

(1982) 03 AHC CK 0067

Allahabad High Court

Case No: Criminal Appeal No. 2903 of 1977

Netrapal

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: March 2, 1982**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 428
- Penal Code, 1860 (IPC) - Section 304, 31, 323, 34

Citation: (1982) 6 ACR 280**Hon'ble Judges:** N.N. Sharma, J**Bench:** Single Bench**Advocate:** G.P. Tandon, for the Appellant;**Final Decision:** Partly Allowed

Judgement

N.N. Sharma, J.

Netrapal, son of Kundan Singh, resident of Garhi Dudhadhari, police station Hasayan, district Aligarh has filed this appeal against his conviction u/s 304 Part II of Indian Penal Code by Sri P.C. Saxena, II Addl. Sessions Judge, Aligarh in S. T. No. A-32 of 1976 by which Appellant was sentenced to three years R.I.

2. Prosecution case briefly stated is that on 1-9-1975 at about 6.00 P.M. victim Sukhram aged about 18 years, along with his brother Umrao (PW 1) happened to be present in his millet crop field where guava trees were standing towards north and south. Appellant strayed his cattle in the field of victim who damaged guava plants; victim took exception to it and abuses were exchanged between them when Appellant called to his aid his co-accused Kunwar Pal, Jawahar and Chiranjee, who were nearby; victim grappled with the Appellant; he got released from grip of Appellant and ran towards north but Netrapal again caught hold of him beneath the guava trees and dashed him against the ground. He was pressed there by Appellant and his co-accused. The case as developed at the stage of evidence was that Jawahar

and Chiranjee held victim by feet and hands while Kunwar Pal strangled him. On the out cry of Umrao, Sunehari (PW 2), Lakhpat (PW 3) and Bhagwan (PW 4), who were working in adjoining fields, arrived. On their approach assailants managed to escape with the cattle; victim was found dead; his bush-shirt and underwear were found torn. Dead body was brought by informant to his house where he got report drawn by Ishwar Singh Pradhan, which was made over at police station Hasayan by him in the same night at 10.45 P.M. Distance of police station from scene of occurrence was five miles. On the basis of written report, First Information Report Ext. Ka 2 was drawn by Head Constable Visheshwar Dayal, who registered the case in general diary. Writing of Visheshwar Dayal was proved by Investigator Sri Layak Singh (PW 6) who was acquainted with the same and took up investigation forthwith; he reached the scene of occurrence in the same mid night; dead body was found on the platform in front of house of victim; inquest was held on dead body vide memo Kxt. Ka 3. Diagram, despatch note and letter were drawn (Ext. Ka 4 to Ext. Ka 6), dead body was sent to mortuary Aligarh through, constable Rajveer Singh (PW 5).

3. Dr. N.K. Maheshwari (PW 7) held autopsy in Malkhan Singh Hospital Aligarh on 3-9-75 at 4.20 P.M.

4. No external injury was found except a small spot of bluish discolouration over right side neck upper part; on internal examination doctor found hyoid bone fractured; trachea, larynx and both lungs were found congested; right lung was found ruptured and pericardium was congested. Stomach was empty.

5. Death was due to asphyxia resulting from strangulation vide post mortem report Ext. Ka. 11 proved by doctor, who opined that victim might have met his death at the time of occurrence. He further conceded that bluish mark of discolouration on the neck could have been caused by pressure of thumb or finger. Margin of 4/5 hours in duration of death on either side was possible.

6. On completion of investigation, Appellant and his co-accused were sent up. They pleaded not guilty to the charge u/s 304 read with Section 34 of Indian Penal Code.

7. Prosecution examined 7 witnesses in support of their case.

8. None was examined in defence.

9. As co-accused have already been acquitted, I need not dilate on their statements.

10. Netra Pal Appellant denied aforesaid allegations; he also denied his participation in the assault and alleged his implication to party factions and ill-will with Ishwar Singh Pradhan. He further stated that his brother Kunwar Pal was on strained relations with Ishwar Singh. His younger brother Than Singh was murdered. Munna was an accused in that murder case. Dhani Ram, uncle of Ishwar Singh testified in defence.

