



2026:AHC:63128

AFR

Reserved on 8.12.2025

Delivered on 26.3.2026

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 623 of 1986

Vinod Kumar

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s) : G.P. Dixit, Kripa Kant Pandey, Rahul Mishra, Rajiv Lochan Shukla
Counsel for Respondent(s) : A.G.A.

Court No. - 89

HON'BLE ANIL KUMAR-X, J.

1. Heard Sri K.K.Pandey, learned counsel for the appellant and Sri K.K.Gupta, learned AGA for the State.

2. The accused-appellants have been convicted and sentenced vide judgment and order dated 21.2.1986 passed by Sessions Judge, Etawah in Sessions Trial No. 24 of 1985, appellant has been sentenced up to seven years rigorous imprisonment for offence under Section 364 IPC.

3. The prosecution case, in brief, is that a written report (Ex. Ka-1) was lodged by Baijnath Singh, son of Raghubir Singh, at Police Station Barhpura, District Etawah on 23.10.1983. It was scribed by Tirbhuwan Singh of village Kasata. The informant alleged that on 20.10.1983, his son Mahesh Singh was at home when Vinod Kumar came and took him along. When Mahesh did not return, an information was lodged at police outpost Jaswara on 22.10.1983 at 7:00 p.m. by his younger brother Jagdish Singh. On 23.10.1983, while searching for his son, the informant found Mahesh Singh lying dead near the field of Kali Prasad Bajpayee, with injuries on his body. He suspected that Vinod Kumar and Sunit Singh, both sons of Shiv Ram Shukla, had committed the murder. Accordingly, a case under Sections 302/34 IPC was registered at Police Station Barhpura on 23.10.1983 at 9:15 a.m. against them. Case was entrusted to P.W.-6 Hori Lal Yadav who after investigation submitted chargesheet against all the three accused under Section 302/34 IPC.

4. Case was committed to Session Court. All the accused were charged for offences under Section 302 read with Section 34 IPC. Six witnesses were examined by prosecution. P.W.-1 Baijnath proved (Ex.Ka-1). He supported the contents of FIR. He stated that accused Vinod had illicit relationship with his son Mahesh. Accused Shiv Ram informed him about this relationship 15 days before the occurrence. He thereafter scolded his son. P.W.-2 Devendra Singh stated that on 20.11.1983 at about 10:00 p.m., while he was returning to his house, he heard screams coming from the house of accused Shiv Ram. Upon inquiring, accused Shiv Ram told him that his younger daughter was unwell, and his sons, i.e., the remaining accused persons, also supported this version by stating that there was nothing unusual.

5. P.W.-3 Bhawan Singh stated that on the alleged day, at about 10:00–10:30 p.m., while he was going towards his field, he met the accused persons. On finding them unusually silent, he enquired about the same, whereupon they replied that there was nothing unusual and that they were getting late. He noticed some yellowish spots on the shirts of accused Vinod and Sunit, which aroused suspicion in his mind; however, being night time, he did not pay much attention. He further stated that he left for his in-laws' house the next morning and, on returning home on 23.10.1983, came to know that the dead body of Mahesh had been found. P.W.-4 Ranveer stated that he had seen Mahesh going inside the house of the accused; however, he did not intervene as Mahesh used to visit their house frequently. On the next day, when he came to know that Mahesh was missing, he informed P.W.-1 Baijnath about the said fact. He further stated that accused Shiv Ram had earlier complained to P.W.-1 Baijnath regarding Mahesh, for which Baijnath had scolded his son.

6. P.W.-5 Dr. Dr. K.C. Jain conducted post mortem of deceased on 24-10-83 at District Hospital, Etawah. He found following ante-mortem injuries on the person of deceased:-

(i). Incised wound 8 cm x 3.5 cm on medial part of neck extending obliquely from lower part of left ear lobule up to medial end of left clavicle bone and fracture of 6th and 7th cervical vertebrae present.

