

(2019) 01 UK CK 0032

In the Uttarakhand High Court

Case No : Criminal Jail Appeal No. 01 Of 2015

Abdul Wahid

APPELLANT

Vs

State Of Uttarakhand

RESPONDENT

Date of Decision : 10-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 302, 303, 304, 305, 306, 307, 394, 411, 412
Code Of Criminal Procedure, 1973 — Section 161

Citation : (2019) 01 UK CK 0032

Hon'ble Judges : Sudhanshu Dhulia, J; Ravindra Maithani, J

Bench : Division Bench

Advocate : Vikas Anand, Amit Bhatt, Mamta Joshi

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J

1. This appeal has been preferred against the judgment and order dated 01.12.2014, passed by learned District and Sessions Judge, Tehri Garhwal in Session Trial No. 54 of 2013, "State of Uttarakhand Vs. Abdul Wahid", whereby the appellant has been convicted under Sections 302 and 394 I.P.C., and has been sentenced to life imprisonment under Section 302 I.P.C., with a fine of Rs.10,000/-, in default of which, the appellant is directed to undergo additional rigorous imprisonment for a period of one year. He has been further sentenced to undergo rigorous imprisonment for a period of five years under Section 394 of I.P.C., with a fine of Rs.5,000/- and in default of payment of fine, appellant is directed to undergo additional rigorous imprisonment for a period of three months.

2. Briefly stated, according to the prosecution, an F.I.R. was lodged on 11.09.2013 at 04:30 p.m. at Reporting Police Chauki Kumalda, Police Station Chamba, District Tehri Garhwal by one Wasim Ahmad stating that Harun (the deceased), aged about 40 years was in the business of buying and selling of

mules. On 10.09.2013, Harun, accompanied with his 17 year old son Sameer, and his servant namely, Abdul Wahid (the appellant herein), and their 13 mules, proceeded towards the hills in district Tehri Garhwal. On their way to the hills in Tehri Garhwal, before the nightfall, they stopped at a place called "Satyon", which is a village in District Tehri Garhwal. They reached "Satyon" in the evening of 10.09.2013 with their mules, and camped on a construction site. After midnight, at about 1.30 a.m., when all three were fast asleep, they were attacked by some unknown assailants. The first information report further says that Harun was attacked first, by a heavy object. The assault was on his head, due to which he was seriously injured. Thereafter, the assailants attacked his servant Abdul Wahid as well. Hearing the alarm raised by the appellant, the son of the deceased i.e. Sameer woke up and then the assailants fled. When Sameer saw his injured father in an unconscious state, he immediately checked his pockets, where his father had kept Rs.1,60,000/- in the night before going to sleep. The money was missing, which was evidently taken away by the assailants.

3. The complainant Wasim Ahmad then states in his FIR that he belongs to the same village as injured Harun, and presently he stays in Dehradun. On 11.09.2013, at 6.00 a.m., in the morning, he was informed about the incident. He immediately reached C.M.I. Hospital, where the injured Harun was hospitalized, and was in a serious condition. At C.M.I. Hospital, Sameer (son of the deceased) informed him about the business transactions that was made prior to the incident. According to which certain business transactions were made by Harun at the place called "Maal Devta", where he had received some amount in cash, then, they went to "Satyon". In the evening, he had transactions with certain persons, who are named in the FIR as Ranveer Singh S/o Bhopal Singh, resident of "Bhutsi", (who had purchased a mule from Harun for Rs. 40,000/-). Rajpal S/o Hari Singh and Lokendra S/o Kaman Singh, both residents of Village "Manj Gaon" and Balbir Singh S/o Bhopal Singh R/o Village "Bhutsi". They had some altercations with Harun, as Harun did not want to sell his mules to them. Apart from this, there was another business transaction made by Harun with a person, namely, Chintamani, who is the resident of Village "Satyon". The complainant says that all these persons may be involved in the incident. According to the F.I.R., the condition of Harun was extremely serious. He was admitted to C.M.I. Hospital and was in I.C.U. He was brought to the hospital in 108 Ambulance from the place of incident.

4. Based on the F.I.R., a Case Crime No.15 of 2013 under Section 394 I.P.C. was registered on 11.09.2013 at 4.30 p.m., at Police Station Chamba.

5. The next day, the appellant was brought at Police Chowki Kumalda, Police Station Chamba. As per the prosecution, the appellant made certain confessions before the police and on the basis of confession, the recovery was made on the pointing out of the appellant on 12.09.2013 at 5.00 p.m., from the place of occurrence. On the pointing out of the appellant a plastic bag having Rs. 55,150/- was recovered from a heap of stone. Further on the pointing out of the

appellant, the weapon which was used in the commission of the crime, which was a stone lying barely 4-5 feet from the place of occurrence, was also recovered. Meanwhile, the injured Harun was further referred to Hospital at Chandigarh and thereafter he passed away on 25.10.2013 at his residence at Bijnor. After investigation, a charge-sheet under Sections 307, 394 and 411 I.P.C. was submitted against the appellant. The Investigating Officer subsequently received the post mortem report and inquest report of the deceased. After further investigation, a supplementary charge-sheet was given in the court against the appellant for converting Section 307 I.P.C. to Section 302 I.P.C., after the death of Harun on 25.10.2013. The case was committed to the court of sessions for trial. On 19.12.2013, charges under Sections 302, 394 and 412 I.P.C. were framed against the appellant, to which he denied and claimed trial.

