

# SUPREME COURT OF INDIA

Akshay Kumar Singh

Vs.

State (NCT of Delhi)

Crl.A.No.609-610 of 2017

(R.Banumathi,J., Ashok Bhushan and A.S.Bhopana,JJ.,)

18.12.2019

## JUDGMENT

### **R.Banumathi,J.,**

1. This Review Petition has been preferred by the petitioner- accused Akshay Kumar Singh who was the cleaner of the bus to review the judgment dated 05.05.2017 passed by this Court in Criminal Appeal Nos.609-610 of 2017 in and by which this Court confirmed the conviction and death penalty imposed upon the petitioner by the trial court as well as by the High Court.

2. In the evening of 16.12.2012, the prosecutrix (since deceased) had gone for a movie with her friend, PW-1. At about 08:45 pm, both the prosecutrix and PW-1 left the movie theatre and reached Munirka bus stand and they boarded the bus bearing registration No. DL-1PC-0149. This bus was being driven by accused Ram Singh (since deceased) and the petitioner-Akshay Kumar Singh @ Thakur was the helper thereof. The accused misbehaved with the prosecutrix and have committed gang rape of the prosecutrix in the moving bus. They also committed unnatural offence and inserted iron rod in the private parts of the prosecutrix. The accused persons had beaten up PW-1 with iron rods and his clothes were torn off. The accused also took away all the belongings of the prosecutrix and PW-1 and thereafter, threw the prosecutrix and PW-1 in a naked/semi naked condition from the moving bus. The prosecutrix was treated at Safdarjung Hospital, Delhi where her three dying declarations were recorded. Since the condition of the prosecutrix became critical, she was shifted for further treatment on 27.12.2012 to Mt. Elizabeth Hospital, Singapore where, she died on 29.12.2012.

3. The trial court held that the complicity and guilt of the accused were proved and convicted the petitioner and other accused under Sections 120-B IPC, 376 (2)(g) read with Section 120-B IPC, 377 read with Section 120-B IPC, 365 and 366 read with Section 120-B IPC, 395 read with Section 120-B IPC, 397 read with Section 120-B IPC, 302 read with Section 120-B IPC, 307 read with Section 120-B IPC, 412 and 201 read with Section 120-B IPC and inter alia imposed death penalty upon them. Death penalty and other sentence of

imprisonment imposed upon them was confirmed by the High Court. The accused had filed Criminal Appeal Nos.609-610 of 2017 before this Court.

4. Criminal appeal filed by the petitioner had earlier been dismissed by this Court vide its judgment dated 05.05.2017 in *Mukesh and another v. State (NCT of Delhi) and others*<sup>1</sup> on the basis of the following evidence which firmly established the presence of the petitioner at the scene of the incident and his involvement in the commission of rape on the prosecutrix :-

(i) evidence of PW-1/injured eye-witness who spoke about the occurrence in the bus; PW-1 identified the petitioner in the TIP conducted on 26.12.2012 as one of the persons who came out of the driver's cabin from the bus and started abusing PW-1 and later, took the prosecutrix to the back side of the bus and raped her;

(ii) three dying declarations of the prosecutrix of which, in the second dying declaration (ExPW27/A), prosecutrix stated the incident in detail and that the accused persons were calling "Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay and in the third dying declaration, the prosecutrix wrote the names of the accused "Ram Singh, Mukesh, Vinay, Akshay, Vipin, Raju" including petitioner-Akshay Kumar Singh and other accused;

(iii) evidence of PW-81-Dinesh Yadav, owner of the bus in which he has stated that accused Ram Singh was the driver and petitioner was the helper in the bus in which the incident occurred;

(iv) Ex.PW71/C, report of PW-71-Dr. Ashith B. Acharaya who opined that one bite mark found on the prosecutrix could have been possibly caused by the petitioner; three other bite marks were caused by accused Ram Singh;

(v) DNA evidence - DNA profile generated from the blood-stained jeans and banian of the petitioner recovered at the behest of petitioner matched with the DNA profile of the prosecutrix; another set of DNA profile generated from jeans pant of the petitioner matched with the DNA profile of PW-1 and DNA profile generated from breast swab of the victim which was found consistent with the DNA profile of the blood of the petitioner;

(vi) recovery of metro card and silver ring of PW-1 recovered at the behest of the petitioner and identified by PW-1.

