

Nepal Mondal Vs. State

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Court : Kolkata

Decided On : Nov-30-2005

Reported in : 2006(2)CHN61

Judge : Alok Kumar Basu and ;Pranab Kumar Deb, JJ.

Acts : Indian Penal Code (IPC) - Sections 302; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 162 and 313

Appeal No. : C. R.A. No. 308 of 2005 and Death Reference No. 1 of 2005

Appellant : Nepal Mondal

Respondent : State

Advocate for Def. : Kazi Safiullah, Ld. Public Prosecutor and ;Swapan Mallick, Adv.

Advocate for Pet/Ap. : Joymalya Ragchi and ;Kaushik Gupta, Adv.

Judgement :

Pranab Kumar Deb, J.

1. The criminal appeal preferred by the appellant Nepal Mondal against the conviction and sentence has been heard along with the death reference following the reference being made by the learned Additional Session Judge, 2nd First

Track Court, Cooch Behar.

2. This case relates to a shocking murder of a little girl. The prosecution case was to the effect that on 13.05.1999 round about 2 p.m., the appellant Nepal Mondal took Namita Das, D/O-Naren Das, with him with the promise to pluck mangoes for her. Since the little girl did not return even after long time,-her relations fanned out to search for her. They found the appellant Nepal Mondal reading 'Gita' in the house of Bimal Mallick. He was not in normal frame of mind. He murmured that reading of the Gita would wipe out the sin one had committed. Unable to get any clue as to the whereabouts of Namita Das, her relations with neighbours fanned out to search for her. Eventually, her deadbody was found in a ditch with injuries on her person.

3. With the information linking the appellant with the commission of the offence started piling up, the appellant was arrested. The deadbody was sent for post-mortem examination after the holding of the inquest report. Meanwhile, the relations and neighbours of Naren Das were examined. On collection of all materials, the chargesheet was submitted.

4. In course of the trial, the prosecution side examined as many as 17 witnesses including the informant Naren Das, his mother Nanibala Das, uncle Dulal Das, some of the neighbours namely Subir Das, Smt. Jyotsna Mallick, and persons having direct knowledge of the incident. The doctor conducting the post-mortem examination and the police officer conducting the investigation were also examined on behalf of the prosecution. Relying mainly on the statements of P.W.3, P.W.4 and P.W.8 that Nepal Mondal had led Namita Das away on the pretext of providing her with mangoes and they had been last seen together, couple with the fact that post-mortem report confirmed it to be the case of murder, the learned Court convicted the appellant for commission of offence under Section 302 IPC. The learned Trial Judge viewed it as one of the rarest of the rare case, justifying imposition of death sentence. The death sentence was awarded, subject to confirmation by the High Court. Accordingly, the Death Reference Case No. I of 2005 was registered. The appellant also filed an appeal, challenging the conviction and sentence under Section 302 IPC.

5. Challenging the finding, Mr. Bagchi contends that the conviction and sentence were based more on speculation than on reason. It is contended that had the glaring infirmities and lacunas been taken note of, the Trial Court certainly would not have come to a positive finding as to the commission of offence of murder by the appellant. Finding no proof as to the involvement of the appellant in the commission of alleged murder, the informant after long discussions and deliberations with near relations introduced the story of the appellant taking his daughter away on the pretext of providing her mango. It is contended that save and except P.W.3 Nanibala Das, none else saw the appellant taking Namita Das away from their house. Had the incident of the appellant taking Namita Das away been witnessed by P.W.3, that fact ought to have been reflected in the FIR. The FIR, it is contended, speaks about the neighbours witnessing the appellant taking Namita Das away. Since the neighbours namely Jyotsna Mallick and P.W.5 Chaitanya Das refused to toe the line of the prosecution, they brought P.W.3 Nanibala Das into the picture for the purpose of making the Court believe that the appellant was last seen with the victim. There was no whisper in the FIR about Namita Das witnessing the incident. This, according to Mr. Bagchi, clearly indicates that a concocted story was cooked up to entangle a young person in the locality because of subsisting strain relationship between the families. Referring to the inordinate delay in lodging the FIR, Mr. Bagchi contends that despite the inquest and post-mortem being done on 04.05.99, the informant took nearly five days to ponder over the matter. It was after the expiry of nearly five days that the informant came up with the story of the appellant leading his daughter away on the pretext of providing her with mangoes. The intervening long period provided enough scope and opportunity to the informant and his relations to set up a story of kidnapping and murder, as urged by Mr. Bagchi.

