SUPREME COURT OF INDIA

Bhaikon @ Bakul Borah

Vs.

State of Assam

Crl.A.No.194 of 2008

(P.Sathasivam and Jagdish Singh Khehar JJ.)

03.05.2013

JUDGMENT

P.SATHASIVAM,J.

1. This appeal is filed against the judgment and order dated 26.09.2006 passed by the Division Bench of the Gauhati High Court in Criminal Death Reference No. 1 of 2006 along with Criminal Appeal No. 67 of 2006 whereby the High Court disposed of the appeal preferred by the appellant-herein by confirming his conviction and altering the sentence of death to imprisonment for life passed by the Court of Ad-hoc Additional Sessions Judge, Lakhimpur at North Lakhimpur dated 18.03.2006 in Sessions Case No. 40(NL) 03 for the offence punishable under Sections 302 and 307 of the Indian Penal Code, 1860 (in short 'IPC').

2. Brief facts:

(a) As per the prosecution case, on 29.03.2000, at around 12 noon, one Rupamoni Dutta (the deceased), aged about 22 years, r/o Mauza Talwa, Village Kakattiup, PS Lakhimpur, Assam went to the field near an embankment to attend her goats. When she did not return home, Ganesh Dutta (PW-2), father of the deceased, went in search for her. After enquiring about her daughter in the house of his elder brother, Khira Dutta, PW-2 started searching for her along the embankment. While returning, he heard a loud laughter at the farm house of the appellant-accused. Thereafter, he returned home and called for his daughter but when he found that she did not return, he again went to the embankment and shouted for her. On hearing

this, the appellant came out of the farm house and looked at him. Then, PW-2 came down the embankment by a path where he saw his daughter lying dead on the left side. There was cut injury on her chin and blood was also oozing from her body.

(b) On seeing this, he raised alarm and his son - Bhaba Kanta (PW-3) came there and they tried to lift her. By that time, other people from the village also gathered there. The appellant-accused also came and enquired. Thereafter, they brought home the dead body. On being informed, Anand Ozah, Sub-Inspector of Police, Panigaon Police Outpost, came and seized the wearing apparels of the deceased and prepared a seizure list. After holding inquest over the dead body, the same was sent for post-mortem examination.

(c) On the same day, PW-3, brother of the deceased, lodged a written complaint with the police at Panigaon police out-post. A case was registered vide G.D. Entry No. 389, at North Lakhimpur P.S. During the course of investigation, the police seized the underwear of the deceased stained with semen on that very day. The appellant-accused Bhaikon @ Bakul Bora and Balin Saikia (PW-1) were also apprehended and interrogated. (d) On 30.03.2000, at about 9.30 a.m., the police alleged to have seized a blue underwear of the appellant-accused suspected to have been stained with semen. They also seized one bed sheet, a sporting and a ‘dao’ from the farm house of the appellant-accused and prepared a seizure list. The seized underwears of both the appellant and the deceased were sent to FSL for examination. The post mortem was conducted on the dead body by Dr. Tulen Pagu (PW-9), who submitted a report stating that the victim died of asphyxia as a result of throttling. He also stated that the vaginal smear showed no spermatozoa.

(e) On 31.03.2000, the Magistrate recorded the statement of PW-1 under Section 164 of the Code of Criminal Procedure, 1973 (in short ‘the Code). After conclusion of the investigation, the police submitted charge- sheet against the appellant-accused under Sections 376 and 302 of the IPC. The case was committed to the Court of Ad-hoc Additional Session Judge, Lakhimpur and numbered as Sessions Case No. 40 (NL) of 2003. (f) The Additional Sessions Judge, Lakhimpur, by order dated 18.03.2006, convicted the appellant under Sections 376 and 302 of IPC and sentenced him to death for the offence punishable under Section 302 of IPC and

rigorous imprisonment (RI) for life for the offence punishable under Section 376 of IPC along with a fine of Rs. 10,000/-, in default, to further undergo RI for a period of 1 (one) year.

(g) Challenging the order of conviction and sentence, the appellant preferred Criminal Appeal No. 67 of 2006 and the trial Court preferred Death Reference No. 1 of 2006 before the High Court.

(h) By impugned judgment dated 26.09.2006, the High Court disposed of the appeal preferred by the appellant-accused by confirming his conviction and altering the sentence of death to imprisonment for life for the commission of offence punishable under Section 302 of IPC along with a fine of Rs.1,000/-, in default, to further undergo imprisonment for 1 (one) month and for the offence under Section 376 of IPC, the High Court sentenced him to imprisonment for 7 years.

(i) Being aggrieved, the appellant preferred this appeal by way of special leave petition before this Court and leave was granted on 18.01.2008.

3. Heard Mr. Parmanand Katara, learned senior counsel appearing for the appellant-accused and Mr. Navnit Kumar, learned counsel appearing for the respondent-State.

