SUPREME COURT OF INDIA

Babu S/O Raveendran

Vs.

Babu S/O Bahuleyan

(Doraiswamy Raju and H.K. Sema JJ.)

11.08.2003

JUDGMENT

SEMA, J.

These two appeals arise out of a common judgment and order of the High Court dated 29.11.1994 passed in Criminal Appeal No. 626 of 1994 and R.T.No.2 of 1994 and are being disposed of by this common judgment.

Criminal Appeal No. 270 is preferred by the defacto complainant (PW-1), the brother of the deceased. Criminal Appeal No. 271 is preferred by the State of Kerala.

The facts of this case as unfolded by the prosecution are brief but horrendous, which shock human conscience. The marriage of the deceased - Sujatha with accused Babu was solemnised on 2.2.1993. Thereafter, the couple stayed together in the parental house of the bridegroom. The deceased seems to have elicited information from PW-3 Lekha, wife of the younger brother of the accused, that the accused had a pre-marital affair with one Omana @ Vavachi (PW-2). The deceased could not tolerate the information so elicited about the extra marital connection of her husband with Omana. She became repulsive and adopted an unresponsive attitude towards the overture approach made by

the accused and she succeeded by keeping him at bay on the bridal night. It appears that the deceased had adopted the same stiff attitude towards the accused on the second night also i.e. 3.2.1993, which had enraged the accused. On being unable to sustain the lust for sex, persistently prevented by the deceased, the accused decided to end the life of the deceased, strangulated her and killed her. Thereafter, the body of the deceased was lifted and taken to an unused well, situated about 17 metres away from the house of the accused and dumped. It is also alleged that at about 2.30 a.m., the accused had woken up the inmates of the house and disclosed to them that his wife was missing and in a hectic search that followed, the body of the deceased was spotted inside the well and was brought out from the well. First Information Report was lodged by PW-1, the brother of the deceased and it was registered as a case of unnatural death.

After the receipt of result of the autopsy, it was confirmed that Sujatha died due to strangulation. The FIR was, accordingly, converted into a case of murder.

In this case the prosecution has examined as many as 15 witnesses.

None of the DWs were examined on behalf of the accused. PW-2 Omana is a lady who was alleged to have had extra marital relation with the accused was declared hostile. PW-3, Lekha is the wife of the accused's elder brother. PW-4 Sasidharan is the husband of PW-3 and elder brother of the accused who was declared hostile. PW-5 Rathesh Kumar was also declared hostile. PW-6 Bahulayan is the father of the accused.

After the trial, the learned Trial Judge, held the accused guilty under Section 302 IPC and imposed the extreme penalty of death sentence.

On appeal, the High Court set-aside the conviction and sentence and acquitted him. The High Court has also dismissed R.T.No.2 of 1994. Both the Courts below concurrently held that the death is homicidal and not suicidal. This question, therefore, need not detain us any longer.

Parties are heard at length. Mr. John Mathew learned counsel for the appellant – State in Crl. A. No. 271 of 1996 and Mr. EMS Anam, learned counsel for the appellant in Crl. A. No. 270 of 1996, contended that the circumstantial evidence well proved unerringly point to the guilt of the accused beyond reasonable doubt. He further contended that the High Court was in error in holding that the testimony of PW-6 was a mistake. Per contra Mr. MP Vinod, learned counsel for the respondents contended that circumstantial evidence do not led to the guilt of the accused. It is his further contention that there is no direct evidence and the acquittal recorded by the High Court may not be disturbed.

The case of the prosecution entirely rests on circumstantial evidence.

The High Court has considered the following circumstances appearing against the accused:- (1) Sujatha died of murder and the dead body was in a well situated about 17 metres away from the house.

(2) The appellant and deceased were closeted in a bedroom at about 8.30 p.m. on the fateful day.

(3) A lungi was recovered from the appellant's room as produced by him.

(4) The appellant's father when examined as P.W.6 said that the appellant had told him at 2.30 a.m. that the deceased was dead.

(5) When the appellant was questioned by the Sessions Judge under Section 313 Cr.P.C. he had stated that there was no attempt on his part to have sexual relationship with Sujatha, but conceded later by saying that he had sexual inter-course with her.

Dr.Sujathan was examined as P.W.13. She stated that she had conducted autopsy and found the following ante-mortem injuries:- (i) Pressure abrasion, 11 cm. long, horizontal, on the front and right side of neck, inner end in the midline, over thyroid cartilage, 9 cm. behind the chin (1.5 cm broad), and outer end 7 cm. below and 3 cm behind the right ear (1.8 cm. broad).

(ii) Pressure abrasion, 9.5 cm. long, oblique, on the front and left side of neck, inner lower end being 1.5 cm below thyroid cartilage and in the midline (1.4 cm. broad) and outer upper end being 6 cm. below and 2.5 cm. behind the left ear (1.5 cm broad) (iii) Linear abrasions, 1.3 cm. and 0.8 cm. oblique, parallel to each other 0.5 cm. apart, on the front of middle of neck, 0.5 cm. below injury No.2.

