SUPREME COURT OF INDIA

Neel Kumar @ Anil Kumar

Vs.

State of Haryana

Crl.A.No.523 of 2010

(B.S.Chauhan Fakkir M.I.Kalifulla, JJ.)

07.05.2012

JUDGEMENT

B. S.Chauhan, J.

1. This criminal appeal has been preferred against the judgment and order dated 17.7.2009 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 268-DB of 2009, by which it has affirmed the conviction of the appellant under Sections 302/376(2)(f) and 201 of Indian Penal Code, 1860 (hereinafter referred as 'IPC) and accepted the death reference made by the Additional Sessions Judge, Yamuna Nagar at Jagadhari vide judgments and orders dated 2.3.2009/6.3.2009 and confirmed the sentence of death.

2. Facts and circumstances giving rise to this appeal are that:

> "A. Smt. Roopa Devi (PW.3) wife of Neel Kumar @ Anil Kumar appellant, had gone to her parental home at village Kesri alongwith her minor son on 26.6.2007 leaving her two children i.e. Sanjana, daughter, 4 years old and Vishal, son, 2 years old at her matrimonial home with her husband appellant. She had to return back on the same day but could not return and stayed at her parental home. On the same day, she received information by telephone at 4.00 p.m. from her brother-in-law Ramesh Kumar that her husband had committed rape upon her 4 years old daughter Sanjana. Roopa Devi (PW.3) came back to her matrimonial home on the next day i.e.27.6.2007 along with 5-7 persons including her family members and neighbours and found her daughter Sanjana, victim, in an injured condition. The Panchayat was convened to resolve the problems. However, the Panchayat could not resolve the dispute, therefore, Roopa Devi (PW.3), complainant, returned to her parental home along with accompanying persons leaving her injured daughter Sanjana and son Vishal in the custody of the appellant at her matrimonial home. Roopa Devi (PW.3) wanted to take

her injured daughter for medical help, but the appellant and his family members restricted her and even tried to snatch her 15 days old son from her.

B. Roopa Devi (PW.3) received a telephone call again from her brother-in- law Ramesh Kumar on 28.6.2007 informing her that appellant had killed her daughter Sanjana. She came there alongwith her brother Gulla (PW.4) and lodged the report to P.S. Bilaspur against the appellant for committing the rape on her 4 years old daughter Sanjana on 26.6.2007 and against her brother-in-laws and appellant for committing her murder on 27/28.6.2007 and concealing her dead body. Thus, on her complaint, a case under Sections 376(2)(f), 302, 201/34 IPC vide FIR No. 91 dated 28.6.2007 at Police Station Bilaspur (Haryana) was registered.

C. Immediately, thereafter, on the same day i.e. 28.6.2007, on the application moved by the Investigation Officer, the Deputy Commissioner, Yamuna Nagar, authorised Shri Narender Singh, SDM, Jagadhari to pass an order of exhumation of the dead body from the graveyard and on such order being passed, the dead body was recovered from the graveyard. It was photographed and an inquest report was prepared. Dead body was sent for post-mortem examination. The requisite plan of place of recovery of dead body was prepared. The Investigating Officer inspected the place of occurrence on 29.6.2007 and prepared the site plan. The appellant and his brothers were arrested on 30.6.2007. Appellant was medically examined and on his disclosure statement, the Investigating Officer recovered one blood stained bed sheet from his house and further a gunny bag containing one Pajama, blood stained piece of cloth, pant, shirt and one pillow from a rainy culvert near Majaar of Peer on Kapal Mochan Road (Exts. P-23 and P-25).

D. After filing the chargesheet, the case was committed to the Court of Sessions and on conclusion of the trial, the learned Sessions Judge vide judgment and order dated 2.3.2009 acquitted all other co- accused but convicted the appellant under Sections 302, 376(2)(f) and 201 IPC and vide order dated 6.3.2009 awarded death sentence under Section 302 IPC, life imprisonment under Section 376(2)(f) IPC and rigorous imprisonment for 3 years for the offence under Section 201 IPC.

