

Kalu Khan Vs. State

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Court : Rajasthan Jodhpur

Decided On : Apr-09-2014

Appellant : Kalu Khan

Respondent : State

Judgement :

-1- IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

State of Rajasthan Vs. Kalu Khan (1) D.B.Criminal Murder Reference No.02/2013
Kalu Khan Vs. State of Rajasthan (2) D.B.Criminal Jail Appeal No.293/2013
Against the judgment dated 7th March, 2013 passed by Special Judge, Scheduled Caste/ Scheduled Tribes (Prevention of Atrocities) Act Cases, Sriganganagar, in Sessions Case No.53/2012. Date of Judgment ::

9. h April, 2014 P R E S E N T HON'BLE MR.JUSTICE GOVIND MATHUR
HON'BLE MR.JUSTICE ATUL KUMAR JAIN Mr. Kalu Ram Bhati, Amicus Curiae,
for accused Kalu Khan. Mr. Vishnu Kachhawaha, Public Prosecutor, for the State.
Mr. Trilok Joshi, for the complainant. BY THE COURT : (PER HON'BLE
MATHUR,J.) The felony of inhuman rape and brutal murder of a girl of four years
has brought the accused appellant on the gallows and execution of that is awaiting
our confirmation. Life and death are divine act and this divine authority has been
delegated to the Courts by law in exceptional circumstances. The authority

delegated is very difficult -2- and requires all cautions in its exercise. The first and foremost effort of a Court should be to continue the life till its arrival at natural end and the delegated divine authority should be exercised only after arriving at a conclusion about non-existence of any other option except awarding judicial death. The non-availability of other option than to award death should be shown by special reasons for death sentence. as required under sub-section (3) of Section 354 of Code of Criminal Procedure, 1973. The man before us is the accused appellant Kalu Khan, a middle aged man of 48 years, who has been convicted for the offences punishable under Sections 363, 364, 376(2) (f), 302 and 201 Indian Penal Code and awarded death sentence in addition to the sentence of imprisonment for the offences other than Section 302 Indian Penal Code by learned Special Judge, Scheduled Caste/Scheduled Tribes (Prevention of Atrocities) Act Cases, Sriganaganagar under the judgment dated 7th March, 2013. The special reasons given by the trial court for recording death sentence are - (1)- the accused, a 'Tantrik' was residing in neighbourhood of the parents of victim, a baby of four years. Other residents of the vicinity were having faith on him being a mature middle aged person, but he caused injury to that; (2)- the accused misusing the faith and confidence, brought the victim baby to his residence with an allurements of giving berries to her; -3- (3)- the accused committed heinous crime of rape with small girl that caused serious injuries to her corpus; (4)- the accused then killed the girl by causing injury on her neck with the aid of sharp edged weapon and this act is not only gruesome but against the human values; and (5)- no person of little human prudence could have imagine that a mature man will cause such inhuman and brutal act with a small girl residing in neighbourhood. The crime committed by the accused is an irreparable injury to the human values and that carries it to the category of rarest of rare. case. An appeal preferred by the accused as per Section 383 of Code of Criminal Procedure, 1973 is also before us, wherein this Court is availing assistance of Shri Kalu Ram Bhati as Amicus Curiae to advance case of the accused appellant. The facts necessary for adjudication of the appeal as well as death reference are that Shri Devilal Meghwal (PW-1), a member of Scheduled Caste, submitted a written report (Ex.P/1) to the Station House Officer, Police Station Lalgah Jatan on 4th May, 2012 at 01:00 PM with assertion that he is resident of 20 S.P.M. (Ganeshgarh). On