PW.13 also found that hymen showed a tear in the 5'o clock position whose margins were reddish. Doctor opined that the deceased had died of constriction force around the neck. Doctor further opined that injury nos. 1 and 2 could be caused by applying force on the neck by tying a Kayali (Lungi) on the neck. In the opinion of doctor, injury nos. 1 and 2 are sufficient in the ordinary course of nature to cause the death. Doctor further opined that injury No.3 is possible to be caused by that portion coming into contact with the top of a nail.

PW-13 further stated that there were signs of attempted sexual intercourse but as to whether there was sexual intercourse can be ascertained only by examination of the vaginal swab and smear. She has further stated that vaginal swab and smear had been collected and preserved at the time of autopsy, and the same had been forwarded to the Chief Chemical Examiner's Laboratory at Thiruvanthapuram for chemical examination. She also stated that she had received the report of chemical examination marked Exhibit P-15 and the report showed the vaginal smear and swab when examined did not show the presence of semen and spermatozoa. In cross- examination PW-13 denied the suggestion that if the body of the deceased is immersed in water for a long time viz. for a few hours and even if the body has been subjected to movements, it will not wash away the semen and spermatozoa.

The High Court was of the view that since in the opinion of doctor the hymen showed a tear in the 5'o clock position whose margins were reddish and therefore the couple had sexual consummation either on the first night or on the succeeding night and the allegation against the accused that he became revengeful on account of his failure to accomplish copulation with his wife is bound to shatter. The High Court seems to have been carried away by the fact that there was a tear of hymen in the 5'o clock position shows the couple had sexual consummation. This finding, in our view, is not based on totality of appreciation of evidence of PW-13. As noticed above, PW-13 had clearly stated that there were signs of an attempted sexual intercourse but as to whether there was sexual intercourse could be ascertained only by examination of the vaginal swab and smear, which had been preserved. PW-13 also stated that the report of chemical examination Exhibit P-15 showed that vaginal smear and swap did not show the presence of semen and spermatozoa. Absence of semen and spermatozoa in the vaginal smear and swap is indicative of the absence of consummation.

Consummation has been defined in Black's Law Dictionary Sixth Edition, as "the completion of a thing; the completion of a marriage by cohabitation (i.e. sexual intercourse) between spouses." In the facts of the present case, the sign of attempted sexual intercourse means that the accused was making an attempt to have sexual intercourse with the deceased and the deceased was resisting the attempt.

The tearing of hymen in the 5'0 clock position could have occurred in the process of resistance. The report of chemical examination that vaginal smear and swab did not show the presence of semen and spermatozoa confirmed the absence of complete sexual intercourse.

It is in the evidence of PW-3 that Sujatha (deceased) was a girl of good character. It is a matter of common knowledge that a girl of self- respect would refuse to cohabit even with her own husband, if it is found that her husband was having pre-marital sex with another woman. There are varied reasons for this. Apart from morality, she would run the risk of contacting sexually communicable disease and she would resist cohabiting even with her own husband. It is but quite natural, therefore, that on the bridal night she had succeeded in refusing to cohabit with her husband and she was

determined to do the same thing on the next night, which would have enraged the husband being not satisfied with lust for sex, decided to do away with her finally after making an aborted attempt. Having regard to the background and circumstances of this case as well as the very wavering stand of the accused as to whether he did not have sexual inter-course with the deceased prior to her death and medical opinion as to the absence of semen and spermatozoa and the fact that if it really was, it would not have got washed in the circumstances found in this case, there is every possibility that the accused was pressing the throat of the deceased and at the same time was trying to have sexual intercourse with her and in the process the tearing of hymen in the 5'o clock position could have occurred but without consummation.

The three injuries on the neck of the accused found by the doctor as noticed above, there is every possibility that the accused applied pressure on the neck of the deceased in an excess of sadism to frighten or torment the deceased or to overcome resistance, can not be ruled out.

The second important circumstantial evidence against the accused is that the accused and the deceased were last seen together. To put it tersely both of them slept together by retiring to the room that night. Last seen together in legal parlance ordinarily refers to the last seen together in the street, at a public place, or at any place frequented by the public. But here, the last seen together is much more than that. The last seen together here is sleeping together inside the bolted room. It is in the evidence of PW-3 and PW-6 that they had dined together and the accused and the deceased were closeted in a room at about 8.30 p.m. Therefore, on the fateful day the accused and the deceased were closeted in a bedroom at about 8.30 p.m. is undisputed and it is for the accused alone to explain as to what happened and how his wife died and that too on account of strangulation.