6. Mr. Bagchi has submitted that evidence on record reveals that a person called Gour Gopal Hazra informed the incident of murder to the police station. Action was taken on the basis of the information so furnished by Dr. Hazra. The information so provided by Dr. Hazra, it is contended, ought to have been treated as an FIR and the subsequent statements so made by the informant ought to have been discarded in terms of the provision of Section 162 of the Code.

7. Mr. Bagchi has dwelt on another aspect of the case. It is submitted that precise time of the incident cannot be ascertained in view of the conflicting statements being made by the near relations of the deceased. As per P.W.3 Nanibala Das, the appellant Nepal Mondal called his grand daughter at about 2 p.m., whereas P.W.4 Motilal Das claimed that the appellant simply called Namita Das , as informed by his grand mother. If P.W.9 Subir Das is to be believed, they went out to search for her at about 2 p.m.. These conflicting statements, according to Mr. Bagchi, shattered the myth that the appellant came over to the house of the informant and took his daughter away. The conflicting statements of the near relations should not inspire any confidence, as submitted by Mr. Bagchi.

8. Mr. Kazi Safiullah, the learned Public Prosecutor, has defended the conviction and sentence, submitting that there was strong circumstantial evidence indicating the involvement of the appellant in the commission of murder of a hapless little girl. It is contended that since the informant and other members were under shock and trauma, they could not lodge the FIR earlier. On being convinced about the involvement of the appellant, the informant lodged the FIR accusing the appellant of committing murder of his daughter. The unnatural act on the part of the appellant soon after the incident was also relevant fact that was given proper weightage by the Trial Court. While other members went out to search for the girl, the appellant remained nonchalant. He did not join the other neighbours and the relations to search for the missing girl. He even tried to misguide and mislead them. His effort to escape was also nipped in the bud. The ghastly murder of a girl took place after the girl had been taken away by him. All the facts were properly chained up to form a complete ring. There being no apparent animosity, there was no earthly reason for the informant and his relations to launch tirade against the appellant. There being overwhelming strong circumstantial evidence, the appellant was rightly convicted for his direct involvement in the heinous offence of commission of murder of a little girl.

9. The prosecution side has brought P.W.3 Nanibala Das as a pivotal witness. She was the old lady who was said to have seen the appellant taking Namita away from their house. As per statement of P.W.3 Nanibala Das, round about 2 p.m. Nepal Mondal came to their house and called Namita Das. The appellant Nepal

Mondal had a mango tree, as disclosed by P.W.3 Nanibala Das. Nepal Mondal offered her mangoes. Then Namita Das and Nepal Mondal went out together. Since Namita Das did not come back, they went out to search for her. They found Nepal Mondal reading 'Gita' after taking bath. When Nepal Mondal was asked as to why he was reading out 'Gita', he answered that hundred one sins could be wiped out by reading 'Gita'. He was not inclined join others in searching for Namita Das. He suggested searching on the western side. The rescuers, however, went towards the eastern side and near a bamboo pole and under a hole they found Namita Das. There was blackening on the throat with her frock being found in torn condition. There were injuries on her person too. The victim was last seen alive in the company of Nepal Mondal, as testified to by P.W.3 Nanibala Das. It was not that Nanibala Das alone saw Nepal Mondal luring the little girl Namita Das to the nearby place. Her mother, physically unfit during pregnancy, also was in the house when Nepal Mondal came to their house and offered mangoes to the little girl. Viewed from these aspects, the Trial Court rightly called her as natural witness.