5. We have heard Mr. A.P. Singh, learned counsel appearing for the petitioner-accused No.3. We have also heard Mr. Tushar Mehta, learned Solicitor General appearing for NCT of Delhi assisted by Ms. Supriya Juneja, learned counsel.

6. The learned counsel Mr. A.P. Singh had taken us through the various grounds urged in the review petition and prayed for review of the judgment. The learned Solicitor General

Mr. Tushar Mehta submitted that the evidence adduced by the prosecution and the defence plea has been considered threadbare both by the trial court, High Court and also by this Court. The learned Solicitor General submitted that upon appreciation of evidence, the High Court and the Supreme Court upheld the findings as to the guilt of the accused and also the sentence. The learned Solicitor General also submitted that the very same grounds were raised in the review petition by the co-accused and the same was dismissed by this Court vide judgments in *Mukesh v. State (NCT of Delhi)*<sup>2</sup> and *Vinay Sharma and another v. State (NCT of Delhi) and others*<sup>3</sup>.

7. In this review petition, the petitioner prays for review of the judgment dated 05.05.2017. In the review petition before us, the petitioner has again sought to assail the merits of the prosecution case and the findings rendered thereon which cannot be permitted.

8. It is no longer *res integra* that scope of review is limited and review cannot be entertained except in cases of error apparent on the face of the record. Article 137 of the Constitution of India empowers the Supreme Court to review any judgment pronounced or made, subject, of course, to the provisions of any law made by the Parliament or any rule made under Article 145 of the Constitution of India. Order XLVII Rule 1 of Supreme Court Rules, 2013 dealing with review reads as follows:-

“1. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.”

As per the Supreme Court Rules, review in the criminal proceedings is permissible only on the ground of error apparent on the face of the record.

9. The jurisdiction of this Court under Article 137 of the Constitution of India has been clearly stated in *Sow Chandra Kante and Another v. Sheikh Habib*<sup>4</sup>, wherein this Court held as under:-

“A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition through different counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient.”

10. Review is a not a rehearing of the appeal over again. In a review petition, it is not for the Court to re-appreciate the evidence and reach a different conclusion. The scope of review jurisdiction has been elaborately considered by this Court in number of cases and the well settled principles have been reiterated time and again. In *Kamlesh Verma v. Mayawati and Others*<sup>5</sup>, the Supreme Court held as under:-

“17. In a review petition, it is not open to the Court to reappreciate the evidence and

reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. This Court in *Kerala SEB v. Hitech Electrothermics & Hydropower Ltd*<sup>6</sup>. held as under: (SCC p. 656, para 10)

“10. ... In a review petition it is not open to this Court to reappraise the evidence and reach a different conclusion, even if that is possible. The learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise.”

11. Considering the scope of review under Article 137 of the Constitution of India and observing that normally in a criminal proceeding, review applications cannot be entertained except on the ground of error apparent on the face of the record, in *Vikram Singh alias Vicky Walia and Another v. State of Punjab and Another*<sup>7</sup>, the Supreme Court held as under:-

“23. In view of the above, it is clear that scope, ambit and parameters of review jurisdiction are well defined. Normally in a criminal proceeding, review applications cannot be entertained except on the ground of error apparent on the face of the record. Further, the power given to this Court under Article 137 is wider and in an appropriate case can be exercised to mitigate a manifest injustice. By review application an applicant cannot be allowed to reargue the appeal on the grounds which were urged at the time of the hearing of the criminal appeal. Even if the applicant succeeds in establishing that there may be another view possible on the conviction or sentence of the accused that is not a sufficient ground for review. This Court shall exercise its jurisdiction to review only when a glaring omission or patent mistake has crept in the earlier decision due to judicial fallibility. There has to be an error apparent on the face of the record leading to miscarriage of justice to exercise the review jurisdiction under Article 137 read with Order 40 Rule 1. There has to be a material error manifest on the face of the record with results in the miscarriage of justice.”

12. A review of the judgment is permitted only when it is shown that judgment suffers from error apparent on the face of the judgment. In *P.N Iswara Iyer and Others v.*

*Registrar, Supreme Court of India*<sup>8</sup>, while considering Order XL Rule 1 of the Supreme Court Rules, 1996, the Constitution Bench of the Supreme Court observed that Order XL Rule 1 affords the wider set of grounds for review of orders in civil proceedings, but limits the grounds vis-a-vis criminal proceedings to errors apparent on the face of the judgment.

