence under Section 302 and 394, I.P.C. whereas the appellant was convicted under these sections with the aid of Section 34, I.P.C. and sentenced to life imprisonment under Section 302 read with Section 34, I.P.C. and to undergo R.I. for three years under Section 394, I.P.C. and both the terms of sentences were directed to run concurrently.

2. The prosecution case in short is that on 16-4-78 when Veera, the complainant, along with his wife Smt. Rajo, his elder brother's wife Natho and nephew Karan Pal returned from the fields after harvesting the crop at about 2.30p.m. they saw Sundar, Rajendra and Surendra accused present in their house. Sundar and Surendra had caught hold of his nephew Pramod alias Vinod aged 10 years and within their view Rajendra had inflicted a number of knife blows on his person as a result whereof he had died on the spot. On seeing Veera and others Rajendra and Surendra scaled over the wall with the help of a cot and made good their escape whereas Sundar was apprehended by these persons. Rs. 4000/- which was kept in an earthen pot inside the house were found missing. The other two accused were also apprehended and after completion of investigation and other formalities they were charged under Section 302, I.P.C. vide F.I.R. No. 80 dated 16-4-78 P.S. Pawana, District Meerut.

3. The learned trial court charged the accused Rajendra under Section 394, I.P.C. as also under Section 302, I.P.C. read with Section 34, I.P.C. whereas his co-accused Surendra and Sundar were charged under Section 394 as also under Section 302, I.P.C.

4. In order to prove its case the prosecution examined PW 1 Veera, PW 2 Smt. Natho, the eye witnesses and PW5 Dr. Dilawar Singh who had conducted the post-mortem examination on the dead body of Vinod alias Pramod on 17-4-78 at 2.30 p.m. PW 4 Bhagmal was examined to testify that he had seen Surendra and Rajendra, the co-accused of the appellant, running outside the village wearing bloodstained clothes at about 3 p.m. on the date of occurrence. PW3 S.I. Som Dutt Tyagi is the Investigating Officer of this case. He deposed to various steps that he took in the progress of the investigation. After the close of the prosecution case statement of the accused under Section 313, Cr.P.C. was recorded. He

denied all the incriminating material that had come on record against him in the evidence of the prosecution witnesses and which was put to him. He pleaded innocence. When called upon to enter upon his defence he chose to lead no evidence.

5. The learned trial court after examining the evidence on record and hearing the learned counsel for the parties acquitted Rajendra and Surendra co-accused of the charges, and convicted the appellant under Ss, 394 and 302 read with Section 34, I.P.C. and sentenced him to undergo life imprisonment under Section 302 read with Section 34, I.P.C. and three years R.I under Section 394, I.P.C. It is that judgment of conviction and order of sentence of December 24, 1979, passed by Sri R. K. Garg, IVth Additional Sessions Judge, Meerut, which has been challenged by the appellant in this appeal and which requires our scrutiny of its sustainability.

6. We have heard the learned counsel for the parties and with their help have surgically scrutinized the evidence on record. Learned trial court has found that PWs Veera and Smt. Natho had reached and apprehended the appellant at the spot while his co-accused had already escaped before their arrival. No cross-appeal against the judgment of acquittal of Rajendra and Surendra has been filed on behalf of the State. Learned counsel for the appellant has vehemently argued that the main assailant, namely, Rajendra having been acquitted, the appellant could not be convicted for the offence of murder only on the basis of evidence of his having caught hold of the deceased. Secondly, he has submitted that the occurrence had allegedly taken place at 2.30 p.m. The Police Station was at a distance of 4 kms. The appellant was taken to the Police Station and F.I.R. was recorded at 6.15 p.m. This period of about 4 hours was utilized in concocting a false version against the appellant.

7. With a view to appreciate this argument we have carefully examined the statements of the eyewitnesses and the relevant documents. It is true that the F.I.R. was recorded and applicant produced before the police about 3 hours 45 minutes after the occurrence, but the fact remains that Sundar, the appellant, was apprehended at the spot by the witnesses.

8. The question doing rounds right now is as to what offence Sundar, the appellant, had committed. Learned counsel for the appellant relying upon the ratio laid down by their Lordships of the Supreme Court in *Sukh Ram v. State of M.P.*, : AIR 1989 SC772 , has argued that since Surendra and Rajendra, co-accused of the appellant have been acquitted on the basis of the same evidence the conviction of the appellant under Section 302/34, I.P.C., could not be recorded. We have carefully examined the above said judgment and can possibly have no quarrel with the proposition of law laid down therein. In the case in hand the appellant was charged under Section 302, read with Section 34, I.P.C. as also under Section 394, I.P.C. along with his co-accused for having caused the death of Pramod alias Vinod, a boy of ten years. Only the appellant was convicted while Rajendra and Surendra were acquitted by the trial court. The appellant was convicted under Section 302 read with Section 34, I.P.C. and under Section 394, I.P.C. There is no indication either in the F.I.R. or in the prosecution evidence of any other person, unnamed or unidentified, other than the three accused to have participated in the commission of the crime. There is not even an iota of evidence with regard to the commission of offence under Section 394, I.P.C. The charge in the present case relates to the commission of offence of murder by the appellant along with other named two accused and with no other person. The trial, in fact, went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other unnamed person. So when the other two co-accused have been given benefit of doubt and acquitted it will not be permissible to take the view that there must have been some other person along with the appellant in causing the injuries to the deceased. It was as such not permissible to invoke Section 34, I.P.C., The appellant would accordingly be responsible for the offence, if any, which could be shown to have been committed by him without regard to the participation of others.

9. Learned A.G.A. has vehemently argued that if the accused could not be convicted with the aid of Section 34, I.P.C., he was certainly liable for having abetted the murder of the deceased Pramod alias Vinod and also under Section 394, I.P.C. This argument of the learned A.G.A. attractive at first sight is, in our opinion, not tenable on the sound appreciation of the evidence on record and the law on the point. The appellant was originally charged with the offence punishable

under Section 302 read with Section 34, I.P.C. but as found in the earlier part of this judgment, he could not be held guilty with the aid of Section 34, I.P.C. Therefore, the prosecution cannot plead in alternative in this appeal that the abetment may have been of some other person even though Rajendra, the co-accused of the appellant has been acquitted. It is true that it cannot be held under law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted and the manner in which the abetment was made. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. But herein, it is not the case of prosecution that the appellant and/or Surendra had in any way instigated Rajendra to inflict injuries on the person of the deceased, nor it has been shown that both of them had caught hold of the deceased in order to make his body available to Rajendra for inflicting knife blows.

10. There is another aspect of this case. The appellant along with his co-accused were charge-sheeted only under Section 302 read with Section 34, I.P.C. and Section 394 and the facts constituting the abetment by the appellant were not put to him in his examination under Section 313, Cr.P.C. and, therefore, the same could not be used against him. In holding the above view we are fortified by the ratio laid down by their Lordships of the Supreme Court in *Sharad Birdi Chand Sharda v. State of Maharashtra*, : 1984 CriLJ1738 .

11. It has been found earlier that there is not even a shred of scintilla of evidence on record to show that the offence under Section 394, I.P.C. had at all been committed by the appellant.

12. In view of the above discussions, the impugned judgment cannot be sustained in the eye of law.

13. Resultantly this appeal succeeds and is allowed. The impugned judgment of conviction and order of sentence dated 24th December 1979 are hereby set aside. The appellant is acquitted of both the charges under Section 302 read with Section 34, I.P.C. as also under Section 394, I.P.C. He is on bail. His bail bonds and sureties are discharged.

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