The third circumstantial evidence against the accused is the recovery of lungi produced by the accused. The High Court was of the view that mere recovery of lungi from the bedroom of the accused is of no consequence, as lungi is commonly worn in domestic life and it is not a strange commodity in a bedroom of any person. The High Court seems to have failed to notice that in the evidence of PW-3 she had stated that her husband saw the lungi in the well on the eastern side of the house and they saw Sujatha was lying dead in that. It is also in the evidence of PW-11, KR Gopikuttan Nair, that he took into custody the underskirt, one pink blouse, white brassieres worn by the dead body, the lungi which was lying in the well in which the body was lying and these material objects were taken and marked as M.Os 2 to 5. This would show that there was more than one lungi in the house, one was thrown with the body and the other worn by the accused, which was recovered from the house.

The fourth circumstance, even from the view of the High Court, if found believable, certainly a decisive point to the guilt of the accused, is the statement of PW-6, the father of the accused. PW-6 in his statement under Sections 161 and 164 Cr.P.C. had stated that his son, the accused had told him at about 2.30 a.m. that the deceased Sujatha was missing from the room.

However, in his examination in Court, PW-6 stated that the accused told him at 2.30 a.m. that Sujatha had died. It could not have been a slip of tongue since at two places and in two different contexts he has stated about the accused having told that Sujatha had died. The High Court was of the view that since PW-6 in his statement under Sections 161 and 164 Cr.P.C. had stated that the accused had told him at about 2.30 a.m. that his wife was not seen in the room, there is no reason why PW-6 would have said in Court that the accused had said that Sujatha had died. There is no justification or scope for any assumption, by any one. The High Court was of the view that this was a mistake committed by PW-6. In our opinion, the view taken by the High Court was clearly erroneous. As already noticed, in his examination under Sections 161 and 164 Cr.P.C. he had stated that the accused told him at about 2.30 a.m. that Sujatha was missing from inside the room. In his examination in the Court he, however, stated that at about 2.30 a.m. the accused informed him about the death of Sujatha. PW-6 is no other than the father of the accused. It is but quite natural that he would try to save his son from punishment. It must be grasped that the truthness of witness is always tested in the court, because his statement is subjected to scrutiny. Truthness of witness is elicited from the cross-examination. This witness was declared hostile and was subjected to cross-examination by the Public Prosecutor as well as by the accused. In his cross examination the witness stated as under: - "I came to know about the daughter-in-law at 2 O'clock in the night. That information was given by the Accused himself. It was after telling me about the death of Sujatha that the Accused himself banged on the room of my elder son Sasidharan and his wife (PW4 and PW3) woke them and told them. At the time when the Accused told me about the death of Sujatha, PW4 and PW3 had not woken up." It is difficult to accept that PW-6 has committed a mistake in saying so. We are clearly of the view that the statement of PW-6 in the Court that the accused had told him at about 2.30 a.m. that Sujatha had died is the true statement of witness and not a mistake. Having regard to the background and circumstances of this case as noticed above, the statement of PW-6 is too significant to be ignored. We have already observed that being the father of the accused he would try to save the accused in his statement under Sections 161 and 164 Cr.P.C. but during the cross examination truth has been elicited from the mouth of PW-6.

Now the question remains to be considered is who is responsible. As already noticed, the accused and the deceased were closeted inside the room.

There is no evidence of intruder. In such a situation, the circumstances leading to the death of the deceased are shifted to the accused. It is he who knows in what manner and in what circumstances the deceased has met her end and as to how the body with strangulation marks found its way into the nearby well. All the aforesaid circumstances, taken together cumulatively lead and unerringly point only to the guilt of the accused.

In the result, the order of the High Court acquitting the accused is hereby set-aside.

The question that remains for consideration is with regard to sentence.

As already noticed, the learned Trial Court awarded the maximum punishment of death sentence for an offence under Section 302 IPC. While awarding capital punishment, the learned trial judge, was of the view that the deceased, aged about 21 years, was married to the accused reposing full faith that her life would be secured in his hands and was expecting a matrimonial home with full hopes to have a happy conjugal married life, has been ruthlessly nipped in the bud of her life, falls within the ambit of rarest of rare cases.

This Court in Bachan Singh VS. State of Punjab, (1980) 2 SCC 684 following two questions that may be asked and answered as a test to determine the 'rarest of rare' case in which death sentence can be inflicted:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances, which speak in favour of the offender? This Court also formulated the following guidelines, which would have to be applied to the facts of each individual case where the question of imposition of death sentence arises:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In the present case, in our view, though the murder is gruesome, but taking the facts and circumstances into consideration, the crime committed by the accused does not satisfy the above tests and it is difficult to say that it falls within the ambit of the 'rarest of rare' cases. In our view,

therefore, the sentence of life imprisonment for an offence under Section 302 would be adequate. The accused is, accordingly, sentenced to rigorous imprisonment for life under Section 302 IPC. With this modification in sentence the appeals are allowed.

The accused is on bail. His bail bond stands cancelled. He is directed to be taken into custody forthwith to serve out the remaining part of the sentence.