13. Applying the above parameters of the review jurisdiction, it is to be seen whether the petitioner has made out any ground indicating error apparent on the face of the record warranting review of our judgment dated 05.05.2017.

14. Even at the outset, it is to be pointed out that the grounds raised by the petitioner-accused in this review petition are identical to that of the grounds raised by the co-accused in their review petitions. Those grounds urged by the co-accused in their review petitions were considered and rejected by this Court in *Mukesh v. State (NCT of Delhi*<sup>(Supra)</sup>) and *Vinay Sharma and another v. State (NCT of Delhi) and others*<sup>(Supra)</sup>.

15. At this juncture, we would like to point out two grounds raised by the petitioner in this review petition viz., (i) futility of awarding death sentence in Kalyug, where a person is no better than a dead body; and (ii) that the level of pollution in Delhi NCR is so great that life is short anyhow and everyone is aware of what is happening in Delhi NCR in this regard and while so, there is no reason why death penalty should be awarded. According to the petitioner, in view of the above, he should be spared of the death sentence. We find it unfortunate that such grounds have been raised in the matter as serious as the present case.

16. The petitioner has also raised the plea that death penalty is the ultimate denial of human rights and that it violates the right to life; it also goes against the principle of non-violence. In the review petition, the petitioner has put forth the general case against the capital punishment by stating that only the poor and downtrodden are more likely to be sentenced with death sentence. Such general contentions put forth against the capital punishment cannot be gone into in this review petition.

17. The petitioner has raised the plea as to the lack of professional skills of the investigating agency and the need for an unbiased investigation. In the petition, general allegations have been made against the investigating agency alleging extortion of confession and then create evidence to falsely implicate the accused. The grounds raised in the petition alleging improper investigation and manipulation of evidence are too general and not specific. It is to be pointed out that each and every point raised by the petitioner-accused assailing the course of investigation was well considered by the trial court which we have gone through at the time of hearing of the criminal appeals. The same points cannot be urged again and again.

18. So far as the dying declaration is concerned, the petitioner has raised the same contention which was raised earlier that is, according to the petitioner, only the first dying declaration (Ex.PW49/A) recorded by PW-49-Dr. Rashmi Ahuja where the prosecutrix has neither named nor mentioned the name of any of the accused persons, has to be relied upon. Contention of the petitioner is that the second dying declaration (Ex.PW27/A)

recorded by PW-24-Dr. Usha Chaturvedi, SDM on 21.12.2012 could not have been recorded as the victim was under the life support and she could not have given four pages of dying declaration. Further contention of the petitioner is that the third dying declaration recorded by PW-30-Pawan Kumar, Metropolitan Magistrate where the victim has named the petitioner and other accused was a tutored version and cannot be relied upon.

19. Mr. A.P. Singh, learned counsel appearing for the petitioner- accused has contended that investigation in the present case is flawed and unreliable. It was submitted that insofar as the recording of the statement of witnesses under Section 161 Cr.P.C., manner of arrest of the accused, conduct of test identification parade are doubtful. Various contentions assailing the course of investigation have been raised both before the trial court as well as before the High Court and this Court which have been considered threadbare and were rejected. We do not find any merit in the contention of the learned counsel for the petitioner assailing the investigation.

20. The learned counsel submitted that because of the media pressure, the petitioner and other accused have been falsely implicated. Taking us through the averments made in para 3(f) of the review petition, the learned counsel submitted that PW-1- Awninder Pratap Singh had taken heavy amount as bribe and this has been highlighted in some of the news channels which affect the credibility of the evidence of PW-1. It was submitted that in this regard, Heera Lal Gupta, father of co-accused Pawan Gupta had filed a complaint vide Diary No.26A on 02.11.2019 before SHO, PS R.K. Puram, Sector-12, New Delhi and also before Deputy Commissioner of Police, Vasant Vihar. The averments made in para 3(f) of the review petition are subsequent events unsupported by any material. In a criminal case, culpability or otherwise of the accused are based upon appreciation of evidence adduced by the prosecution and also the evidence adduced by the defence. The materials or the news emerging in the media and press as also the news channels cannot be taken note of in arriving at a conclusion on the culpability of the accused or to test credibility of the witness. Such events cannot be urged as a ground for review.

