SUPREME COURT OF INDIA

Amit

Vs.

State of U.P.

Crl.A.No.1905 of 2011

(A. K. Patnaik and Swatanter Kumar JJ.)

23.02.2012

JUDGMENT

A. K. PATNAIK, J.

1. This is an appeal by way of special leave under Article 136 of the Constitution of India against the judgment dated 29.07.2009 of the Allahabad High Court in Criminal Appeal No.7361 of 2007 and in Reference No.26 of 2007 confirming the conviction of the appellant under Sections 364, 376, 377, 302 and 201 of the Indian Penal Code (for short `IPC') as well as the sentences of imprisonments and death awarded by the learned Additional Sessions Judge.

2. The facts very briefly are that on 19.03.2005, one Radhey Shyam lodged a First Information Report (for short `FIR') at the Daurala Police Station in District Meerut at 21:15 hours alleging that while his mother Manno and wife Shakuntala were present at house, his neighbour Amit, the appellant herein, took away his daughter Monika, aged 3 years, from his house on the pretext that he would give biscuits to her but neither his daughter nor the appellant returned and when at about 5.00 p.m. the appellant came back to his house, he inquired about the whereabouts of Monika, but the appellant did not reply and ran away. Crime No.90 of 2005 for the offence under Section 364, IPC, was registered. The appellant was apprehended on 20.03.2005 near the Pawli Khas Railway Station, Modipuram, P. S. Daurala in District Meerut and his shirt, which bore blood-stains on its right arm, was taken off from his person. On the statement of the appellant, the dead body of Monika kept in a plastic bag was recovered from the wheat field in the out skirts of village Palhara in the presence of Radhey Shyam and Iqbal Singh. A pair of green colour chappals, which were blood-stained, were also recovered from the

corner of a room of the house of the appellant on the statement of the appellant in presence of Radhey Shayam and Iqbal Singh. The shirt of the appellant and the chappals, frock, underwear of Monika and a back thread were sent to the Forensic Science Laboratory Uttar Pradesh, Agra, which confirmed presence of human blood and human sperms on some of these materials. After investigation, chargesheet was filed against the appellant under Sections 364, 376, 377, 302 and 201, IPC, and charges were accordingly framed by the learned Additional Sessions Judge, Court No.12, Meerut, and Sessions Trial No.449 of 2005 was conducted.

3. At the trial, Radhey Shyam was examined as PW-1. His wife and mother were examined as PWs-2 and 3. Iqbal Singh, the witness to the seizures made pursuant to the statements of the appellant, was examined as PW-4. Dr. Vikrama Singh, Senior Pathologist, who carried out the post-mortem on the body of Monika, was examined as PW-5 and the Investigating Officer was examined as PW-6. In his statement under Section 313, Criminal Procedure Code (for short `Cr.P.C.'), the appellant denied having committed the offences but no evidence was adduced by him in his defence. The trial court considered the evidence, heard the arguments and found the appellant guilty of the charges under Sections 364, 376, 377, 302 and 201, IPC. After hearing the appellant on the question of sentence, the trial court imposed the punishment of life imprisonment and a fine of Rs.5,000/- for the offence under Section 364, IPC, and a further sentence of six months if the appellant failed to pay the fine. For the offence under Section 376, IPC, the trial court also imposed the punishment of life imprisonment and a fine of Rs.5,000/- and on failure to pay the fine, a further sentence of six months. For the offence under Section 377, IPC, the trial court also imposed the punishment of life imprisonment and a fine of Rs.5,000/- and on failure to pay the fine, an additional sentence of six months' imprisonment. For the offence under Section 201, IPC, the trial court imposed a sentence of five years imprisonment and a fine of Rs.2,000/- and on failure to pay the fine, an additional sentence of two months' imprisonment. The trial court took the view that this is one of those rarest of rare cases in which the appellant was not eligible for any sympathy of the Court and imposed the sentence of death and a fine of Rs.5,000/- on the appellant for the offence under Section 302, IPC. The High Court, as we have already noted, has not only confirmed the convictions under Sections 364, 376, 377, 302 and 201, IPC, but also the sentences awarded by the trial court.