(ii). Incised wound 6 cm x 3 cm, obliquely from medial part of left supra clavicular fossa bone deep, fracture of clevicle present.

(iii). Incised wound 3 cm x 2.5 cm over lower part of the mandible left obliquely extending up to the front of middle oblique, fracture of left mandible present.

(iv). Incised wound 6.5 cm x 3.5 cm over outer end of mandible. Bone deep over scapular region front and fracture of outer end right cleivicle present.

7. On the internal examination he found that the left temporal bone was fractured along with the bone of the skull and the middle bone of the neck was also fractured. The spinal cord was lacerated and the wind pipe was lacerated at the bottom and the blood vessels were cut on the left side along-with pharynx and esophagus.

8. The cause of death, in the opinion, of the doctor was due to shock and haemorrhage. Rigour mortis was not present on the dead body and the decomposition had spotted set in much quantity and the abdomen was distended. Maggots were present and the nails and hairs had become loose and could be brought out easily. Blisters were also present over the body and the duration of the death could be about 4 days ago. P.M. report was marked Ex.Ka-2.

9. P.W.-6 S.I. Hira Lal Yadav stated that missing report (Ex.Ka-3) of Mahesh was lodged by his uncle Jagdish Singh on 22-10-1983. P.W.-1 Baijnath written report (Ex.Ka.-1) and the case was registered in the G.D. Extract of G.D. was marked (Ex Ka-4). He recorded statements of witnesses, visited spot and got inquest report (Ex Ka-5) scribed, prepared photo nash handed over the dead body to constables to be taken for postmortem. He also recovered blood stained and plain earth from spot and prepared its memo (Ex.Ka-11). He found the trail of blood and reached to the house of accused Shiv Ram. However, front door was locked and nobody was present there. He found blood stained plant of Ghamra in the boundary of house and prepared its recovery memo (Ex.Ka.-13). He also prepared site plan (Ex.Ka-13) of the house. He thereafter interrogated other witnesses and submitted charge sheet (Ex.Ka-13).

10. The learned Trial Court acquitted accused Shiv Ram Shukla and Sunit Kumar holding that there was no direct eye-witness to the murder of Mahesh Singh and no evidence to establish their complicity. It did not discuss the testimony of the witnesses in its judgment and merely reproduced their examination-in-chief and cross-examination. It held that testimony of the witnesses thus did not prove their involvement by any cogent and reliable evidence. However, it acquitted the appellant Vinod of the charge under Section 302 IPC , but convicted him for the offence under Section 364 IPC on the ground that the taking away of Mahesh was witnessed by P.W.-1 Baijnath.

11. Learned counsel for the appellant submitted that the prosecution case is based only on suspicion, as the FIR itself was lodged on suspicion without

any direct evidence. It was argued that the incident allegedly took place on 20.10.1983, but the missing report was lodged on 22.10.1983, and the FIR was registered only after the dead body was recovered, which creates doubt about the prosecution story. It was further submitted that there is no mention in the FIR about any illicit relationship between the deceased and the appellant, and even the Trial Court has rejected this motive, noting that the complaint in this regard was made to P.W.-1 Baijnath by co-accused Shiv Ram, who has been acquitted.

12. It was also submitted that although the Investigating Officer claimed recovery of a blood-stained ghamra plant, it was not sent for chemical examination. The blood-stained clothes of the deceased were sent for examination, but the FSL report shows that the stains were not suitable for classification, and it could not be determined whether the blood belonged to the deceased or someone else. It was further argued that although the appellant was charged under Section 302 IPC, he was convicted under Section 364 IPC without explaining how the abduction took place, and there is no evidence of abduction on record. Moreover, no question regarding the offence under Section 364 IPC was put to the appellant during his examination under Section 313 Cr.P.C. In support, reliance was placed on **Subrati vs. State of U.P., 2021 LawSuit (All) 886** and **Upendra Nath Ghose vs. Emperor, AIR 1940 Cal 561**.