3rd May, 2012, at about 08:00 AM, his grand-daughter Baby N., aged four years, was at the residence of his younger brother Kashiram, residing in neighbourhood. The girl was missing since 08:30 AM while on way from the house of Kashiram to the house of Devilal -4- Meghwal. Intense search of her was made in entire village, but of no consequence. At about 10:00 on 4th May, 2012, while making search, it was noticed that Jumman Khan son of accused Kalu Khan was burying something in a pit in the court yard of his residence. On asking, he failed to give any satisfactory answer, thus, little digging was made at the place and from there dead body of missing girl was found. Trembled Jumman disclosed that his father Kalu Khan brought Baby N. to his house by alluring her to give berries. Kalu Khan then prompted Jumman to commit rape with the girl and after commission of that Kalu Khan also committed rape with her. The girl then was killed as her physical condition was deteriorating. An apprehension was disclosed that rape and killing would have been committed as a part of some Tantrik. process. On basis of the written report (Ex.P/1) a case was registered, inquest report was prepared, certain articles were recovered from the spot and the dead body was subjected to an autopsy. As per the autopsy report (Ex.P/16) the cause of death of Baby N. was extensive injuries at neck and other vital parts of the body. The vagina of the girl was swollen, highly wounded and was full of blood and other fluid. Accused Kalu Khan and Jumman were arrested during the course of investigation and at the instance of Kalu Khan a 'kassi', the weapon of offence, was recovered. A blood stained shirt of Kalu Khan was also recovered. All these articles were sent to the Forensic Science Laboratory for their serological and chemical examination. As per -5- report of the Forensic Science Laboratory (Ex.P/56) the blood stains available on the clothes of the victim girl, 'kassi' and shirt of the accused were of A. blood group. After completion of the investigation a police report was filed before the competent court and the case was committed to the court of learned Special Judge, Scheduled Caste/Scheduled Tribes (Prevention of Atrocities) Act Cases, Sriganaganagar. The court after hearing the accused framed charges against him for commission of the offences punishable under Sections 363, 364, 376(2)(f), 302, 201 Indian Penal Code and for Section 3(2)(V) and 3(2) (VI) of the Scheduled Caste/Scheduled Tribes (Prevention of Atrocities) Act, 1985. On denial of the charges, trial commenced as desired. Relevant to mention here that the case of

other accused Jumman Khan was referred for adjudication to the Juvenile Justice Board, he being a juvenile. The prosecution supported its case with the aid of 15 witnesses, 58 documents and 9 articles. An opportunity was given to the accused to explain adverse and incriminating circumstances against him in the prosecution evidence and while availing that he in general termed the entire evidence false except the fact about his arrest and potency test conducted as per document Ex.P/43. A document was exhibited as Ex.D/1 which is a statement made by witness Indraj under Section 161 Code of Criminal Procedure before the investigating agency during the course of investigation. -6- The trial court after examining the entire evidence available on record and considering the submissions of learned Public Prosecutor and counsel for the accused, held the accused guilty for commission of crime for the offences punishable under Sections 363, 364, 376(2)(f), 302 and 201 Indian Penal Code. An order of acquittal was recorded for the offences punishable under Sections 3(2)(V) and 3(2)(VI) of the Scheduled Caste/Scheduled Tribes (Prevention of Atrocities) Act, 1985. The trial court sentenced the accused to undergo life term imprisonment for the offence punishable under Section 364 Indian Penal Code with a default stipulation, to undergo seven years rigorous imprisonment with default stipulation for the offence punishable under Section 363 Indian Penal Code, to undergo life term imprisonment with default stipulation for the offence punishable under Section 376(2)(f) Indian Penal Code, to undergo seven years rigorous imprisonment with default stipulation for the offence punishable under Section 201 Indian Penal Code and also awarded death sentence for causing crime under Section 302 Indian Penal Code. The proceedings have been submitted to this Court for confirmation of the death sentence as required under Section 366 Code of Criminal Procedure, 1973. As already stated, the appeal preferred by the accused is also before us. In appeal, the argument advanced by learned counsel is that the conviction of the accused is based on circumstantial evidence, therefore, the death sentence should have not been recorded by the trial court. It is further submitted that the evidence available on record is -7- not sufficient to indicate only one conclusion about involvement of accused Kalu Khan in the crime in question and the foundation of entire case is an extra judicial confession made by Jumman Khan son of accused Kalu Khan which is not sufficient to record the conviction.

