

Devendra Prasad Tiwari

Vs

State of U.P.

Criminal Appeal No. 303 of 1977

(Jaswant Singh, P. S. Kailasam JJ)

29.08.1978

JUDGMENT

JASWANT SINGH, J. -

1. This appeal by Special by Leave is directed against the Judgment and Order dated April 16, 1976, - of the Allahabad High Court (in Criminal Appeal 2489 of 1975 and Reference 64 of 1975) confirming the conviction of the appellant under Section 302, Indian Penal Code and the sentence of death imposed on him thereunder for intentionally causing the death of his own son named Gorakh Prasad aged about 30 year, on the night between September 1 and September 2, 1974, in the field of Phool Chand Lonia on the outskirts of village Patra Tola Fakirahna within the jurisdiction of Police Station Pipraich, District Gorakhpur.

2. The story as put forth by prosecution was as follows : The appellant who belongs to village Patra, District Gorakhpur was employed at the relevant time as Daftary in the D. A. V. College, Gorakhpur. About a year and a half, before the occurrence, the deceased who was a peon in the same institution gave up service at the instance of the appellant and set up a tea-stall in a portion of the shop of PW, Bharat Lal in form of the College. He was assisted in the management of the shop by his younger brother PW, Dinesh. Smt. Kapoora whom the deceased married about two years before the date of occurrence resided in a separate portion of the house belonging to the appellant in village Patra which is about 14 miles from Gorakhpur. The deceased used to accompany the appellant every evening to his village and to return to Gorakhpur next morning. Some two months before the occurrence the appellant who was a widower started casting evil eyes on Kapoora and making indecent overtures to her. He would often talk in disparaging terms to Kapoora about the deceased and tell her that she would have a comfortable and happy life if she agreed to live with him. Once when Kapoora was alone in the house, the appellant went near her cot at about 9 or 10 p.m. and caught hold of her hands with a view to commit criminal assault on her but she hurled abuses at him and succeeded in extricating herself by pushing him aside. About 4 or 5 hours later on the same night, the appellant made another attempt to have sexual intercourse with Kapoora but the latter foiled the same by putting up stout resistance, whereupon the appellant inflicted an injury on her nose with a knife. Kapoora complained about the misbehaviour of the appellant to her brother-in-law Dinesh as also to her husband when the latter came to the village whereupon the deceased strongly protested to his father but to no avail. With a view to implement his evil designs on Kapoora the appellant often suggested to the deceased not to return to the village every evening as that would be detrimental to his business. The appellant also occasionally reprimanded and beat the deceased for not heeding his advice in the matter of his visits to the village. During the absence of the deceased from his village the appellant persisted in his attempts to have illicit inter-course with Kapoora. On one night the appellant became so desperate that he told Kapoora that he would have

illicit intercourse with her at any cost. Feeling insecure, Kapoora slipped away and took refuge in the house of a neighbour and came back therefrom after a day and a half when her husband returned to the village from Gorakhpur. This time the deceased did not take things lying down and disclosed the nefarious designs of his father on Kapoora to his relatives and acquaintances whereupon the appellant felt humiliated and annoyed.

3. On August 2, 1974, the appellant pressurised Kapoora and the deceased to write letters Exs. Ka 2 and Ka 3 expressing regret and admitting therein that the complaints made by Kapoora to the deceased about the misbehaviour of the appellant were false. On the evening of September 1, 1974 the appellant left Gorakhpur for his village Patra along with the deceased who was at that time wearing Pyjama Ex. 2, stripped underwear Ex. 4, red langot Ex. 3 and shoe Ex. 1. On the way to the village the appellant murdered the deceased in the field belonging to Phool Chand Lunia with Banki Ex. 6 (which he had purchased a day or two earlier from PW, Vishwanath) and concealed his body in a pit close to a nearby nallah. After thus disposing of the deceased and concealing his body the appellant arrived at his house at 2.30 a.m. When noticing the appellant completely drenched Kapoora asked him the reason for the same. The appellant replied saying that he had fallen in a pit near the railway line. In reply to another query made by Kapoora about the deceased, the appellant told her that he had not accompanied him because he was having stomach ache.