13. Learned AGA, on the other hand, submitted that the prosecution has proved its case by reliable circumstantial evidence, which forms a complete chain pointing towards the guilt of the appellant. It was argued that the appellant was last seen taking the deceased with him, as stated by P.W.-1 Baijnath, and this circumstance has remained unshaken. The recovery of the dead body with injuries further supports the prosecution case. It was also contended that minor discrepancies, if any, regarding delay in lodging the FIR or absence of definite forensic results do not affect the core of the prosecution case. The learned Trial Court has rightly appreciated the evidence on record and has correctly convicted the appellant, and therefore, the impugned judgment calls for no interference.

14. Having heard learned counsel for the parties and perused the record, this Court finds that the conviction of the appellant under Section 364 IPC, when the charge was framed only under Section 302 IPC, raises important legal issues which require consideration. In particular, in the absence of any clear evidence of abduction, it needs to be examined whether such conviction could have been recorded without framing a specific charge and without putting the relevant questions to the appellant in his examination under Section 313 Cr.P.C. This issue goes to the root of the case and, therefore,

requires careful scrutiny. It is difficult to understand why the Trial Court convicted the appellant under Section 364 IPC after acquitting him under Section 302 IPC, especially when it had itself found that the alleged motive of illicit relationship was not proved and that the testimony of the witnesses, who claimed to have seen the deceased with the appellant before his death, was not reliable.

15. In view of the aforesaid facts and submissions, the following legal questions arise for consideration before this Court:

(i). Whether an accused can be convicted for an offence under Section 364 IPC in the absence of cogent and reliable evidence establishing kidnapping or abduction?

(ii). Whether a Court can convict an accused under Section 364 IPC after recording a finding that the death of the abductee was homicidal, but acquitting him of the charge under Section 302 IPC?

(iii). Whether an accused, who has been charged solely for an offence under Section 302 IPC, can be lawfully convicted under Section 364 IPC in the absence of a specific charge to that effect?

16. In so far as question no. 1 is concerned, the same is answered in the negative, as it is not necessary to discuss in depth the nature of evidence required to prove conviction under Section 364 IPC. A bare reading of the definition of Section 364 I.P.C. depicts that the ingredients of the said offence are (1) abduction/kidnapping by the accused must be proved; (2) it must also be proved that he was kidnapped in order to; (a) that such person may be murdered; or (b) that such person might be disposed of as to be put in danger of being murdered. The intention for which a person is kidnapped must be gathered from the circumstances attending prior to, at the time of and subsequent to the commission of the offence.

17. If the facts of the present case are considered in light of the above position, it is clear that there is no evidence to show that the deceased Mahesh was kidnapped or abducted by the appellant. Rather, the evidence shows that he went with the appellant on his own. P.W.-1 Baijnath, in his cross-examination, has stated that the deceased was about 27 years old and was married. He has not stated that any force or pressure was used by the appellant. Except for the statement that the appellant called the deceased to go along with him, there is no evidence of any inducement, threat or compulsion. Simply going with someone does not amount to kidnapping or abduction. Therefore, the basic requirement of Section 364 IPC is not proved, and the conviction cannot be sustained.

18. Coming to second question, it seems that Trial Court misread the provision enshrined under Section 221. Clause (1) of Section permits the Court to convict the accused of the minor offence though he was not charged with it. Sub section (2) deals with a similar, but slightly different situation. When a person is charged with an offence and facts are proved which reduces it to a minor offence he may be convicted of the minor offence although he is not charged with it. It permits a court to convict for an offence other than that for which no charges have been framed only when the offence for which charge has been framed and the offence for which no charge has been framed are cognate offences. Judgement of Supreme Court in **Rafiq Ahmed @ Rafi vs State Of U.P. 2011 (8) SCC 300** has discussed the meaning of cognate offences. It held that :-