4. Mr. Katara, learned senior counsel for the appellant-accused, raised the following contentions:-

(i) Since the evidence of PW-1 is not reliable, the conviction and sentence based upon his sole testimony cannot be sustained. (ii) Inasmuch as the High Court has modified the death sentence into imprisonment for life, after expiry of the period of 14 years, the authorities ought to have released the appellant.

5. Mr. Navnit Kumar, learned counsel for the State, after taking us through the entire material relied on by the prosecution submitted that the evidence of PW-1, who witnessed the occurrence is reliable and is corroborated by PW-2, father of the deceased and the doctor (PW-9), who conducted the post mortem. He also submitted that inasmuch as the sentence of death was commuted to imprisonment for life, there cannot be automatic release after the expiry of the period of 14 years as claimed by the appellant-accused.

6. We have carefully considered the rival contentions and perused all the relevant materials.

7. Let us deal with the first contention raised by learned senior counsel for the appellant. It is not in dispute that the appellant was charged for the offence punishable under Sections 376 and 302 of the IPC. In other words, according to the prosecution, the appellant along with another person committed rape and, thereafter, murdered the deceased. The entire prosecution case rests on the solitary evidence of the eye-witness PW-1. According to PW-1, the accused-appellant engaged him as a labourer in his farm house and all along he was working under compulsion. Regarding the incident, he narrated that the incident took place about 4 years ago. He further deposed that on the date of occurrence, he saw the appellant- accused and his friend following the deceased and on seeing the same, he also followed them and saw that the appellant-accused and his companion behaving indecently with the girl, committed rape on her and, thereafter, the appellant-accused assaulted the girl by throttling her neck. He further noticed that because of the acts of the appellant-accused, the girl died on the spot and he also noticed that the appellant-accused along with the accomplice dragged her to the nearby place surrounded by shrubs and bushes and left the body there. Thereafter, the appellant-accused returned home and PW-1 went to the wheat field in order to show that he was busy in attending the goats. He also explained that since both them were having 'Khukri' in their hands, he did not raise alarm out of fear. Though PW-1 remained silent, after 2 hours, when PW-2, father of the victim, raised a commotion at the place of occurrence, the appellant-accused also came there and saw the dead body of the girl. The conduct of PW-1, in view of the above, cannot be doubted because of refusal on his part to open his mouth in the presence of his master. Even the trial Court found him trustworthy that he had nothing to falsely implicate his master and rightly held him to be a reliable witness. Further, the evidence of PW-1 clearly shows that he was forced to work in the house of the appellant-accused. The fact that he was working in the house of the appellant-accused was admitted by him in his statement under Section 313 of the Code. There is no reason to disbelieve the version of PW-1, who is an independent eye-witness to the incident.

8. The next witness relied on by the prosecution is Ganesh Dutta–father of the victim who was examined as PW-2. In his evidence, he explained that his daughter went to the field to attend the goats but she did not return. He further narrated that when he went in search of her, he found her lying dead with injury on the neck.

9. The prosecution has also relied on the evidence of two brothers of the deceased viz., Bhaba Kanta Dutta as PW-3 and Mahendra Dutta as PW-4 who also corroborated the statement made by PW-2. Apart from the above evidence, the co-villagers, viz., PWs 7 and 8 were also examined who deposed that they had seen the dead body of the deceased.

10. The other evidence relied on by the prosecution is of the doctor (PW- 9) who conducted the post mortem. He noted the following injuries:-

> " A dead body of an average built, female, rigor mortis present.
>
> 1. A cut injury over lower part of the chin, size 3"x1"x1/2".
>
> 2. Lower part of the mandibular bone was cut at the side of injury size 2"x1/4"x1/4".
>
> 3. Bruise mark over middle part of the front of the right side of the back size 11/2"x1".
>
> 4. Bruise mark in the middle of the front of the left side of the neck size 21/2"x11/2".
>
> 5. Trachea fractured at the level of the bruise marks.
>
> 6. Multiple bruises on left side of the neck overlying each other.
>
> Heart was healthy containing dark fluid blood, left side empty.
>
> Above injuries (in No. 1) were ante mortem in nature.
>
> Injury Nos. 1 and 2 were caused by sharp cutting weapon.
>
> Injury Nos. 3, 4, 5 and 6 caused by blunt weapon. Vaginal smear show no spermatozoa. Smear was taken immediately and the pathologist examined the sample/smear on 01.04.2000. Uterus non-gravid. (No sign of pregnancy).
>
> In my opinion, the person died of asphyxia as result of throttling."

PW-9, in his evidence has stated that no mark of sexual violence was found on the genital organs of the body.

