

State of Rajasthan and anr. Vs. Gopal and anr.

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Court : Rajasthan

Decided On : Nov-16-2005

Reported in : RLW2006(1)Raj604

Judge : Shiv Kumar Sharma and; Fateh Chand Bansal, JJ.

Acts : Evidence Act - Sections 27, 118; Oath Act - Sections 4 and 5; Indian Penal Code (IPC) - Sections 57, 201, 302, 363, 366, 376 and 376(2); Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : U.B. Criminal Death Reference No. 2 of 2005

Appellant : State of Rajasthan and anr.

Respondent : Gopal and anr.

Advocate for Def. : Ashvvani Kumar Sharma, Public Prosecutor

Advocate for Pet/Ap. : Poonam Chand Bhandari, Amicus Curiae

Judgement :

Shiv Kumar Sharma, J.

1. The facts of this case remind us the poem of 'Leila Seth' on 'The Girl Child' which reads thus:

Where have all the young girls gone?

Some were aborted before they were born

A few were buried or choked with coarse paddy;

Others were smothered, starved or drowned in a well;

Poisoned with berries of oleander till dead,

So that dowry need not be paid or in-law's fed,

or daughters raped, beaten or burnt-

This is the sad story of the girl child's hell.

2. This case reveals a sordid and obnoxious incident that occurred sometime in the evening of February 18, 2005 in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of adherent nature is said to have been committed by the appellant herein with victim Meenakshi, a girl of the tender age of about 7 years, who feel a prey to his lust. The appellant Gopal was charged and tried under Sections 366, 376(2), 302 and 201 IPC for having committed rape on victim and then murder her. Learned Additional Sessions Judge (Fast Track) No.I, Jaipur relying on the circumstantial evidence convicted appellant for the offences under Sections 302, 363, 376 and 201 IPC and having regard to the peculiar facts and circumstances of the case found it to be rarest of rare cases and therefore, sentenced him thus:-

Under Section 302 IPC:

Sentence of death or fine of Rs.500/- to be recovered from the property of accused Gopal.

Under Section 363 IPC:

To suffer rigorous imprisonment seven years and fine of Rs.500/-, in default to further suffer six months rigorous imprisonment.

Under Section 376 IPC:

To suffer life imprisonment and fine of Rs.500/-, in default to further suffer six months rigorous imprisonment.

Under Section 201 IPC:

To suffer rigorous imprisonment seven years and fine of Rs.500/-, in default to further suffer six months rigorous imprisonment.

3. The learned Additional Sessions Judge made a reference (bearing Death Reference No.2/2005) under Section 366 Cr.P.C. for confirmation of death sentence. The appellant Gopal also preferred appeal challenging his conviction and sentence as aforesaid. We straightway proceed in accordance with Sections 366 and 368 Cr.P.C. to examine the entire evidence independently.

4. The brief facts of this shameless intrigue as unraveled by the prosecution at the trial are as follows:-

On February 18, 2005 the informant Gopi Lal, father of victim Meenakshi, submitted a written report (Ex,P-I) at police station Narena, Camp Sakhun Fort, stating therein that while he and his family members were worshiping deity Mataji in the house of his uncle Ramlal, his daughter Meenakshi along with Surendra, Mukesh and other children of Mohalla (ward) went to take bath at the water tap at 4.00 PM, when Meenakshi did not return till 6.00 PM the informant went to the children and asked about Meenakshi. The children told informant that Gopal (appellant) took her with him to the fort on the pretext of giving her money for toffee. When the informant and other family members were searching Meenakshi they saw appellant coming from the fort. On being enquired about Meenakshi he pleaded ignorance. After vigorous search Meenakshi was found lying dead in empty Tanka (water tank) of the fort. There were injuries on her face and head and blood was oozing out from her private parts Her hair and clothes were found burnt. Police Station Narena on the basis of this report registered a case under Sections 366, 376, 302 and 201 IPC and investigation commenced. Post-mortem on the dead body was performed. Necessary memos were drawn, statement of witnesses were recorded, the accused was arrested and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned

Additional Sessions Judge (Fast Track) No.I, Jaipur City, Jaipur. Charges under Sections 366, 376(2)(f), 302 and 201 IPC were framed. The accused denied the charges and claimed trial. The prosecution in support of its case examined as many as 17 witnesses. In the explanation under Section 313 Cr.P.C., the accused claimed innocence and stated that he was falsely implicated. No evidence in defence was however, examined. Learned trial Judge on hearing final submissions decided the case as indicated herein above.