According to learned Amicus Curiae Jumman Khan himself is said to be a participant in the crime concerned, therefore, acceptance of the crime by him cannot be read in evidence. Per contra, learned Public Prosecutor submits that the trial court has recorded its finding independent to any extra judicial confession made by Jumman Khan. The circumstances available are forming a complete chain of facts indicating only one conclusion about involvement of the accused in inhuman and gruesome criminal act. His act has caused an irreparable injury to the human and social values, therefore, the trial court rightly awarded death sentence. We have examined the entire evidence available on record and also considered the rival submissions. The trial court relied upon the statements given by Shri Indraaj (PW-6) who saw the victim girl in company of accused Kalu Khan; the evidence adduced by Shri Devilal (PW-1), grand-father of victim girl; Devilal son of Balram (PW-2), a neighbour of Devilal (PW-1); Shri Om Prakash (PW-4), a neighbour of Devilal (PW-1) and accused and Kashiram (PW-5), brother of Devilal and also a neighbour of accused as well as complainant Devilal. Dr. Prem Bajaj (PW-3) adduced medical evidence and Ms. Deeksha Kamra -8- (PW-15), the investigating officer, while deposing before the court stated all the steps taken during the course of investigation. Shri Indraaj (PW-6) while deposing before the court, stated that on 3rd May, 2012 he came to the house of Kashiram, at that time Baby N. was going towards the residence of his grand-father Devilal situated at the distance of about a bigha. This witness saw Kalu Khan giving some berries to the girl and also carrying her in his lap. No much importance was given to this fact by him at that time being a quite normal event. He also maintained his version in cross examination. Shri Devilal (PW-1) stated that he and his brother Kashiram are residing in the same vicinity, where accused Kalu Khan was also having his house. Kalu Khan was a Tantrik. and a Mazar was also there in the court yard of his house. On 3rd May, 2012, his grand-daughter aged four years was at the residence of Kashiram. She lost the way while returning to home. While making her search, on 4th May, 2012. Jumman Khan son of Kalu Khan was found burying something in his court yard. Usual information was sought from him about the missing girl. He was looking little perturbed, therefore, a digging was made at the place where the earth was soft. From the pit dead body of Baby N. came out. The trembled Jumman stated that Baby N. was brought to the house by his father Kalu

Khan who first prompted him to commit rape with the girl and after commission of that Kalu Khan also committed rape with the girl and then killed her by 'kassi'. -9- The other prosecution witnesses Devilal son of Balram, Om Prakash son of Chetram and Kashiram, who were also searching the girl with Devilal (PW-1) narrated the same facts. Having examined the statements of abovenamed witnesses, we do not find any discrepancy of facts and as such no reason exists to disbelieve them. Dr. Prem Bajaj (PW-3), who conducted autopsy, narrated physical condition of the corpus of victim. As per this witness an incised wound measuring 12 x 4 cm cutting main blood vessels and flashes was available on neck, a cut 12 x 3 cm on parietal bone forwarding towards the skull was there and the skull bone was fractured. Serious injuries were found on vagina and that was full of blood and swab. The body was having several abrasions. On opening chest, the lungs were found pale. The brain matter was also coming out from the head injury. The medical evidence clearly indicates commission of brutal rape and the murder of victim Baby N.. The recovery of 'kassi' has also been established beyond any shadow of doubt and learned counsel for the appellant too accepted that. An important aspect of the matter is that no explanation is given by the accused as to how dead body of girl was found in a pit at his residence. No explanation is also given by him about availability of blood stained 'kassi', the weapon of offence and blood stained clothes from his room. -10- The evidence relating to last seen establishes the availability of victim with accused and the evidence adduced by Shri Devilal (PW-1), Shri Devilal son of Balram (PW-2), Shri Om Prakash (PW-4) and Shri Kashiram (PW-5) clearly establish that the dead body was found from the house of the accused. The medical evidence establishes beyond any shadow of doubt about commission of rape with a minor girl and then committing her murder. The blood stained 'kassi', the blood stained shirt of the accused, the blood stained clothes of the girl having same blood group also establishes the prosecution case. All these circumstances clearly indicate definite involvement of the accused in the crime in question. As such, we do not find any wrong with the findings arrived by the trial court. The important question now before us is that whether the crime committed by the accused is rarest of rare case, demanding his capital sentence?. Learned counsel for the accused submits that a Division Bench of this Court in State of Rajasthan v. Kunal Majumdar DB