6. The prosecution in order to establish its case examined as many as 15 witnesses, namely, PW1 Wasim Ahmad, PW2 Mohd. Aslam, PW3 Mohd. Musa, PW4 Kishan Singh, PW5 Sub Inspector Pankaj Devrani, PW6 Sub Inspector Jaykrit Butola, PW7 Gambhir Singh, PW8 Dr. Prem Prakash, PW9 Sant Kumar Sharma, PW10 Dr. Sarfaraz, PW11 Robina, PW12 Rishi Pal Singh, PW13 Ranveer Singh, PW14 Sub Inspector Kishan Kumar Tamta and PW15 Mohd. Sameer. Out of the prosecution witnesses, the important witnesses are PW1 Wasim Ahmad, PW5 Sub Inspector, Pankaj Devrani, who at the relevant time was Station House Officer, P.S. Chamba and also a witness to the recovery, PW6 Sub-Inspector, Jaykrit Butola, the Investigating Officer, PW7 Gambhir Singh, who is also a witness to the recovery of currency notes and a stone and PW15 Mohd. Sameer, who is the son of the deceased and was present at the place of incident at the relevant time.

7. The complainant Wahid Ahmad was examined as PW1. He narrates in his examination-in-chief what he has already said in the F.I.R. According to him, he lodged F.I.R. on the basis of information given to him by the appellant Abdul Wahid and Sameer, who is the son of the deceased. This witness in his examination-in-chief does not implicate the appellant in any manner, nor points a finger of suspicion towards him. His consistent case has been, that the assailants were the unknown persons. Under these circumstances, there was no reason for the defence to even cross-examine this particular witness but in any case, he was cross-examined, but nothing has come out in his cross-examination which may be relevant for the purposes of this appeal.

8. PW5 Sub Inspector, Pankaj Devrani, at the relevant time was the Station House Officer, P.S. Chamba, Tehri Garhwal. He says that in the early morning hours of 11.09.2013, he received an information about the attack on Harun at the place called "Satyon". He immediately reached the spot, along with other police personnels. According to him, Abdul Wahid S/o Ismile R/o Wodgara, Kiratpur, Bijnor was brought at Police Chowki Kumalda on 12.09.2013. But neither in his statement nor in the arrest memo, it has been stated as to from where appellant Abdul Wahid was arrested by the Police. From the FIR itself, it is

clear that the FIR was lodged by the complainant on the narration of the events by none other than the appellant himself (and the son of the deceased PW15). The appellant was also present in C.M.I. Hospital, where injured was initially taken. Therefore, the natural presumption would be that the appellant was arrested while he was either in C.M.I. Hospital or in the company of the son of the deceased. Neither the complainant nor the son of the deceased at any point of time raised any finger of suspicion on the appellant, rather the complainant in the FIR has named other persons, who had some altercations with the deceased on that fateful day, and the finger of suspicion in the FIR was towards them. These persons were never interrogated by the Police during its investigation. Not only this, PW15 Sameer, who is the son of the deceased and the most reliable witness, as he was the only person who was present at the time of the incident was never interrogated or questioned by the Police in its investigation, at least not in the manner it is done, i.e. by recording his statement under Section 161 CrPC.

9. Be that as it may, according to PW5 Pankaj Devrani, after confession made by the appellant, on further disclosure that he can get the stolen money and weapon recovered, he was brought to the place of occurrence. The appellant pulled out from the heap of stone, a plastic bag containing currency notes of Rs.55,150/-. The appellant also got recovered a stone, which he used in the offence. In the confession made before the Police, the appellant says that he was the servant of the deceased Harun and on that night the deceased had received Rs.40,000/- from a person to whom he had sold mules and Rs.15,000/- he had received from another person and this was the reason why he gave a fatal blow to the deceased while he was sleeping and took away the money and kept it in the heap of sand, from where, money was ultimately recovered as per the prosecution. The learned Deputy Advocate General for the State has placed heavy reliance on the recovery.

10. PW7 Gambhir Singh is an independent witness of recovery of both the weapon of crime i.e. stone, as well as currency notes. This witness says that recovery was made at about 7.00 to 7.30 p.m., in the evening, whereas as per PW5 Pankaj Devrani, Station House Officer, recovery was made at about 5.00 p.m., but then noticeable discrepancy here is that as per PW5 Station House Officer, the independent witness PW7 was picked by them from a place called "Maroda Bridge" and then he was brought to the place of incident. However, PW7 in his cross-examination clearly states that he met the police personnel at the place of the incident only from where recovery was made.