5. As per post-mortem report (Ex.P-26) following ante mortem injuries were found on the dead body:-

1. Haematoma Forehead.
2. Lacerated wound 0.5' x 2' x bone deep on Rt. parietal region of skull (in middle) - of underlying bone (scalp)
3. Bruise (multiple) on face. Rt. shoulder, Arm and forearm.
4. Bleeding from both ears.
5. Multiple abrasions on back, both knee and Rt. thigh.
6. Lacerated wound" x Ms. deep left parietal region of skull.
7. External genital region. No evidence of any injury (Labia majora, L. Minora, ulna no injury Cloths of blood present about vagina and anus.
8. Internal Genital. Pv or one finger easily. Hymen ruptured and clotted blood present.

In the opinion of Medical Board the cause of death was due to Haematoma because of head injury.

6. The appellant was examined on February 19, 2005 vide Ex.P-33 and it was found that there was swelling and redness at glans penis with bleeding of junction.

7. There is no ocular version of the incident and the prosecution entirely based its case on circumstantial evidence. Learned counsel for the appellant vigorously

canvassed before us that the circumstances relied on by the prosecution have not been satisfactorily established and that in any event the circumstances said to establish against the appellant do not provide a complete chain to bring home the guilt against the appellant. Learned counsel vehemently submitted that Leela (PW. 4), Surendra (PW. 5) and Mukesh (PW. 6) who are said to have last seen the appellant and the deceased, were children between the age of 8 to 12 years and the evidence of these witnesses should not be accepted as credible as they were tutored by the prosecution. Learned counsel for the appellant further assailed the evidence of Lakha Ram, Investigating officer (PW. 16) by contending that his testimony did not get corroboration by the independent Motbirs viz., Ranglal (PW. 10) and Mohd. Razak (PW. 11). The Motbirs did not support the prosecution case and were declared hostile. The memos Ex.P-30 and Ex.P-31 drawn by the IO in connection with the disclosure statements of the appellant and the recovery memos Ex.P-21 through which stone and pieces of frock were allegedly recovered could not be relied upon on the basis of the evidence of the IO. Learned counsel that contended that the appellant was falsely implicated in the case by Raju Lal (PW. 8) in connivance with Indra, the wife of the appellant, who was residing separately for the last one and half year because of inimical relations with the appellant. Learned counsel also urged that as per the prosecution story deceased had taken food and then proceeded with the appellant at 4 PM but in the post-mortem report undigested food was not found in the stomach of the deceased. It thus appears that prosecution story was false and deceased appeared to be missing from 7 AM.

8. The standard of proof required to convict a person on circumstantial evidence is now well established by a series of decision of the Hon'ble Supreme Court. According to that standard the circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused and should not be capable of being explained by any other hypothesis,

except the guilt of the accused and when all the circumstances cumulatively taken together should lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime.

9. Bearing these principles in mind we shall now examine the various circumstances said to be appearing against the appellant and at the same time consider the contentions advanced by the learned counsel for the appellant referred to above.