Criminal Murder Reference No.01/2007), decided on 13th February, 2013, commuted the death sentence, though in that case too a rape was committed on a minor girl and she was murdered by the accused who was her custodian. The Division Bench of this Court in the case of Kunal Majumdar (supra) considered all aggravating and -11- mitigating circumstances which are required to be taken into consideration while considering a case of capital punishment. The discussions made in the case of Kunal Majumdar (supra) read as under:- As per sub-section(3) of Section 354 Code of Criminal Procedure, the courts are having obligation to have special reasons for awarding death sentence, thus, the capital sentence is an exceptional form of punishment. In Bachan Singh v. State of Punjab (AIR 1980 SC898, Hon'ble Supreme Court concluded that the real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality and that ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. In Machhi Singh & Ors. v. State of Punjab [(1983)3 SCC470, Hon'ble Apex Court provided five categories of murder, within which the rarest of rare doctrine was to be practically applied. These five contingencies include the motive, the manner of commission of crime, the magnitude, the anti-social or abhorrent nature of the crime and the personality of the victim. The issue again came up before Hon'ble Apex Court in Ramnaresh & Ors. v. State of Chhattisgarh (AIR 2012 SC1357, wherein the Court reiterated the 13 aggravating and 7 mitigating circumstances as laid down in the case of Bachan Singh (supra) required to be taken into consideration while applying the doctrine of rarest of rare. case. -12- In Brajendrasingh v. State of Madhya Pradesh (AIR 2012 SC1552, the Apex Court while reiterating the principles set out in Bachan Singh's and Ramnaresh's cases (supra) added that the Court while examining rarest of rare. case is required to see that whether any other sentence except death penalty would be inadequate in the circumstances existing. The circumstances so noticed are as under:- Aggravating Circumstances :

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, etc. by the accused with a prior record of conviction for capital felony.

2. The offence was committed while the offender was committing another serious offence.
3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
5. Hired killings.
6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
7. The offence was committed by a person while in lawful custody. -13-
8. The offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty u/s. 43 Cr.P.C.
9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
11. When murder is committed for a motive which evidences total depravity and meanness.
12. When there is a cold blooded murder without provocation.
13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society. Mitigating Circumstances :

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course. -14- 2. The age of the accused is a relevant consideration but not a determinative factor by itself. 3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated. 4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct. 5. The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence. 6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime. 7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused. 8. As per the law laid down in the case of *Brajendrasingh* (supra) an important factor -15- i.e. required to be taken into consideration is that whether any other circumstance except death penalty would be inadequate looking to the facts of the case concerned. By keeping in mind the aggravating and mitigating circumstances noticed by Hon'ble Supreme Court in the case of *Ramnaresh* (supra) and *Brajendrasingh* (supra), this Court in *State of Rajasthan v. Devilal* (DB Criminal Murder Reference No.01/2012), decided on 30th January, 2013, observed as under:- The aggravating and mitigating circumstances noticed above may be much more in different circumstances and whatever circumstances noticed by Hon'ble Supreme Court as above are inclusive. No straight jacket formula can be prescribed for application of the doctrine rarest of rare. situation. The contingencies for application of the doctrine aforesaid may differ circumstances to circumstances and time to time, but in any event the court while considering the case for awarding severest punishment, which as a matter of fact akin to divine authority, is required to be extremely cautious with absolute

vigilance about the factual circumstances, objective conditions and other relevant factors applicable to the society wherein the crime is committed. The court while considering the case for awarding capital punishment must understand that an exceptional authority must be exercised in most exceptional case, with utmost care, caution and only after arriving at the conclusion that no other punishment in any circumstance shall serve and satisfy the injury caused to the social order. The Indian society is a multilayer, multi dimensional, -16- multi class, multi caste and multi cultural society with several virtues and several ills of every variant. An individual living in such society carries these virtues and ills with him. The courts cannot ignore all these factors while making necessary consideration for settling a severest sentence.

. Hon'ble Supreme Court in its recent judgment in Sangeet and Anr. v. State of Haryana (MANU/SC/0989/2012) threshed the entire issue and concluded as under:-

1. This Court has not endorsed the approach of aggravating and mitigating circumstances in Bachan Singh. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.
2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.
3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.
4. The Constitution Bench of this Court has not encouraged standardization and - 17- categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes.