11. PW6 Jaikrit Butola is the Investigating Officer. During the investigation when he took the statement of Gambhir Singh and others, he realized that Gambhir Singh had given a statement that his house is extremely close to the place of the incident, but inspite of it, he did not hear any sound or noise, which was bound to occur when three or four persons would attack Harun. But being told by the appellant Abdul Wahid, that assailants had come in the night and they ran away,

they tried to search for the assailants, but in vain. On this PW6 raised suspicion on Abdul Wahid. Subsequently he was arrested and the recovery was made on his pointing out.

12. PW15 Mohd. Sameer is the son of the deceased. In his examination-in-chief, he says that they were in the business of buying and selling mules. On 10.09.2013, they had come to "Satyon". They had exchanged mules and in return, received Rs.15,000/-. They had sold another mule for which they got Rs.78,000/-. For second Mule which was sold, they had received Rs.40,000/-. In the night of 10.11.2013 at about 1.00 a.m., when Sameer was asleep with his friend Sachin, he was informed by the appellant that his father has been attacked. He saw his father who was lying injured. 108 Ambulance was promptly called and his father was taken to C.M.I. Hospital, Dehradun. Thereafter, the father of PW15 was referred to Chandigarh hospital and ultimately he died. He then states that at the time of the incident, his father had Rs.55,000/- as out of the total sale consideration that was the actual amount he had received. Some currency notes were in the denomination of Rs.1,000/- and remaining were in denomination of Rs. 500/-. He points out that on the date of the incident the present appellant was with his father. He recognizes the present appellant Abdul Wahid in the court and says that he was one who was sleeping next to his father. Thereafter, he says that Police had come to C.M.I. Hospital for investigation and he had given a written note to the police.

13. In the hand written statement given by this witness to the police, referred above, he states that on 10.09.2013 in the night his father was attacked by the assailants and money was taken away from him. He was not present on the spot, but he was in the house of Sachin. The only person who was with his father was his servant Abdul Wahid i.e. the appellant. His father was in C.M.I. Hospital in ICU. He does not know about money or transactions of money done with his father. He promises that when his father recovers, he will cooperate in the investigation.

14. This witness was put to cross-examination where it has come that apart from the statement which was given to the police in the form of written note, the police never took any other statement under Section 161 CrPC. There are also contradictions in the statement of this particular witness, as it has come in the first information report that at the time when his father was asleep, he had Rs.1,60,000/-, but in his examination-in-chief, this witness says that his father was having only Rs.55,000/-.

15. Further in the F.I.R., which was lodged on the basis of information given by PW15 Sameer, it is mentioned that he was sleeping inside the room and his father and the appellant were sleeping in Verandah but in court, he says that he was actually sleeping with his friend Sachin in his house. In any case, he has not pointed finger specifically on the appellant at any point, except by admitting that at the relevant time the servant i.e. the appellant was sleeping next to his father.

16. This is purely a case of circumstantial evidence. In a case of circumstantial evidence, the prosecution must be able to prove before the court that there was only one and one possibility which is the guilt of the accused. There should be no other possibility. This is only possible when the entire chain of evidence is complete. In this case, it is not so. First of all, let us see the motive at the hands of the appellant. It has come from the record that the appellant was the servant of the deceased and he was working with him since last 5-6 years. The fact that he was a person of confidence is evident from the fact that he was sleeping next to the deceased on the fateful day and it has never come anywhere in the evidence that the integrity of the appellant as a servant was ever in doubt. He was in a regular business transaction of buying and selling of mules. He would have similar opportunities in the past as well where his 'master' was having money in his pocket. In any case, the motive factor is extremely a weak factor here, and when we see the manner of recovery, it is also extremely doubtful as the only independent witness to the recovery gives a different statement than what has been given by the police. PW7 Gambhir Singh has said that when police reached at the spot of incident, he was already there at the place but according to the prosecution, he was picked up by the Police from "Maroda Bridge", and then brought to the scene of the crime. More importantly, the stone which was found only a few feet away from the scene of the crime, remained there unnoticed. The Police was there for more than 24 hours on the spot, but the stone was never spotted by the police and ultimately it was recovered only on the pointing out of the appellant! Although the stone was sent for forensic examination and there is a forensic report which suggests that there was human blood on it, but conviction is not possible on the basis of this evidence alone. More importantly, the complainant himself had raised suspicion on several persons which he had named in the FIR, but admittedly during investigation those persons were never questioned.

17. In a criminal case, prosecution must prove its case beyond the reasonable doubt. In the present case, the prosecution has not been able to prove its case beyond a reasonable doubt.

18. Consequently, the criminal appeal is allowed. The impugned judgment and order dated 01.12.2014 passed by the Trial Court in Session Trial No. 54 of 2013 convicting and sentencing the accused/appellant under Sections 302 and 394 I.P.C., is hereby set aside. He is acquitted of the charges framed against him. The appellant is in jail. He shall be released forthwith, unless wanted in any other case.

19. Let a copy of this judgment along with Lower Court Record be transmitted to the Court below for compliance.