21. The learned counsel appearing for the petitioner-accused has taken us through the averments made in para 3(g) of the review petition and also the clippings of book titled "Black Warrant" written by Sunil Gupta, a former law officer of Central Jail, Tihar, Delhi who served long time in Tihar jail. The learned counsel submitted that in the book written by the above officer, the officer has expressed his opinion that Ram Singh, accused No.1 was murdered in Tihar jail on 11.03.2013. Here again, the opinion of the said former law officer Sunil Gupta is only his opinion which is not supported by any material. If the former law officer had any doubt regarding death of Ram Singh, the said officer could have offered himself to appear as a defence witness or he could have filed an affidavit before any of the courts, either trial court or High Court or before the Supreme Court. The opinion of the said officer Sunil Gupta which is not supported by any material, cannot be a ground for reviewing our judgment.

22. As pointed out in the judgment, there were three dying declarations recorded from the prosecutrix:-

(i) in the first dying declaration (Ex.PW-49/A) recorded by Dr. Rashmi Ahuja (PW-49) on 16.12.2012 at 11.15 pm, the prosecutrix has stated that more than two men committed rape on her after which, she does not remember the sexual intercourse; the prosecutrix also stated that she was subjected to unnatural sex and she was bitten over her lips, cheeks and breast;

(ii) in the second dying declaration (Ex.PW-27/A) recorded by PW-27- Usha Chaturvedi, SDM on 21.12.2012 at 09.00 pm, the prosecutrix has narrated the entire incident in great detail, specifying the role of each of the accused, rape committed by number of persons, insertion of iron rod in her private parts, description of the bus, robbery committed and throwing of both the victims out of the moving bus in naked condition. Prosecutrix also stated that the accused were calling each other “Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay”; and

(iii) in the third dying declaration (Ex.PW-30/D) recorded on 25.12.2012 at 1.00 p.m by PW-30-Pawan Kumar, Metropolitan Magistrate by putting multiple choice questions to the victim and getting answers by gestures and writing. While giving third dying declaration, prosecutrix revealed the names of the accused by writing in her own handwriting viz. “Ram Singh, Mukesh, Vinay, Akshay, Vipin, Raju”.

This Court considered the three dying declarations in the light of the well-settled principles and found that the multiple dying declarations inspire the confidence of the Court and are credible. The above contentions were earlier raised and were considered by this Court in paras (148) to (164), (186) to (192) and (395) to (417) of the judgment and rejected. While so, the petitioner cannot raise the same plea.

23. So far as the plea of alibi, contention of the petitioner is that he was not present in Delhi on the night of 16.12.2012 and that he accompanied his sister-in-law Sarita Devi (DW-15) along with her son Kundan. He boarded Mahabodhi Express on 15.12.2012 and left for Aurangabad, Bihar from Platform No.9, New Delhi Railway Station. Contention of the petitioner that the evidence adduced by the petitioner to prove his presence in the Karmalahang, P.S. Thandva, District-Aurangabad, that is the evidence of DW-1, local auto driver, DW-12-Sarju Singh who has spoken about the petitioner reaching his house in his native village on 16.12.2012 and DW-13- Rajmohan, father-in-law of petitioner and DW-14-Punita Devi, wife of petitioner who have deposed that the petitioner came to their house in the native village Karmalahang along with Sarita Devi (DW-15), would show that the petitioner was not present in Delhi on the night of 16.12.2012. It was submitted that though the defence has showed booked ticket details of Mahabodhi Express from New Delhi to Aurangabad on 15.12.2012 to prove the departure of the petitioner, this aspect was not appreciated by the court and the petitioner’s plea of alibi was erroneously turned down.

24. To substantiate the plea of alibi, the petitioner has examined DW-11-Chavinder, Auto Driver who has taken the petitioner and his family members from Anugrah Narayan Railway Station, District- Aurangabad, Bihar to his native village, Karmalahang. DW-12-

Sarju Singh, DW-13-Rajmohan, father-in-law of petitioner and DW-14-wife of the petitioner have spoken about the presence of petitioner in the village. DW-15-Sister-in-law of petitioner whom the petitioner claims had accompanied her on 15.12.2012. Considering the evidence of DWs 12, 14 and 15 in Para (256), this Court has observed that DWs 12, 14 and 15 are all relatives of accused Akshay Kumar Singh alias Thakur and that as observed by both the courts, they tried to wriggle the petitioner out of the messy situation as is the natural instinct of the family members.