4. The appellant chided Kapoora a little for being morose and glum without her husband. Next morning the appellant left for Gorakhpur as usual and came back alone the same evening. On Kapoora's asking him as to why the deceased had not come, the appellant tauntingly told her as to why the how he would earn his livelihood if he would come back daily to the village. Earlier in the day when PWs, Dinesh and Bharat Lal inquired from him at the tea stall at Gorakhpur about Gorakh, the appellant told Dinesh that Gorakh had stayed behind as he was having an abdominal pain. On 4th and 5th of September, 1974 also, the appellant went to Gorakhpur in the morning and returned alone therefrom in the evening.

5. While working in his field on the morning of September 3, 1974, PW, Shyam Lal was informed by one Mohammed that a dead body was lying in a pit near the field of Phoolchand. On receipt of this information, Shyam Lal went to the place indicated by the informant and saw a mutilated, disfigured, swollen, and unidentifiable dead body having a number of injuries on the left forearm, neck and other parts of the body lying partly inside and partly outside a pit near the paddy field of Phool Chand. Thereupon he went and informed the 'pradhan' of the village Patra named Nihal Singh. As Nihal Singh was in a hurry to go to Gorakhpur to purchase some medicines and to attend the Court of the S.D.M. in connection with some case he wrote out the report (Ex. Ka-1) and dispatched the same to the Police Station, Pipraich, through his son Surender Pal. On coming to know that a dead body had been found from a pit near the nullah, Kapoora became intuitively apprehensive about the safety of her husband and requested PW, Satya Narayan to go to Gorakhpur and enquire about the welfare of her husband. Satya Narayan accordingly went to the tea stall of the deceased at Gorakhpur and made enquiries about the latter from PW, Dinesh who told him that the deceased had gone to his village four days ago and had not returned since then. On being told by Satya Narayan that deceased had not returned to his house for the last four or five days, Dinesh went and fetched the appellant from the college. On being apprised by Satya Narayan about the purpose of his visit, the appellant told the former to go back to the village and tell Kapoora not to worry about her husband. Satya Narayan accordingly went back to the village and conveyed the appellant's message to Kapoora. On receipt of the aforesaid report sent by PW. Nihal Singh. S. I. Anand Prakash Tiwari, Officer-in-charge of the Police Station Pipraich left for village Patra after making an entry in the general diary. On reaching the pit which lay towards the east of Tola near the railway

line the S.I. saw a mutilated and disfigured dead body wearing Pyjama (Ex. 2), Langot (Ex. 3) and underwear (Ex. 4) lying therein. Thereupon the S.I. got some villagers from the adjoining village but none was able to identify the dead body. After preparing the inquest report and some other papers, the S.I. sealed the dead body in a gunny bag and sent the same for post-mortem examination through constable Sarbjeet Misra and Chowkidar Ram Surat. On September 4, 1974, PW Dr. Anand Khanna performed the autopsy on the dead body which had greenish discoloration on the stomach and genitals and lower jaw, neck and abdomen whereof had been eaten away by maggots and found the undermentioned ante-mortem injuries on its person :

1. Incised wound 6" x 4" Trachea, oesophagus and external and internal carotid vessels deep on both sides of neck and front. All above scrochin cut through and through cleanly. The wound was on left side.
2. Incised wound 1" x 1/2" on outer part of middle of left pina, skin and cartilage both cut through and through.
3. Abrasion wound are of 8" x 8" in front abdomen.
4. Abrasion wound area of "4 x 4" in front and middle of chest.
5. Incised wound 4 1/2" x 2" muscle deep front of outer side of left forearm 3 3/4" x 3 3/4" above wrist joint.
6. External Organs of Generation.

6. The doctor made the following additional remarks on the post mortem report :

"Sealed bundle on underwear, one silk pyjama piece and one langot sealed and handed over to accompanying constable".