E. Being aggrieved, the appellant preferred Criminal Appeal No.268-DB of 2009 in the High Court of Punjab and Haryana at Chandigarh, which was dismissed by the impugned judgment and order dated 17.7.2009 confirming the death sentence upon reference. Hence, this appeal.

3. Mr. Shekhar Prit Jha, learned counsel appearing for the appellant, has submitted that appellant has falsely been enroped in the offence by the complainant Roopa Devi (PW.3) as

the relationship between the husband and wife had been very strained. Even, subsequently, she filed divorce petition against the appellant. It is quite unnatural that once the complainant Roopa Devi (PW.3) had come from her parental house to her matrimonial home, then, on being informed about the rape by the appellant upon their minor daughter of 4 years of age, the complainant would go back to her parental house leaving the girl in the custody of the appellant and that too, when she was suffering from serious vaginal injuries. Since, the evidence of the complainant and her brother Gulla (PW.4) has been disbelieved in respect of four brothers of the appellant and they have been acquitted, the same evidence could not have been relied upon for convicting the appellant. When the complainant left for her parental house on 27.6.2007, the children had been in the custody of appellants brother Ramesh Kumar and, therefore, there was no possibility of the appellant committing Sanjanas murder. It is by no means a case which falls in the category of rarest of rare cases warranting the death sentence. The appeal deserves to be allowed.

4. On the contrary, Mr. Kamal Mohan Gupta, learned counsel appearing for the respondent State, has vehemently opposed the appeal contending that the appellant has committed most heinous crime, if he can commit the rape of his own 4 years old daughter, the society cannot be safeguarded from such a person. The manner in which the offence has been committed and the nature of injuries caused to the prosecutrix makes it evident that it is a rarest of rare case wherein no punishment other than death sentence could be awarded, thus, the appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. Smt. Roopa Devi (PW.3), complainant has lodged the FIR dated 28.6.2007, giving the complete version regarding both the criminal acts i.e. rape as well as murder of Sanjana. This witness also gave details of the Panchayat convened to resolve the dispute and as the same was not resolved, Roopa Devi (PW.3), complainant, went back to her parental home leaving the two minor children with appellant. She came back on receiving the information about the death of her daughter next day and lodged the complaint. On the basis of the said complaint, FIR was registered on 28.6.2007 at 3.20 p.m. and investigation ensued. There is evidence on record to show that after getting the permission on the order of Deputy Commissioner, Yamuna Nagar, the SDM concerned passed the order of exhumation of the dead body of Sanjana and it was sent for post-mortem examination. The post-mortem report suggested the following injuries on her body:

> "Lacerated wound present in vagina extending from anus to urethral opening admitting four fingers of size 6 x 4 cms. Underlying muscles and ligaments were

exposed and anus was also torned and on dissection uterus was perforated in the abdomen."

7. The prosecution case has been supported by Gulla (PW.4), brother of the complainant, and further got support from the contents of the divorce petition filed by Roopa Devi (PW.3) complainant, subsequently, wherein it had clearly been stated that the appellant had raped and murdered their 4 years old daughter Sanjana and in that respect, the case was pending in the criminal court. The recoveries had been made by Shri Suraj Bhan (PW.17), Investigating Officer on the basis of disclosure statement made voluntarily by the appellant.

8. Accused Ramesh Kumar, brother of the appellant who had also faced trial had supported the case of the prosecution to the extent that he informed Roopa Devi (PW.3), complainant at Kesri about the commission of rape by the appellant on his daughter and further deposed that on hearing such a news she had come to Bilaspur.

9. Dr. Ashwani Kashyap (PW.2) conducted autopsy on the dead body of the deceased victim and as per his testimony and the post- mortem report (Ext.P3) the cause of death was asphyxia because of throttling which was ante-mortem in nature and sufficient to cause death in ordinary course of events. He also found vaginal and anal wounds on the deceased.