25. The plea of alibi taken by the petitioner-accused and the evidence adduced by the petitioner has been well-considered by this Court in Paras (247) to (269). Upon appreciation of evidence, this Court affirmed the findings of the trial court and the High Court rejecting the plea of alibi and held that plea of alibi taken by the petitioner is an afterthought. We do not find any error apparent on the face of the record in consideration of evidence and rejection of the plea of alibi. The appreciation of evidence in rejecting the plea of alibi does not suffer from any error apparent on the face of the record and this cannot be urged as a ground for review.

26. The next contention urged by the petitioner is the use of iron rod and absence of injury to the uterus on the alleged insertion of the iron rod in the private parts of the victim. Elaborate submissions were made on the alleged use of iron rod and the same was rejected by well-considered reasonings in Paras (193) to (209) and (413) to (422) and the said findings thereon supported by the opinion of the medical expert do not suffer from any error.

27. The other contentions viz. (i) CCTV footage of Hotel Delhi Airport was not properly examined; (ii) the bus bearing registration No.DL-1PC-0149 was falsely implicated; (iii) PW-81-owner of the bus was in judicial custody for six months before his examination in the court and he was so detained in custody only to bring pressure upon him to depose in favour of the prosecution; and (iv) the petitioner-accused was photographed earlier and the same was shown to PW-1 to enable him to identify the petitioner-accused in the test identification parade. These contentions and other contentions assailing the case of the prosecution were all raised earlier and upon consideration of evidence, the same were rejected by this Court. The review petition is not for re-hearing of the appeal on reappraisal of the evidence over and over again. A party is not entitled to seek review of the judgment merely for the purpose of rehearing of the appeal and a fresh decision.

28. On the question of award of death sentence, the Court has considered the aggravating and mitigating circumstances. In Paras (322) to (368) and (511) to (518) of the judgment, while considering the question of death sentence, opportunity was granted to the petitioner accused and also other accused to file their affidavits as to their family background, criminal antecedents, possibility of reformation and such other relevant factors. The petitioner accused through his counsel, Mr. A.P. Singh has filed an affidavit stating his family background and stating that he has no criminal antecedent and that his case is not falling under “the rarest of rare cases” to affirm the death sentence, which contention was considered and rejected. The aggravating and mitigating circumstance and the affidavit

filed by the petitioner was considered in detail in Para (324). The contention urged by the counsel for the parties and learned amicus curiae were considered in paras (327) to (368) and (511) to (518) of the judgment and the court observed that the background and family circumstances cannot be taken as the mitigating circumstances. Considering the manner in which the offence was committed, in the judgment dated 05.05.2017, this Court held that the case is falling within “the rarest of rare cases”.

We do not find that these findings suffer from any error apparent on the face of the record. The mitigating circumstances elaborated upon by the defence by way of highlighting the comparatively young age of the convicts, their socio-economic background, their unblemished antecedents and their chances of reformation, fade into insignificance. In light of the aggravating circumstances and considering that the case falls within the category of “rarest of rare cases”, the death penalty is confirmed.

29. Insofar as the submission of learned counsel for the petitioner-accused that the death penalty has been abolished in UK and several other Latin American countries and Australian States, the same contentions were raised by Mr. A.P. Singh in the earlier review petitions and the same were dismissed. [*vide Mukesh v. State (NCT of Delhi)(Supra) and Vinay Sharma and another v. State (NCT of Delhi) and others (2018) 8 SCC 186(Supra)*]

30. Dismissal of the review petitions filed by the co-accused: The review petition filed by the co-accused were dismissed as having no merit, on 09.07.2018 *Mukesh v. State (NCT of Delhi) (Supra)*. The court observed that the submissions urged by the other accused were already considered while delivering the judgment and were rejected. The same points were earlier raised in the review petitions filed by other co-accused. The grounds raised in the present review petition are almost repetition of the arguments raised in the earlier review petitions which were rejected and in our view, cannot be raised repeatedly.

31. We do not find any error apparent on the face of the record in the appreciation of evidence or the findings of the judgment dated 05.05.2017. None of the grounds raised in the review petition call for review of the judgment dated 05.05.2017. The review petition is dismissed.

Judgment Referred.

<sup>1</sup>(2017) 6 SCC 0001

<sup>2</sup>(2018) 8 SCC 0149

<sup>3</sup>(2018) 8 SCC 0186

<sup>4</sup>(1975) 1 SCC 0674

<sup>5</sup>(2013) 8 SCC 0320

<sup>6</sup>(2005) 6 SCC 0654

<sup>7</sup>(2017) 8 SCC 0518

<sup>8</sup>(1980) 4 SCC 0680