7. In the opinion of the doctor, the death of the dead body brought to him was due to shock and haemorrhage resulting from the above noted injuries. The doctor was further of the opinion that the injury on the neck of the dead body was sufficient in the ordinary course of nature to cause the death and that injuries 1, 2 and 5 could be caused by Banki (Ex. 6).

8. After dispatching the dead body, S. I. Anand Prakash Tiwari made a spot inspection and found some marks of blood and crushed paddy plants in the field of Phool Chand which he seized. The S.I. left for Pipraich the next day as the Deputy Inspector General of Police had to inspect his Police Station. On learning from one Sukhbai Singh on the morning of September 5, 1975 that Gorakh was missing since 4/5 days, S. I., Anand Prakash repaired to village Fakirahara and interrogated the appellatant. As the appellatant did not give satisfactory and straight replies to his queries, the S.I. got suspicious and proceeded to examine Kapoora. The disclosure made by Kapoora having confirmed his suspicion that the dead body was of Gorakh, the S.I. interrogated the appellatant and arrested him. On the same day at the instance of the appellatant. The S.I. recovered Banki (Ex. 6) and letter Ex. Ka A and Ka 3 from a box lying in the room belonging to the former. The key of the room was supplied by the appellatant.

9. On September 6, 1974, the S.I. produced the appellatant before R. P. Singh, Judicial Magistrate, 1st Class, for having his confessional statement recorded under Section 164 of the Code of Criminal Procedure. The Judicial Magistrate sent the appellatant to jail for a day and recorded his confessional

statement (Ex. Ka 8A) on September 7, 1974. On the same day, the S.I. recovered shoe (Ex. 1) from the pit from which the dead body had been recovered four days earlier.

10. The pyjama (Ex. 2). Langot (Ex. 3) and underwear (Ex. 4) and the shoe (Ex. 1) were identified by PWs, Dinesh, Kapoora and Bharat Lal as belonging to the deceased.

11. On completion of the investigation, the appellant was proceeded against in the Court of the Judicial Magistrate, 1st Class, Gorakhpur who committed him to the Court of Sessions to stand his trial under Section 302 of the Indian Penal Code. The Sessions Judge, Gorakhpur convicted the accused under Section 302, I.P.C. and sentenced him to death subject to confirmation by the High Court. The High Court has, as already stated, confirmed the conviction and sentence of the appellant.

12. At the hearing of the appeal, Mr. Vishnu Bahadur has strenuously urged that the appellant is entitled to acquittal as the evidence on the record is not at all sufficient to bring home the guilt to him.

13. It is true that there is no direct evidence regarding commission of the aforesaid offence by the appellant and the prosecution case rests entirely on circumstantial evidence. It is also true that before a confessional statement made under Section 164 of the Code of Criminal Procedure can be acted upon, it must be shown to be voluntary and free from police influence and that the confessional statement made by the appellant in the instant case cannot be taken into account, as it suffers from serious infirmities in that (1) there is no contemporaneous record to show that the appellant was actually kept in jail as ordered on September 6, 1974 by Shri R. P. Singh, Judicial Magistrate, Gorakhpur, (2) Shri R. P. Singh who recorded the so called confessional statement of the appellant did not question him as to why he was making the confession and (3) there is also nothing in the statement of the said Magistrate to show that he told the appellant that he would not be remanded to the police lock-up even if he did not confess his guilt. It cannot also be gain-said that the circumstantial evidence relied upon by the prosecution must be complete incapable of explanation of any other hypothesis than that of the guilt of the accused.

14. In the present case, however, the following pieces of unimpeachable evidence make a complete chain inevitably leading to the conclusion that it was the appellant and the appellant alone who was the perpetrator of the ghastly crime :

(a) Last seen together - It is established from the testimony of the appellant's own son, Dinesh as well as from the testimony of PW. Bharat Lal that the deceased and the appellant left Gorakhpur together for their village at about 6.30 p.m. on September 1, 1974.