Evidence of Last Seen :

10. It is the prosecution case that on the date of incident while Gopi Lal, the father of Meenakshi, along with his family members were busy in worshipping deity Mataji, Meenakshi, Surendra, Mukesh and other children of Mohalla, went to take bath around 4 PM at the water tap. When Meenakshi did not return till 6 PM, Gopi Lal went to search Meenakshi. The children informed that Gopal (appellant) persuaded Meenakshi to accompany him to the fort on the pretext of giving her money for toffee. The prosecution examined three child witnesses viz., Leela (PW. 4), Surendra (PW. 5) and Mukesh (PW. 6) to establish that on the day of occurrence the appellant had commanded the deceased to accompany him to the fort and the appellant and the deceased had actually proceeded towards the fort and they were last seen together. We have closely scanned the statements of Leela, Surendra and Mukesh. All the three child witnesses categorically stated that they along with Meenakshi took bath at the water tap near the fort together and Gopal persuaded Meenakshi to accompany him to the fort on the pretext of giving her toffee. These witnesses identified appellant in the trial Court. There had been a searching cross-examination and the witnesses withstood the same. The evidence of these child witnesses sought to be assailed on the ground that they were tutored by the prosecution. Having carefully scrutinised the testimony of Leela (PW. 4), Surendra (PW. 5) and Mukesh (PW. 6) we find their version to be truthful and reliable. They are all natural witnesses having no axe to grind against the appellant so as to make false statement to implicate the appellant, Section 118 of the Evidence Act provides that all persons are competent to testify, unless the court considers that by reason of tender years, extreme old age, disease or

infirmity, they are incapable of understanding the question put to them and of giving rational answers. Under Section 4 of the Oath Act all witnesses are to take oaths or affirmation. The proviso however, says that Sections 4 and 5 of the Oaths Act shall not apply to a child witness under 12 years of age. Evidence of child witness can be relied upon even in the absence of corroboration on all material particulars. It is only a sound rule in practice not to act on the uncorroborated evidence of a child witness, whether oath has been administered to him or not. This was first observed by LORD GODDARD in *Mohamed Sugul era v. the King* AIR 1946 PC 3. This is more a rule of prudence than a rule of law. Learned trial Judge after asking few preliminary questions was satisfied as to the competency of child witnesses Leela, Surendra and Mukesh to testify and we are also of the opinion that these witnesses understood the duty of speaking the truth. From the evidence of Leela, Mukesh and Surendra the prosecution is able to establish that on the day of occurrence the appellant had commanded the deceased to accompany him to the fort and the appellant and the deceased had actually both proceeded towards the fort and they were last seen together.

Presence of the appellant near about the place of occurrence :

11. Gopi Lal (PW. 1) in his deposition stated that on receiving information from children that Gopal took Meenakshi with him towards the fort on the pretext of giving toffee, when he along with villagers proceeded towards the fort around 6 PM, he saw Gopal was washing his hands and feet and the water tank in front of the fort. On being questioned about Meenakshi, Gopal pleaded ignorance. Bhanwar Lal (PW. 2) also deposed that he saw Gopal coming out of the fort and washing his hands, feet and face at the water tank. Raju Lal (PW. 8) and Anand (PW. 9) corroborated the testimony of Gopi Lal and Bhanwar Lal. Evidence of these witnesses could not be shattered in the cross-examination. On examining the testimony of these witnesses from the point of view of trustworthiness we find them reliable and truthful. The prosecution thus has established that the appellant was present near about the fort where the incident occurred.

Evidence relating to the injuries to the deceased :

12. The search party comprising of Gopi Lal (PW. 1), Bhanwar Lal (PW. 2), Raju Lal (PW. 8) and Anand (PW. 9) which discovered the dead body of Meenakshi in the empty Tanka (water tank) of the fort, noticed that there were injuries on her face and head. Her hair were soaked with blood. Her cheek, shoulder and neck were burnt and blood was oozing from her private parts. Dr. Renu Mittal (PW. 14), who conducted post-mortem on the dead body, deposed that there were ante mortem lacerated wounds on the right and left parietal region and Haematoma on forehead. Bleeding from both ears was seen. Clots of blood found present about vagina and anus. Hymen was ruptured and clotted blood was present. Learned counsel for the appellant invited our attention to that part of testimony of Dr. Renu Mittal wherein she stated that no injury was seen on Libia Majora and minora and no sign of recent intercourse was found. On the strength of this evidence it was canvassed that charge under Section 376 1PC was not established. At the first blush this argument appeared attractive, but after deeply going through the evidence of Dr. Renu Mittal we have no hesitation in holding that the offence is nothing short of rape punishable under Section 376 IPC, Their Lordships of the Supreme Court in *Madan Gopal Kakkad v. Naval Deuby and Anr* : [1992]2SCR921 indicated thus:-

A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all material inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert, may form its own judgment on those materials after giving due regards to the expert's opinion because once the expert's opinion is accepted, it is not the medical opinion of the medical officer but of the Court.