5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.

6. Remission can be granted under Section 432 of the Cr.P.C. in the case of a definite term of sentence. The power under this Section is available only for granting additional remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power under Section 432 of the Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.

7. Before actually exercising the power of remission under Section 432 of the Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner.

. On basis of these aggravating and mitigating circumstances the death sentence awarded to Kunal Majumdar was considered and commuted. The facts of the case of Kunal Majumdar (supra) are quite distinguishable. In the case aforesaid the allegation was of making an effort to commit -18- rape and on being failed to do so, commit murder of a minor girl. It is also pertinent to notice that in the case of Kunal Majumdar (supra) the accused made efforts to save life of the girl by taking her to the hospital at his own. A chance for reformation and rehabilitation of the accused was also noticed by the Court. In the aforesaid case the death sentence awarded by the trial court was commuted with following reasons :- We have examined case of the accused appellant in light of the conclusion mentioned above. No doubt that the accused appellant has been found guilty of committing a very heinous crime involving inhuman treatment and torture with a person who was in his custody. The victim was innocent, helpless and was relying upon the trust of social norms, being housemaid with the family of accused appellant. These circumstances certainly impress to award severest punishment as awarded by the trial court, however, while assessing the circumstances to settle severest sentence, the Court is also required to examine the mitigating circumstances in

light of the objective conditions relating to criminal i.e. accused appellant. The age of the accused though is not a determinative factor in itself, but certainly a relevant consideration. In the case in hand, the accused is quite a young boy and he is having a young wife and a little baby. The death of minor Bharti Manjhi occurred in the course of commission of some other crime and it is also the position admitted that the accused appellant took her to the hospital and as per the evidence available, while transporting to hospital the girl was alive. The accused appellant also -19- informed the family members of deceased about all the incidents. The conviction of the accused is based on circumstantial evidence which as a matter of fact found trustworthy, but while exercising the most exceptional authority akin to the divine power, the Court should as far as possible restrain itself to do anything that cannot be undone at a later stage. Whenever any ray of hope, may that be quite dim, exists for reformation of a human being a chance should be given for such reformation. The death penalty is required to be given only after arriving at a conclusion that the criminal is nothing but a menace for the society and no hope exists for reformation. In the case in hand the accused appellant was serving in Indian Air Force, he is in his quite young age and he too is having a liability to provide a good life to his own daughter. No material is available to arrive at the conclusion that he is a menace for society. Looking to all these circumstances we are having a little hope of his reformation and just to get that materlised, we are not inclined to confirm the death sentence.

. In the instant matter the position is entirely different. Here the accused, a middle aged man of 48 years, residing in neighbourhood of the victim, working as Tantrik., kidnapped the girl and committed inhuman rape and then killed her. He also got involved his son in this crime. His entire act is a serious scar on human values. He has broken the faith of the neighbours, the faith in humanity and further he also acted against the values to nurture the relations of father and son. The accused committed murder when he was committing the serious offence -20- of rape. The entire crime was committed outrageously while involving inhuman treatment and torture to the victim. The victim was a helpless child residing in neighbourhood of the accused. He was a person who could have been trusted being a neighbour, but he acted adversely. The heinous crime is committed without any provocation and with complete cold blooded planning. The brutality on the part of accused not

only pricks the judicial consciences but even conscience of the society. The facts available are sufficient to satisfy ourselves that no other punishment except death penalty would be adequate in present set of circumstances. We are also of the view that looking to the middle age of the accused, his effort to involve his son also in the heinous crime and the brutality put forth in the crime is sufficient to arrive at the conclusion about no chance of his reformation. His entire act depicts that he is a menace, hence, the reason given by the trial court as per sub-section (3) of Section 354 in addition to whatever we stated above are sufficient to award death sentence. Accordingly, the appeal preferred by the accused is dismissed and the judgment and order passed by the trial court is affirmed. The death sentence awarded is confirmed. (ATUL KUMAR JAIN).J.

(GOVIND MATHUR),J.

Mathuria KK/ps.

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