10. It has been suggested by the defence that the story of Nanibala Das witnessing Nepal Mondal taking Namita Das away was introduced for the first time at the time of trial. The inquest was done on 04/05/99 at early hours of the morning. The police officer recorded what the mother and grand mother of the deceased had seen on the previous day. It is far from true that P.W.3 Nanibala Das disclosed the fact that Nepal Mondal took her grand daughter away on 13/5/99 for the first time at the time of trial. She simply reiterated what she had stated earlier. We are not impressed by the submission that after long discussion and deliberation the factum of Nepal Mondal taking Namita Das was introduced in the FIR.

11. The grand mother was quite worried when her grand daughter did not return home. Concerned about her grand daughter, P.W.3 Nanibala Das went out, airing what she had seen earlier. Her behaviour and conduct were normal. There is no logic for believing that this important witness was brought into the picture at a belated stage to resurrect the helpless position of the prosecution.

12. Taking a cue from the statements of P.W. 12, Mr. Bagchi has sought to impress upon the Court that hyoid bone may be fractured in the event of somebody landing over hard substance. The evidence is to be considered in its totality. The little girl called Namita Das went out of the house wearing a frock, as stated by her grand mother Nanibala Das. Her wearing apparels were found in torn condition when her deadbody was recovered near the garden of the appellant. There were several injuries on the body. There was blackening on the throat as well. With so many injuries on her person and hyoid bone being fractured, the doctor conducting the post-mortem examination reasoned that she had been strangulated. The body was dumped into a ditch to conceal its presence. All these facts were rightly taken into consideration as strong circumstantial evidence to form the formidable chain. These noticeable features on her body also negate the claim of accidental death.

13. When others were making vigorous search for the missing girl, the appellant remained nonchalant. He was reluctant to join the other rescuers. He even suggested searching of the girl on the western side. The appellant was found reading out 'Gita' at 4 p.m. after taking bath at a time when the neighbours and relations of the little girl were making a frantic effort to find her whereabouts. He tried to mislead the other rescuers. His unusual behaviour was also taken note of. His effort to flee off was also nipped in the bud. All the facts and circumstances do indicate that it was the appellant Nepal Mondal who caused the brutal murder of a little girl after taking her away from the custody of her relations. There is strong evidence indicating that he coaxed the little girl into going with him with the promise of providing her with mangoes.

14. The incident occurred many years back. P.W.3 Nanibala Das and the other witnesses were mainly rustic witnesses. After a long gap of nearly five years it was not possible for them to say precisely at what time they started searching for Namita. The mother and the grand mother of Namita Das also joined the search, as indicated by P.W.1 Naren Das and P.W.4 Motilal Das. The fact that Nepal Mondal had taken away the girl away was also conveyed to P.W.4 by Nanibala Das, as acknowledged by P.W.4 Motilal Das. The deadbody was found under a ditch. Sensing trouble, the appellant Nepal Mondal tried to flee off, but his attempt

was foiled. The scenario presented by the prosecution gives a clear indication that the incident of murder could not be the handy work of anybody else.

15. Following detection of injuries on different parts of the little girl, the prosecution sought to give a faint suggestion that the girl was perhaps raped before being murdered. Here we would like to make it clear that since there was no charge of commission of rape, that question cannot be looked into. We cannot on the same logic accept that the girl was ravished. However, there were fair indications that the girl had sustained injuries all over her body. Evidentially, there was also mark of strangulation with her hyoid bone being fractured. She was at the relevant time in the company of a young man called Nepal Mondal. It was Nepal who called the girl from the house on the pretext of giving her mangoes. There were noticeable injuries on her body as well. He was not in a mood and inclined to search out the missing girl. What he did was to mislead the other members of the searchers. All the chains of facts and circumstances lead to the only conclusion that the appellant perpetrated the commission of murder of a little girl. There was apparently no animosity with the family of the deceased. It is hard to swallow the suggestion that the appellant was entangled in a false case of murder just because of his refusal to marry the girl. The deceased was a girl of 11 years. Nowhere it has been indicated that the parents of the girl were very much interested to give her in marriage. This wild suggestion is nothing but a desperate attempt on the part of the appellant to absolve himself from the liability.