4. At the hearing of the appeal, learned counsel for the appellant submitted that PW-3 was the only person who was witness to the appellant taking away Monika from the house of PW-1, but PW-3 was an aged woman and she has admitted in her cross- examination that she cannot see with her right eye. 6

He submitted that PW-3 was an interested witness inasmuch as she was the grandmother of Monika and her evidence should not be relied on. He argued that no Test Identification Parade was conducted during investigation for the witness to identify the appellant. He further submitted that no independent witnesses were taken by the Police for recovery of the articles and instead the father of Monika (PW-1) was made a witness to the recovery of various articles and there is evidence to show previous enmity between PW-1 and the appellant and PW-1 has planted this case against the appellant. He also argued that the weapon by which Monika was killed has not been recovered and hence there is no proof that the appellant has committed the offence under Section 302 IPC.

5. Learned counsel for the State, on the other hand, took us through the evidence of PWs-1, 2, 3 and 4 as well as the three memoranda of recovery made on 20.03.2005 pursuant to the confessional statements of the appellant admissible under Section 27 of the Evidence Act as well as the report of the Forensic Science Laboratory to show that the trial court rightly convicted the appellant and the High Court rightly confirmed the conviction under Sections 364, 376, 377, 302 and 201, IPC.

6. We may first consider the contention of the learned counsel for the appellant that the evidence of PW-3 who saw the appellant taking away Monika from her lap should not be relied on. PW-3 is no doubt the grandmother of Monika but she is not an interested witness. As has been held by this Court in State of Rajasthan v. Smt. Kalki and another [(1981) 2 SCC 752], Myladimmal Surendran and others v. State of Kerala [(2010) 11 SCC 129] and Takdir Samsuddin Sheikh vs. State of Gujarat and another [(2011) 10 SCC 158], an interested witness must have some direct interest in having the accused somehow convicted for some extraneous reason and a near relative of the victim is not necessarily an interested witness. There is no evidence to show that PW-3 was somehow interested in having the appellant convicted. PW-3, however, is an aged woman and she has admitted in her cross-examination that she cannot see with her right eye but she has also stated in her cross-examination that she can see with her left eye and the sight of her left eye has not diminished on account of old age and she can fully see everything and can also pass a thread through the eye of the needle and that she does not use spectacles and can see without spectacles. Hence, the evidence of PW-3 that the appellant came to her house and took away Monika from her lap on the pretext of giving biscuits to her cannot be disbelieved.

7. We may now deal with the contention of the learned counsel for the appellant that no Test Identification Parade was conducted during investigation for the witness to identify the appellant as the person who had taken away the child from her lap. Test Identification Parade would have been necessary if the appellant was unknown to PW-3 but as the appellant was the neighbour of PW-3 and known to her no Test Identification Parade was necessary for PW-3 to identify the appellant. In fact when PW-1 returned home, he was told by PW-3 that the appellant had taken away Monika on the pretext of giving her biscuits because PW-3 knew the appellant. Moreover, on such information received from PW-3, PW-1 lodged the FIR naming the appellant as the person who had taken away Monika on the pretext of giving her biscuits. Hence, the argument of learned counsel for the appellant that no Test Identification Parade was conducted for PW-3 to identify the appellant is misconceived in the facts of this case.

8. Regarding the contention of learned counsel for the appellant that no independent witnesses were taken by the police for recovery of the articles and PW-1, who was the father of Monika and who was inimical to the appellant was made a witness to the recovery of the articles, we find from the memo Ex.Ka-10 recording the recovery of blood- stained shirt of the appellant that the recovery was made in presence of two Constables, namely, Harender Singh and Jasbir Singh, and PW-1 was not a witness to this recovery.

> Thereafter, the appellant made a confession that he had concealed the dead body of Monika in the wheat field and pursuant to this confession the dead body of Monika kept in a plastic bag was recovered in presence of not only PW-1 but also PW-4 (Iqbal Singh). The recovery memo (Ext.Ka-2) with regard to the dead body of Monika and the recovery memo Ext.Ka-3 with regard to plastic bag bear the signatures of the two witnesses PW-1 and PW-4. Pursuant to the statement made by the appellant, the chappals which Monika was wearing at the time of murder were also recovered from the house of the appellant in presence of PW-1 and PW-4 and the recovery memo with regard to the chappals (Ext.Ka-5) also bears the signatures of PW-1 and PW-4. Thus, it is not correct, as has been submitted by learned counsel for the appellant, that only PW-1 was a witness to the recovery of various articles and that this was a case which PW-1 had planted on the appellant on account of previous enmity. PW-4 was also a witness to the recovery of the articles which implicate the appellant in the offence and it is not the case of the appellant that PW-4 was in any way inimical to the appellant.