11. Learned senior counsel for the appellant, by drawing our attention to the remarks of PW-9 that there was no mark of injury on the genital organs of the body of the deceased contended that conviction under Section 376 of IPC is unsustainable. In the light of overwhelming materials placed by the prosecution, we are unable to accept the said contention. As rightly observed by the trial Court and the High Court, there is no reason to disbelieve the version of PW-1 and the corroborative evidence of PW-2, father of the deceased. In the same way, the injuries noted by PW-9 also support the prosecution story though he has noted that there was no sign of injury on the genital organs of the deceased.

12. Taking note of oral and documentary evidence led in by the prosecution, particularly, the evidence of PWs 1, 2 and 9 as well as the statement of co-villagers, we agree with the conclusion arrived at by the trial Court and affirmed by the High Court regarding the death of Rupamoni Dutta and reject the claim made by learned senior counsel for the appellant- accused.

13. Coming to the second contention, it is not in dispute that considering the heinous crime of committing rape and murder and throwing the dead body in a place surrounded by bushes and shrubs, the trial Court has awarded the sentence of death, however, the High Court, taking note of the fact that the accused is a young man of 33 years of age and also finding that the case does not come under the purview of the "rarest of rare" category, declined to confirm the sentence of death and altered the same to the imprisonment for life while upholding the conviction under both the counts.

14. Mr. Katara, learned senior counsel for the appellant-accused, by taking us through various sections of the Penal Code viz., Sections 121, 121A, 122, 128, 131, 194, 224 and 238 and the sentences which the Court of Magistrates, Sessions Judges and High Courts may pass and also some of the sections which mention life imprisonment as maximum punishment or imprisonment of either description for a term which may extend to 10 years or lesser than 10 years contended that when statute provides imprisonment for life for an offence and in alternative imprisonment for a term which may extend to 10 years, in that case, incarceration of 14 years should be held sufficient and the appellant is entitled to be released on that ground. After hearing his arguments patiently and noting the same, we are of the view that the case on hand relates to commuting the sentence of death into

imprisonment for life and all the contentions raised by learned senior counsel relating to the sentence are unacceptable or irrelevant.

15. This Court, in a series of decisions has held that life imprisonment means imprisonment for whole of life subject to the remission power granted under Articles 72 and 161 of the Constitution of India. [Vide Life Convict @ Khoka Prasanta Sen vs. B.K. Srivastava & Ors. (2013) 3 SCC 425, Mohinder Singh vs. State of Punjab, (2013) 3 SCC 294, Sangeet and Anr. vs. State of Haryana (2013) 2 SCC 452, Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat (2011) 2 SCC 764, Chhote Lal vs. State of Madhya Pradesh (2011) 8 SCR 239, Mulla and Another vs. State of Uttar Pradesh (2010) 3 SCC 508, Maru Ram vs. Union of India & Ors. (1981) 1 SCC 107, State of Madhya Pradesh vs. Ratan Singh & Others (1976) 3 SCC 470 andGopal Vinayak Godse vs. State of Maharashtra AIR 1961 SC 600].

16. In view of the clear decisions over decades, the argument of learned senior counsel for the appellant-accused is unsustainable, at the same time, we are not restricting the power of executive as provided in the Constitution of India. For adequate reasons, it is for the said authorities to exercise their power in an appropriate case.

17. It is also relevant to point out that when death sentence is commuted to imprisonment for life by the Appellate Court, the concerned Government is permitted to exercise its executive power of remission cautiously, taking note of the gravity of the offence. [Vide Swami Shraddananda (2) @ Murli Manohar Mishra vs. State of Karnataka (2008) 13 SCC 767 and Sahib Hussain @ Sahib Jan vs. State of Rajasthan 2013 (6) Scale 219.

18. In view of the categorical and consistent decisions of this Court on the point, we are unable to accept the argument of learned senior counsel for the appellant-accused.

19. Learned senior counsel for the appellant also placed reliance on a decision of this Court in Writ Petition (Crl.) No. 34 of 2009 dated 07.09.2009 wherein the order passed by the Governor of the State of Uttar Pradesh for release on remission of the petitioners therein was set aside by a Division Bench of the High Court of Allahabad and the same was challenged before this Court by way of a writ petition. It was also pointed in the above said writ petition that a number of convicts who had undergone actual sentence of 14 years were directed to be released forthwith

by this Court in SLP (Crl.) No. 553 of 2006 dated 09.05.2006. This Court, following the same, issued a similar order in the said writ petition for the release of the petitioners therein. As stated earlier, the case on hand relates to commuting the sentence of death into imprisonment for life and we have already preserved the right of the executive for ordering remission taking note of the gravity of the offence. Hence, the said decision is not helpful to the facts of this case and the contention of learned senior counsel is liable to be rejected.

20. In the light of the above discussion, we do not find any valid ground for interference, on the other hand, we are in entire agreement with the conclusion arrived at by the High Court, consequently, the appeal is dismissed.