10. Dr. Rajeev Mittal (PW.1) medically examined the appellant and as per his report there was no external injury on the genitals of the appellant. However, he opined that mere absence of injury on private parts of the appellant was no ground to draw an inference that he had not committed forcible sexual intercourse with the victim.

11. Mukesh Garg (PW.11), Sarpanch of village Bilaspur has stated that the S.H.O. has narrated the facts of the case to him and the exhumation of the dead body from the graveyard was done in pursuance of the order of the SDM, Jagadhari. The dead body had been buried by Neel Kumar (appellant) after committing rape and murder of the victim. Thus, this witness was associated in the investigation at the time of exhumation of the dead body.

12. Narender Singh (PW.12), SDM proved the report of ex-humation of the dead body (Ext. P11) and stated that he carried out the same on getting the direction from the Deputy Commissioner. Ish Pal Singh (PW.15), Head Constable and Joginder Singh (PW.16) have supported the prosecution case being the witnesses of arrest and recovery of incriminating material at the voluntary disclosure statement of the appellant.

13. Madan (PW.14) was examined by the prosecution as an eye-witness for the murder of Sanjana. However, he turned hostile and he did not support the case of the prosecution.

14. Suraj Bhan (PW.17), Investigating Officer deposed that he had recovered the dead body from the graveyard on the written permission of the SDM and the same was sent for the post-mortem after preparing the inquest report under Section 174 of Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) He had recorded the statement of witnesses under Section 161 Cr.P.C. He inspected the spot of occurrence on 29.6.2007, prepared the site plan and on the next day i.e. on 30.6.2007, arrested the appellant alongwith his brothers. It was at that time the appellant in interrogation made disclosure statement (Ext. P-23) and in pursuance thereof, he recovered the incriminating material as referred to hereinabove. The said articles were taken into possession vide recovery memo Ext. P-25 and sent for FSL report. Subsequently, the positive report was received.

15. The trial court found the testimonies of Roopa Devi (PW.3) complainant, Gulla (PW.4), maternal uncle of the victim, Dr. Ashwani Kashyap (PW.2), Dr. Rajiv Mittal (PW.1) fully reliable and came to the conclusion that it was quite natural that Sanjana deceased could have made oral dying declaration before her mother Roopa Devi (PW.3), complainant. However, even if it is ignored, there were various circumstances against the appellant. The court enumerated the said incriminating circumstances as under:

> "(I) The victim was in the custody of accused Neel Kumar @ Anil Kumar.
>
> (II) No explanation from the side of this accused as to how such severe injuries were suffered by the victim and how she met with death as these facts were in his special knowledge alone.
>
> (III) Non information of the crime by the accused to the police or other members of the family.
>
> (IV) Recovery of the blood stained clothes of the victim and the accused from the possession of accused on his disclosure statement.
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> (V) Presence of blood on the clothes of the accused and no explanation thereof.
>
> (VI) Abscondance of the accused after the occurrence.
>
> (VII)Strong motive against the accused for murder as charges of rape were being raised against him."

16. The learned Sessions Court further remarked that as the victim was in the custody of the appellant, there had been no explanation from the side of the accused as to how such severe injuries were suffered by the victim and how she met with death as these facts were in his special knowledge alone. The provisions of Section 106 of the Indian Evidence Act, 1872 (hereinafter called Evidence Act) were fully applicable in this case. Appellant was guardian

of the child and was duty bound to safeguard the victim. The accused had kept mum and had not given any information to any law enforcing agency or even to the mother of the victim. It comes out from the statement of Roopa Devi (PW.3) that the information about rape and murder to her was telephonically given by co-accused Ramesh Kumar. If somebody else would have committed the offence it was but natural that appellant

Neel Kumar@ Anil Kumar must have taken steps to initiate the legal action to find out the culprit. The silence on his part in spite of such grave harm to his daughter is again a very strong incriminating circumstance against him. The High Court has agreed with the findings recorded by the trial court and confirmed the death sentence after re-appreciating the evidence.