13. Modi in *Medical Jurisprudence and Toxicology* (21st Edition) said that rape is a crime and not a medical condition, therefore, medical officer should not give his opinion that no rape had been committed. Opinion expressed by Modi at page 369 reads as under:-

Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

14. In Parikh's Text book of Medical Jurisprudence and Toxicology, the term 'Sexual intercourse' in law is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

15. The testimony of Dr. Renu Mittal (PW. 14) eloquently speaks that the innocent, helpless soul Meenakshi was first subjected to monstrous sexual assault and then mercilessly done to death by inflicting injuries on the head so that there remains no direct evidence against culprit.

Evidence relating to injuries on the appellant:

16. Dr. Deepak Sharma (PW. 17) deposed that on February 19, 2005 he examined the appellant who as per medical report (Ex.P-33) was found capable of committing sexual intercourse and there was swelling and redness at glans penis with bleeding of junction.

Discovery and Seizure of incriminating articles :

17. At the time of autopsy on the dead body of Meenakshi, Dr. Deepak Sharma (PW. 17) took the sample of her dried blood and kept in glass container Article-11. Blood sample and pubic hair of Gopal were also preserved for chemical examination by Dr. Deepak Sharma vide memo Ex.P-33 Underwear of Gopal stained with blood was seized and sealed vide memo Ex.P-20. Lakha Ram IO (PW. 16) deposed that at the time of arrest the appellant was wearing the underwear. The said underwear was seized and sealed in presence of Motbir Rameshwar (PW. 7) and Raghuveer Singh (PW. 3). Both these motbirs supported the recovery of underwear. Two pieces of frock and one stone stained with blood got recovered by Lakha Ram (PW. 16) at the instance of appellant. The information disclosed by the appellant under Section 27 of the Evidence Act was recorded in Memo Ex.P-33. Motbirs Ranglal (PW. 10) and Mohd. Razak (PW. 1) however, did not support the prosecution story but merely on the ground that independent witnesses did not support the recovery of pieces of frock and stone, we can not approach the action of Investigating Officer with initial distrust who had no enmity with the appellant. Their Lordships of the Supreme Court in State Govt. of NCT of Delhi v. Sunil (2001) 1 SCC 652 indicated in para 21 thus:-.The official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence, when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross- examination of witnesses or through any other material, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not legally approvable procedure to presence the police action as unreliable to start with, nor to jettison such actin merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such action.

18. We do not find any force in the submission of learned counsel that recovery of underwear, pieces of frock and stone stained with blood at the instance of

appellant is highly doubtful. The seals of the seized articles were intact till they were sent for chemical examination to FSL. This fact is evident from the testimony of Lakha Ram IO (PW. 16) and Kailash Chand, Head Constable (PW. 13) who deposed that nine sealed packets kept intact in Malkhana were sent through Mohd.Arif (PW. 12) to FSL. As per FSL report dried blood of Meenakshi was of group 'A' and blood found on pubic hair of Gopal was also of group 'A'.

19. The arguments of learned counsel for the appellant that Indra the wife of appellant whose relation with the appellant were strained and who had deserted the appellant implicated the appellant falsely in connivance with Raju Lal (PW. 8), simply deserves to be rejected without any merit. It is beyond comprehension to think that a wife would even think of falsely implicating the husband in a heinous crime like this. We also do not find merit in the contention of learned counsel that as undigested food was not found in the stomach of Meenakshi, it should be presumed that she would have been kidnapped much before 5 PM, in view of the statement of Leela (PW. 4) who stated that while Pooja was going on she and Meenakshi left the house and went to take bath at the water tap.