"Usually an offence of grave nature includes in itself the essentials of a lesser but cognate offence. In other words, there are classes of offences like offences against the human body, offences against property and offences relating to cheating, misappropriation, forgery etc. In the normal course of events, the question of grave and less grave offences would arise in relation to the offences falling in the same class and normally may not be inter se the classes. It is expected of the prosecution to collect all evidence in accordance with law to ensure that the prosecution is able to establish the charge with which the accused is charged, beyond reasonable doubt. It is only in those cases, keeping in view the facts and circumstances of a given case and if the court is of the view that the grave offence has not been established on merits or for a default of technical nature, it may still proceed to punish the accused for an offence of a less grave nature and content. We have already noticed that a person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record. Examples of this kind have already been noticed by us like a charge being framed under Section 302 IPC and the accused being punished under Section 304, Part I or II, as the circumstances and facts of the case may demand. Furthermore, a person who is charged with an offence under Section 326 IPC can be finally convicted for an offence of lesser gravity under Section 325 or 323 IPC, if the facts of the case so establish. Alike or similar offences can be termed as 'cognate offences'.

19. Going further it defined the meaning of cognate offences and said "Such offences indicate the similarity, common essential features between the offences and they primarily being based on differences of degree have been understood to be 'cognate offences'." Recently, Hon'ble Supreme Court in **State Of Uttar Pradesh vs Ram Swaroop @ Barkat, 2026 INSC 256** held that:-

"Section 222(1) of the Code deals with a case where a person is charged with an offence consisting of several particulars. The Section permits the Court to convict the accused of the minor offence though he was not charged with it. Sub section (2) deals with a similar, but slightly different situation. When a person is charged with an offence and facts are proved which reduces it to a minor offence he may be convicted of the minor offence although he is not charged with it. As noticed hereinabove, the expression

"minor offence" is not defined under the Code, as to whether the act of abduction/ kidnapping defined under Section 364 can be construed as a minor offence would be the question. Section 364 of the IPC would indicate that if a person kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered would be punishable with imprisonment for life or rigorous imprisonment for a term which may extend to 10 years. This provision when compared with Section 302 would clearly indicate that they are separate and distinct offences and by no stretch of imagination can be construed as cognate offences. As such, we are of the considered view that the High Court was fully justified and correct in reversing the finding of the learned Trial Judge in convicting the appellant for the offence punishable under Section 364 though charged for 302 of IPC."

20. In this reference, it will be relevant to refer the judgment of Calcutta High Court in **Upendra Nath Ghose vs. Emperor, AIR 1940 Cal 561** where in it was held that:-

"9. We are of opinion that these misdirections of the learned Judge have resulted in a wrong verdict being given. If the Crown took the view that the evidence established that Upendra had murdered the girl then he should have been charged with murder and nothing Clause A charge under Section 364, I.P.C., in the circumstances of the present case is entirely misconceived. We do not think, that the circumstances proved in this case can lead to the conclusion that the girl was murdered by Upendra. They are capable of many reasonable explanations which would be consistent with his innocence. We are, however, not concerned at present with the charge of murder inasmuch as the jury have found Upendra not guilty of that charge. As regards the charge under Section 364, I.P.C., it seems to us that the circumstances established are very far from establishing it. No motive has been shown as to why Upendra should want to abduct the girl in order to get her murdered; it would be ridiculous to assume that he intended to murder her in order to get possession of five gold madulis which are of not much value and which he could have secured without adopting this elaborate method. No circumstance has been proved which would indicate that Upendra wanted to murder the girl or get her murdered at or before the time that he took her away. If all the circumstances sought to be proved are accepted as having been proved it raises at most a suspicion that Upendra had taken away the girl for some improper purpose. They are certainly not sufficient to establish a charge under Section 364, Penal Code."