17. In our opinion, the courts below have taken a correct view so far as the application of Section 106 of the Evidence Act is concerned. This *Court in Prithipal Singh & Ors. v. State of Punjab & Anr*[1]considered the issue at length placing reliance upon its earlier judgments including *State of West Bengal v. Mir Mohammad Omar & Ors*[2]and Sahadevan @ *Sagadevan v. State rep. by Inspector of Police, Chennai*[3]and held as under:

> "That if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (See *also: Santosh Kumar Singh v. State through CBI*[4]*and Manu Sao v. State of Bihar*[5]Thus, findings recorded by the courts below in this regard stand fortified by the aforesaid judgments.

18. A shirt and pant belonging to the appellant recovered on the basis of his disclosure statement (Ext. P23) and taken into possession vide Memo Ext. P25 were sent to the FSL for examination. Report of FSL (Ext.P18) shows that shirt and pant of the appellant were stained with blood. However, no explanation has been given by the appellant as to how the blood was present on his clothes.

19. In *Pradeep Singh v. State of Rajasthan*[6]accused had not given any explanation for the presence of blood stains on his pant and shirt. He had simply pleaded false implication. Presence of blood on his clothes was found to be incriminating circumstance against him. It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 Cr.P.C. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstance against him. (See also: *Aftab Ahmad Anasari v. State of Uttaranchal*[7].

20. In view of the above, we do not find any cogent reason to take a view different from the view taken by the courts below and this leads us to the further question regarding the sentence as to whether it could be a rarest of rare case where imposition of death penalty is warranted.

21. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised.

22. After considering the issue at length, this court in *State of Maharashtra v. Goraksha Ambaji Adsul*[8]held as under:

> "Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty. (See *also: Bachan Singh v. State of Punjab*[9]*Machchi Singh & Ors. v. State of Punjab*[10]*and Devender Pal Singh v. State NCT of Delhi & Anr*[11].

23. A similar view has been taken by this Court *in Haresh Mohandas Rajput v. State of Maharashtra*[12]observing as under:

> "The rarest of the rare case comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of the rarest of the rare case. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and [pic]meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded.

24. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand. The instant case is required to be examined in the light of the aforesaid settled legal propositions. There is no reason to disbelieve the above evidence and circumstances nor there is any reason to doubt the commission of offence by the appellant and the recovery of incriminating material on his disclosure statement. The incriminating circumstances taken into consideration by the courts below can reasonably be inferred. However, so far as the sentence part is concerned, in view of the law referred to hereinabove, we are of the considered opinion that the case does not fall within the rarest of rare cases. However, considering the nature of offence, age and relationship of the victim with the appellant and gravity of injuries caused to her, appellant cannot be awarded a lenient punishment.

25. A three Judge Bench of this Court in *Swami Shraddananda @ Murali Manohar Mishra v. State of Karnataka*[13]considering the facts of the case, set aside the sentence of death penalty and awarded the life imprisonment but further explained that in order to serve the ends of justice, the appellant therein would not be released from prison till the end of his life.

26. Similarly, in *Ramraj v. State of Chattisgarh*[14]this Court while setting aside the death sentence made a direction that the appellant therein would serve minimum period of 20 years including remissions earned and would not be released on completion of 14 years imprisonment.

27. Thus, in the facts and circumstances of the case, we set aside the death sentence and award life imprisonment. The appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for pre-mature release.

28. The appeal stands disposed of.

Judgment Referred

[1]*(2012) 1 SCC 10*
[2]*AIR 2000 SC 2988*
[3]*AIR 2003 SC 215*
[4]*(2010) 9 SCC 747*
[5]*(2010) 12 SCC 310*
[6]*AIR 2004 SC 3781*
[7]*AIR 2010 SC 773*
[8]*AIR 2010 SC 773*
[9] *AIR 2011 SC 2689*
[10]*AIR 1980 SC 898*
[11]*1983] INSC 80; AIR 1983 SC 957*
[12]*AIR 2002 SC 1661*
[13]*(2011) 12 SCC 56*
[14]*AIR 2008 SC 3040*
[15]*AIR 2010 SC 420*