(b) Arrival of the appellant at his house at the dead of night unaccompanied by the deceased - It stands proved from the testimony of Kapoora that at the dead of the night intervening September 1 and 2, 1974, the appellant alone returned to his house and on enquiry by her as to why his Dhoti was completely wet, the appellant told her that he had fallen in a pit. In reply to another query by Kapoora, the appellant told her that Gorakh had not come as he was having stomach pain.

(c) Garments worn by the deceased at the time of this departure from Gorakhpur for his village on the evening of September 1, 1974 - From the testimony of PWs,

Dinesh and Bharat Lal, it is established that at the time of his departure from Gorakhpur for his village, the deceased was wearing Pyjama (Ex. 2), Langot (Ex. 3) and underwear (Ex. 4) in addition to other clothes.

(d) Clothes seen worn by the dead body at the time of its recovery from the pit on September 3, 1974 - From the evidence of S. I. Anand Prakash and PW, Shyam Lal, it is established that Pyjama (Ex. 2), Langot (Ex. 3) and underwear (Ex. 4) were in the wearing of the dead body at the time it was taken out from the pit at 10.00 a.m. on September 3, 1974.

(e) Identity of the clothes found on the dead body - The evidence of PWs, Dinesh and Bharat Lal go to prove that the aforesaid garments viz. Pyjama (Ex. 2), Langot (Ex. 3) and underwear (Ex. 4) which were found on the dead body at the time of its recovery on September 3, 1974 belonged to the deceased and were worn by him at the time of his departure for his village on the evening of September 1, 1974 along with his father.

(f) Contradictory statements made by the appellant regarding the whereabouts of the deceased - The prosecution evidence clearly shows that the appellant has been making contradictory statements about the deceased during the period intervening the time of his arrival at his house on the night intervening September 1 and 2, 1974 and his arrest by the Police in connection with the offence for which he has been convicted. Where as on his arrival at the aforesaid unearthly hour at his house on the night intervening September 1 and 2, 1974 he told Kapoora in reply to her query that the deceased had not come from Gorakhpur as he was having stomach pain, in answer to a query made by Dinesh and Bharat Lal on the morning of September 2, 1974 at Gorakhpur, he told them that the deceased had remained behind in his village as he was having abdominal pain. The assurance sought to be conveyed by the appellant to Kapoora through Satyanarayan when the latter went to Gorakhpur at the behest of Kapoora to enquire about the whereabouts of the deceased is also not without significance.

(g) Purchase of Banki (Ex. 6) by the appellant - The purchase of Banking (Ex. 6) by the appellant before the occurrence is proved from the evidence of PW Vishwanath.

(h) The recovery of Banki (Ex. 6) at the instance of the accused. It stands proved from the evidence of S. I. Anand Prakash and PW, Shyam Lal that Banki (Ex. 6) was recovered on September 5, 1974 from a box lying in the room admittedly belonging to and in exclusive possession of the appellant, the key of which was supplied by him.

(i) Medical evidence - Dr. Anand Khanna who performed the post mortem examination of the dead body which was discovered on September 3, 1974 has opined that its death was due to shock and hemorrhage resulting from the aforementioned incised injuries which were caused by Banki (Ex. 6).

(j) Motive of commission of offence - From the statement of Kapoora which is corroborated by documents (Exs. Ka 2 and Ka 3) it is proved that for quite some time before the occurrence, the appellant who was a widower had been making amorous

overtures to Kapoora and attempted several times to seduce her and to have sexual intercourse with her during the absence of the deceased from his house.

15. The above mentioned pieces of circumstantial evidence leave no room for doubt in our mind that the appellant intentionally caused the death of the deceased in a brutal manner so that he should be free to make Kapoora yield to his sinister designs. Accordingly we see no ground to interfere with the conclusions arrived at by the courts below regarding the guilt of the appellant. Keeping in view the manner in which and the motive with which the ghastly crime was committed, we are of opinion that the death penalty awarded to the appellant is well deserved.

16. In the result, the appeal fails and is hereby dismissed.

</html