16. Making a strong plea for reduction of sentence, Mr. Bagchi has submitted that it might be that the girl received injuries in trying to fend herself. We are afraid we cannot accept the death was an accident. The post-mortem report does confirm strangulation of a little girl. There were marks of injuries and bruises all over her bodies. It was a definite case of murder.

17. Challenging the mode of examination of the accused under Section 313 of the Code, Mr. Bagchi has submitted that since all the incriminating facts and circumstances had not been put to the appellant, such facts and circumstances should not have been relied on by the Trial Court to base the conviction. Reasonable opportunities to explain the circumstances not having been provided,

the whole trial had been vitiated, as contended by Mr. Bagchi.

18. The purpose of examination of an accused under Section 313 of the Code is to afford an opportunity to explain the incriminating facts and circumstances. We have gone through the statements of the accused made under Section 313 of the Code. We cannot share the view of Mr. Bagchi that the appellant was denied opportunity to explain the incriminating facts and circumstances. It was clearly explained as to what were the incriminating facts and circumstances with the clear idea and object of providing him an opportunity to explain it in his own way. There was no denial of opportunity. Since the whole purpose and object of examination under Section 313 of the Code was to explain the facts and circumstances for the purpose of affording an opportunity to the accused to explain it, there was no scope for giving him caution before such examination. The object of examination under Section 313 of the Code was not to extract or elicit some sort of confession from him. The object is altogether different. This beneficial provision provides an opportunity to a person to explain the circumstances in his own way. In the instant case, the examination was done after the recording of the statements of the prosecution witnesses in terms of the Sub-clause (2) of Section 313. The Court may, at any stage without previously warning the accused, put such questions to him as the Court considers necessary. That is the unfettered power given to the Court. For examination of an accused prior warning is not required. There is no scope for the Court to remind an accused that his evidence may be used against him. As we have already mentioned, the object of the beneficial provision of Section 313 of the Code is to afford an opportunity to the accused to explain the incriminating facts and circumstances in his own way. There is no scope for extracting or eliciting any sort of confession. Nothing is to be done to deter an accused from explaining the circumstances. We are unable to share the view of Mr. Bagchi that trial had been vitiated because of erroneous examination under Section 313 of the Code.

19. Claiming that the appellant was a young man in the early twenties, Mr. Bagchi has submitted that this is not an ideal case for imposition of death sentence. The incident as submitted by Mr. Bagchi, does not fall under the category of 'rarest of rare case'. The mitigating facts, it is submitted, were not taken into consideration in

awarding the death sentence.

20. The murder of a little girl, no doubt, deserves severe condemnation. The murder was definitely not the outcome of a deep-rooted conspiracy. Logic had no place in the commission of murder. The incident occurred when the appellant had just crossed his tenure. There was no proof of commission of rape on her. The act does not fall squarely on 'rarest of the rare' type. The imposition of death sentence was too severe for a young man who was in his early twenties. The sentence of imprisonment of life, in our view, would be commensurate with the misdeed the appellant had done.

21. In the result, the death reference is rejected, allowing the appeal in part. While upholding the conviction under Section 302 IPC, we modify the sentence of death to that of rigorous imprisonment of life and fine of Rs. 5,000/-, in default, rigorous imprisonment for one year for commission of offence under Section 302 IPC.

22. Send a copy of the judgment along with LCR to the Trial Court with a direction to issue modified jail warrant in terms of the order of sentence contained herein.

23. Send another copy of the judgment to the Superintendent of Jail/ Correctional Home where the appellant is presently lodged for information and necessary follow up action.

24. Urgent xerox certified copies, if applied for, are to be supplied.

Alok Kumar Basu, J.

25. I agree.

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