9. Coming to the argument of the counsel for the appellant that the weapon with which Monika was killed has not been recovered, it appears from the evidence of the senior pathologist Dr. Vikrama Singh, PW-5, who carried out the post mortem report on the body of Monika that there were swelling marks on her head and left side of the face which established that she has been hit on her head and her left side of the face. PW-5 has also stated in his evidence that there was a ligature mark all around her neck which indicates that she was also strangulated. PW-5 has further deposed that there was a lacerated wound on the anterior part of arms anus and her vagina was inflamed and congested which prove that unnatural offence and rape was committed on her. PW-5 has opined that all the injuries together are the cause of the death of Monika. The report of the Forensic Science Laboratory (Ex.A-23) confirms human blood and human sperms on the underwear of Monika. Thus, even if the object with which Monika was hit has not been identified and recovered, the evidence of PW-3, the recovery of various articles made pursuant to the confession of the appellant, the evidence of PW-5 and the report of the Forensic Science Laboratory Ex.A-23 prove beyond all reasonable doubt that it is the appellant alone who after having kidnapped Monika committed unnatural offence as well as rape on her and killed her and thereafter caused disappearance of the evidence of the offences. The High Court has, therefore, rightly confirmed the conviction of the appellant under Sections 364, 376, 377, 302 and 201 IPC.

10. We may now consider the contentions of the learned counsel for the parties on the sentence for the offence under Section 302, IPC. Learned counsel for the appellant submitted that the appellant was a young person aged about 28 years when he committed the offences and may reform in future. He cited the judgments of this Court in Sebastian Alias Chevithiyan v. State of Kerala [(2010) 1 SCC 58] and Rameshbhai Chandubhai Rathod (2) v. State of Gujarat [(2011) 2 SCC 764] in which this Court in similar cases of murder of a child after rape by a young person has held that imprisonment for life and not death sentence is the appropriate punishment. He submitted that the appellant, therefore, should not be awarded death sentence.

11. Learned counsel for the State, on the other hand, submitted that the trial court has held that kidnapping and raping a three years old daughter of a neighbour by another neighbour on the pretext of offering biscuit is a heinous and inhuman act and comes under the category of rarest of rare cases as has been held by this Court in several decisions. He submitted that the view taken by the trial court is consistent with the decisions of this Court in State of U.P. v. Satish [(2005) 3 SCC 114] and Bantu v. State of Uttar Pradesh [(2008) 11 SCC 113]. According to him,

death sentence is the appropriate punishment for rape of a child followed by murder.

12. We find that the trial court has relied on the decision of a two Judge Bench of this Court in State of U.P. v. Satish (supra) in which the offence of rape of a child followed by brutal murder of a child has been held to fall in the rarest of rare category for which death sentence is appropriate. In Bantu v. State of Uttar Pradesh (supra), a two-Judge Bench has similarly awarded death sentence to the accused for having committed murder after rape of a young girl of 5 years. In the subsequent decision in the case of Sebastian Alias Chevithiyan v. State of Kerala (supra), however, a two-Judge Bench of this Court in a similar case of a rape followed by murder of a young child by a young man of 24 years has taken a different view and has modified the sentence of death to one imprisonment for the rest of his life. In Rameshbhai Chandubhai Rathod (2) v. State of Gujarat (supra), which was also a case of a rape followed by murder of a girl child by a young man, while Dr. Arijit Pasayat, J. took the view that death sentence is the appropriate punishment, A.K. Ganguly, J. was of the view that as the accused was young in age and may be rehabilitated in future, death sentence is not the appropriate punishment. The difference between the two Judges was referred to a three-Judge Bench of this Court and the three-Judge Bench held that in such cases of rape followed by murder by a young man, instead of death sentence a life imprisonment should be awarded with a direction that life sentence imposed will extend to the full life of the appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reasons. In the present case also, we find that when the appellant committed the offence he was a young person aged about 28 years only. There is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes in future. On the other hand, given a chance he may reform over a period of years. Hence, following the judgment of the three-Judge Bench in Rameshbhai Chandubhai Rathod (2) v. State of Gujarat (supra), we convert the death sentence awarded to the appellant to imprisonment for life and direct that the life sentence of the appellant will extend to his full life subject to any remission or commutation at the instance of the Government for good and sufficient reasons.

13. While therefore sustaining the conviction of the appellant for the different offences as well as the sentences of imprisonment awarded by the trial court for the offences, we allow the appeal in part and convert the sentence of death to life imprisonment for the offence under Section 302 IPC and further direct that the life imprisonment shall extend to the full life of the appellant but subject to any

remission or commutation at the instance of the Government for good and sufficient reasons. The appeal stands disposed of.