20. From the evidence discussed above it is satisfactorily and conclusively proved that all the links in the chain are complete and do not suffer from any infirmity. The circumstances, form a complete chain of evidence as not to leave any reasonable ground for a conclusion consistent with the hypothesis of the innocence of the appellant but on the contrary the same are of exclusive nature consistent only with the hypothesis of the guilt of the appellant and conclusively lead to irresistible conclusion that it was the appellant and he alone had kidnapped and committed murder of the girl Meenakshi after subjecting her to monstrous sexual assault. The appellant also made attempt to burn her hair and face. The victim was a totally helpless child there being no one to protect her in the fort where she was taken by the appellant misusing her confidence to fulfill his lust.

21. On an independent appraisal on record we are satisfied that the prosecution has established the charges under Sections 302, 363, 376 and 201 IPC against the appellant beyond reasonable doubt and he was rightly convicted.

22. That takes us to the question of sentence. Section 302 IPC beyond stating that the sentence for murder is either death or imprisonment for life, does not elaborate any further on what are the circumstances under which death sentence or lesser sentence could be imposed. Their Lordships of the Supreme Court in *Bachan Singh v. State of Punjab* : 1980 CriLJ636 while being reluctant to categorise or list all aggravating circumstances, held that sentence of death must be imposed only in 'the rarest of rare case'. It is now well settled that in exercising its discretion the court may take into consideration as mitigating, on the basis of which the lesser punishment of imprisonment for life may be imposed:-

(i) That the offence was committed under the influence of extreme or emotional disturbance;

(ii) If the accused is young or old, he shall not be sentenced to death;

(iii) The probability that the accused would not commit communal acts of violence as would constitute a continuing threat to society;

(iv) The probability that the accused can be reformed and rehabilitated;

(v) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;

(vi) That the accused acted under the duress of domination of another person;

(vii) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

23. In *Shri Bhagwan v. State of Rajasthan* 2001 Cr.L.J. 2925 five persons of a family were battered to death without mercy by a young culprit aged about 20 years. Their Lordships of the Supreme Court, commuted the death sentence imposed upon the accused into sentence of imprisonment of life and indicated that the accused shall not be released from the prison unless he has served out at least 20 years of imprisonment including the period already undergone by him.

24. In Reddy Sampath Kumar v. State of AP : 2005 CriLJ4131 , a greedy son-in-law with the intention of grabbing the property of his father-in-law, committed the death of his father-in-law, mother-in-law and their three minor children. Hon'ble Supreme Court directed that the ends of justice would warrant that the appellant should be in jail in terms of Section 57 of the Penal code and shall not get the benefit of any remission either granted by the state or by the Government of India on any auspicious occasion.

25. The act of unparalleled evil and barbarity of the appellant as noticed by us in the instant case, cannot be looked with equanimity. The crime committed by him tends to destroy one's faith in all that is good in life. The appellant on the date of offence was 22 years of age as is evident from his medical examination report (Ex.P-33). Therefore, looking to the young age of the appellant, we do not think that this case is to be one of the rarest of rare cases warranting death sentence. Hence, even though we commute the death penalty, yet we are of the view that the punishment should have deterrent effect as well as no further chance to the appellant for relapsing into the crime and becoming danger to the society. Placing reliance on the ratio indicated in Shri Bhagwan v. State of Rajasthan (supra) we upheld the conviction of the appellant under Section 302IPC but commute the death sentence imposed upon Mm and direct that he shall undergo the sentence of imprisonment of life, we further direct that the appellant shall not be released from the prison unless he has served out atleast 20 (twenty) years of Imprisonment including the period already undergone by him. The appellant shall not get the benefit of any remission either granted by the State or by the Government of India on any auspicious occasion. We also confirm the conviction of appellant under Section 376, 363 and 201 IPC and the sentence so awarded by the learned trial Judge.

26. The reference is answered accordingly and with the above directions and modification in the sentence the appeal of the appellant stands disposed of.