10. This prosecution is one of the many instances in which we have found that the provisions of Section 364, Penal Code, have been misused. When the case for the prosecution is that the person abducted has been murdered by the abductor there can be no scope for a charge under this section. The abductor should be charged with murder pure and simple. We have noticed however in such cases where the evidence to establish the charge of murder is weak or inconclusive the prosecution is prone to adopt this device of adding or preferring a charge under Section 364, Penal Code in the hope that a jury which may hesitate to find the accused guilty of murder on such slender evidence may be induced to find against him on the lesser charge. We need hardly point out the unfairness and impropriety, to use no stronger term, of this procedure and we are determined so far as lies in our power to stop this abuse of the provisions of Section 364, Penal Code. It was the duty

of the learned Judge in this case to refuse to frame a charge under this section. We find that there is really no evidence to bring home this charge to the appellant and we accordingly set aside the order of conviction and sentence and acquit him. He shall be released forthwith."

21. In view of the facts of the present case and the legal position discussed above, question no.3 is also answered negative. It is clear that an accused who is charged only under Section 302 IPC cannot be convicted under Section 364 IPC in the absence of a specific charge, as both offences are different and not related. In this case, there is no evidence to prove the ingredients of Section 364 IPC, and the appellant was neither charged for this offence nor questioned about it under Section 313 Cr.P.C. Therefore, the conviction of the appellant under Section 364 IPC is not legally sustainable.

The legal principles emerging from the above discussion may be summarised as follows:

(i). Conviction for uncharged offence in limited cases:

An accused can be convicted for an offence not specifically charged only when such offence is a minor offence included within the major offence charged, as provided under Sections 221/222 Cr.P.C.

(ii). Concept of minor and cognate offences:

Conviction for a lesser offence is permissible only when the offences are cognate in nature, i.e., they share common essential ingredients and differ only in degree.

(iii). Test of cognate offences:

Offences can be treated as cognate only when they belong to the same class and have similar essential features; a graver offence may include within it a lesser offence of the same nature.

(iv). Section 302 IPC and Section 364 IPC not cognate:

Offences under Sections 302 IPC and 364 IPC are separate and distinct and cannot be treated as cognate offences.

(v). Conviction under Section 364 IPC without charge impermissible:

Where an accused is charged under Section 302 IPC, he cannot be convicted under Section 364 IPC by treating it as a minor offence.

(vi). Improper use of Section 364 IPC in murder cases:

Where the prosecution case is that the abducted person has been murdered,

ordinarily there is no scope for framing a charge under Section 364 IPC.

(vii). Requirement of intention under Section 364 IPC:

For conviction under Section 364 IPC, it must be proved that the accused abducted the person with the intention that such person may be murdered or put in danger of being murdered.

(viii). Misuse of alternative charge under Section 364 IPC:

An accused cannot be convicted under Section 364 IPC merely because the evidence regarding the offence of murder is weak or insufficient. The prosecution must independently prove the essential ingredients of Section 364 IPC, namely kidnapping or abduction along with the required intention. If the charge under Section 364 IPC is used only as an alternative when the case of murder is doubtful, such conviction would be improper and not legally sustainable.

(ix). Absence of proof fatal to prosecution:

If there is no clear and reliable evidence to show that the accused actually kidnapped or abducted the person, and there is also no evidence to show that he had the intention to get that person murdered or put him in danger of being murdered, then the offence under Section 364 IPC is not made out. Mere suspicion or doubtful circumstances are not enough. In such a situation, the basic requirements of the offence remain unproved, and therefore, the conviction under Section 364 IPC cannot be sustained.

22. Accordingly, the appeal is allowed. The judgment and order passed by the learned Trial Court convicting the appellant under Section 364 IPC are set aside. The appellant is acquitted of the charge under Section 364 IPC. He is on bail. His bail bonds are cancelled and sureties are discharged.

23. The Trial Court's record shall be remitted back along with a copy of this judgment.

24. Compliance report be submitted to this Court at the earliest. Office is directed to keep the compliance report on record.

March 26, 2026

Ujjawal

(Anil Kumar-X,J.)