11. Learned trial Judge disbelieved prosecution evidence against co-accused of Netra Pal but convicted Netrapal u/s 304 Part II simpliciter and sentenced him, as given above.
12. Aggrieved by this decision, Appellant has filed this appeal.
13. I have heard learned Counsel for parties and perused the record.
14. On behalf of Appellant it was argued that learned trial Judge has acquitted three co-accused of Appellant on the same evidence on which conviction of Appellant has been recorded and so Appellant also should have been acquitted. I do not subscribe to this view. In his judgment learned trial Judge has tried to distinguish the case of Appellant from his co-accused. He has observed that this marpit started with Netrapal and Netrapal threw Sukhram to the ground. The role that was assigned to the co-accused subsequently was not laid in First Information Report or in their statements by prosecution witnesses recorded u/s 161 of Code of Criminal Procedure. He also pointed out discrepancy that Sunehri and Lalpat alleged that Jawahar held feet and Chiranjee held hands of Sukhram while Bhagwan Singh has given reverse order.
15. Obviously, courts have to separate chaff from grain vide *Garib Singh v. State of Punjab* AIR 973 SC 463. Under these circumstances method employed by learned trial Judge in search of the core of truth cannot be regarded as wrong or illegal.
16. The next contention was that after acquittal of co-accused, conviction of Appellant u/s 304 read with Section 34 of Indian Penal Code was unsustainable vide [Prabhu Babaji Navle Vs. State of Bombay](#), .
17. This ruling is not in point for the simple reason that in this case conviction of Appellant has been recorded u/s 304 Part II simpliciter and not with the aid of Section 31 of Indian Penal Code.
18. The next contention was that Umrao Singh, informant, was not present on the scene of occurrence and incrimination of Appellant was at the instance of Ishwar Singh Pradhan, who scribed written report and who had ill will with the Appellant. This allegation has been refuted by Umrao in his statement. The mere fact that Umrao could not perceive small spot of bluish discolouration of skin over right side of neck of Sukhram could not justify the inference that he was not present on the spot. Umrao Singh saw the occurrence from a distance and had no courage to intervene during attack; it was evening, as occurrence took place at 6.00 P.M. and so this small spot which was not bleeding could have gone unnoticed by Umrao.
19. In this connection Umrao alleged that he was present in his holding measuring 8 bighas in Nagla Ahir. His brother Sukhram was also present there; miller crop was sown in the field. Cattle of Netrapal strayed on southern boundary mark of their field. Netrapal was grazing cattle. His brother asked Netrapal to remove cattle to avoid damage to their guava saplings. Netrapal abused Sukhram and told that he would

persist in grazing cattle there. At that stage Netrapal shouted and his three associates who were co-accused and present on the nearby fields arrived. Exchange of hot words led to the scuffle. All assailants belaboured Sukhram. None of the assailants was armed with any arm. Netrapal knocked Sukhram to the ground and remaining assailants pressed him. Thereafter Sukhram got him self released and ran towards north; however, Netrapal over-powered him again below guava trees near northern boundary mark and dashed him to the ground. Associates of Netrapal held Sukhram. On the alarm raised by informant witnesses Bhagwan Singh Sunehri and Lakhpat reached the spot and witnessed the occurrence. On their approach assailants ran away. Me found Sukhram dead and he carried dead body to his house. This description of the occurrence was related by informant in his report and is consistent with medical evidence and was believed by learned trial Judge. I find no good reason to differ from him so far as complicity of Netrapal in the assault is concerned.

20. However, I do not agree with the learned trial Judge on the point that Netrapal had any intention to commit culpable homicide. There is nothing on record to show that Appellant attacked victim with the intention of causing such bodily injury as was likely to cause death. Dr. N.K. Maheshwari (P. W.7) who conducted post mortem examination opined that death was the result of asphyxia. Learned trial Judge found that Netrapal was guilty of causing this injury as he strangled Sukhram. This conclusion is not borne out by evidence on record. It was not laid by informant in his report that Netrapal strangled Sukhram. Even in his own statement, informant Umrao Singh did not testify that Netrapal strangled Sukhram; witnesses Sunehri (PW 2), Lakhpat (PW 3) and Bhagwan Singh (PW 4) were unanimous on the point that Kunwar Pal pressed neck of Sukhram. Obviously, Kunwar Pal, who is the author of that injury has been acquitted. There was no common object of the assailants to cause death of Sukhram. Thus, where there is no common intention to commit culpable homicide nor there is evidence to show as to which of them gave fatal blow, none of the assailants can be convicted u/s 304 Part II of Indian Penal Code. The only conviction recordable in this case should have been u/s 323 of Indian Penal Code vide AIR 1922 Lah 394 .

21. On the point of sentence I find that having regard to the loss of life, Appellant should be sentenced to one year's, RI. He has already remained in detention for about two months and shall serve out remainder of the sentence.

22. In the result, appeal is partly allowed. Conviction of Appellant is altered to Section 323 of Indian Penal Code simpliciter from Section 304 Part II, of Indian Penal Code. His sentence is reduced to one year's RI only. He shall serve out remainder of the sentence viz, ten months as he has already been in detention for about two months during trial and that period has to be taken into account vide Section 428 of Code of Criminal Procedure. Appellant is on bail. Let him surrender to his bail bonds and taken into custody forthwith to serve out aforesaid sentence.

23. Impugned order is modified accordingly.

Appeal partly allowed.