

(2007) 11 PAT CK 0072

In the Patna High Court

Case No : Death Reference Case No. 5 of 2005 with Criminal Appeal (DB) Nos. 544 and 587 of 2005

Ashish Mandal alias Ashis Mandal and Chandradeo Mandal

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 21-11-2007

Acts Referred:

Citation : (2007) 11 PAT CK 0072

Judgement

Rekha Kumari, J.—The above Death Reference and the two appeals filed by the appellants Ashish Mandal alias Ashis Mandal and Chandradeo Mandal respectively arise out of the same judgment dated 9.8.2005 passed by the 1st Additional Sessions Judge, Bhagalpur in Sessions Trial No. 205 of 2005/ 42 of 2005 and as such they have been taken up and heard together and this judgment will dispose of all of them.

2. The learned Additional Sessions Judge by the above judgment has convicted both the appellants under Sections 376 and 302/34 of the Indian Penal Code and. on 17.8.2005 without awarding separate sentence for the above offences, has sentenced both of them consolidately for the two offences, to death subject to the confirmation by this Court and has made the above death reference.

3. The prosecution case, as mentioned in the fardbeyan (Ext. 1) of the informant Smt. Ajo Devi recorded by the S.I. Vijay Kumar Singh, of Ghogha Police Station in the district of Bhagalpur on 14.8.2004 at 11.00 a.m. at Shahpur near the house of the informant, is that on 13.8.2004 her (informant) daughter Chanda Kumari along with her sister Khushbu Kumari and other girls of her village had gone to Amapur Diara to cut the maize crops in the field of Basudeo Mandal of her village. On that date at about. 7.00 p.m. Khushbu Kumari returned to her house and informed her (informant) that after cutting of the crops was over, Chanda and she (Khushbu) went to their own maize field, when appellant Ashish Mandal of her village reached there and drove Khushbu away and dragged Chanda Kumari in the maize field. Khushbu, hence, returned home alone. It is

further mentioned that as it was night and one had to cross a river to go to the Diara, they did not go to the Diara in the night. It is also alleged that one day prior to that day, appellant Ashish Mandal had also asked Chanda to go to his field to lift the bundles of maize, but sensing his bad intention, she did not go. On 14.8.2004 at 6.00 a.m. the informant along with her husband Damodar Mandal went to Amapur Diara. On the way, her husband told her (informant) that on the date, of occurrence at 11.00 a.m. he had seen appellants Chandradeo Mandal and Ashish Mandal going to Amapur Diara. When the informant and her husband reached Amapur Diara, they saw their daughter lying dead in their maize field. Her Salwar and underpant were untied and her Dupatta was firmly tied around her neck. There were stains of blood on the back side of Salwar, the face was swollen giving impression that she was raped and then murdered. She was convinced that both Ashish Mandal and Chandradeo Mandal of her village had committed rape on her and then committed her murder by strangulation by tightly tying the Dupatta around her neck.

4. On the basis of the above Fardbeyan, a case was registered. The police after completing investigation submitted chargesheet against the appellants.

5. Both the appellants were charged u/s 376 of the Indian Penal Code for committing rape of Chanda Kumari. They were further charged u/s 302/34 of the Indian Penal Code for committing murder of said Chanda Kumari. They pleaded not guilty to the charges. Their defence, as gathered from the suggestions given to the P.Ws. and the D.W. examined, is that they are innocent and falsely implicated and that no occurrence as alleged took place. The victim was missing from the morning of 13.8.2004 from her house and thereafter she was found murdered.

6. The prosecution examined in all six witnesses to substantiate the charges. Among them P.W. 1 is Ajo Devi, the informant, P.W. 2 is Khushbu Kumari, P.W. 4 Damodar Mandal (husband of the informant), P.W. 5 is Dr. Atul Kumar Mallick, who had conducted the post mortem examination on the dead body, P.W. 6 is Bijay Kumar Singh, S.I., the I.O. of the case. P.W. 3 is Amerika Ram, Officer-in-charge of Ghogha Police Station who has simply submitted chargesheet in the case.

7. The appellants examined one defence witness D.W. 1 Kapildeo Mandal, who has stated about the missing of the victim girl.

8. The learned Additional Sessions Judge after considering the evidence of the above witnesses convicted the appellants and sentenced them as mentioned above.

9. The point for determination before this Court is whether the learned Additional Sessions Judge was justified in convicting the appellants and whether the sentence of death passed is fit to be confirmed.

10. Learned Counsel for the appellants submitted that there is no reliable

evidence in this case. The sole eye witness is Khushbu Kumari (P.W. 2) but she being a child witness and thus is not reliable witness. Her evidence has not been corroborated by any other reliable evidence. The actual F.I.R. of the occurrence has not. been brought on record. The post mortem report shows that maggots had appeared on the dead body which suggests that the death had occurred earlier than the time alleged by the prosecution. There is great improvement in the prosecution case as narrated in the court from the case as mentioned in the F.I.R. making the whole prosecution story doubtful.

11. Learned A.P.P. defended the judgment and the sentence passed by the learned trial court.

12. In order to appreciate the above submissions of the learned Counsel, I have gone through the entire evidence on record.

13. P.W.5 the Doctor has deposed that on 15.1.2004 (wrongly mentioned for 15.8.2004) he was Professor and Head of the Department of Forensic Medicine in Jawahar Lal Nehru Medical College, Bhagalpur and on that date at 11.30 a.m. he performed the post mortem examination on the dead body of Chanda Kumari, daughter of Damodar Mandal of village Shahpur, P.S. Ghogha, District Bhagalpur and found the followings:

The Salwar worn by the deceased had red stain on the back. A cloth was found tied around the neck. The ligature and Salwar were handed over to the Chowkidar accompanying the dead body.

Injury No. I

The tongue was protruded and bitten by teeth. The nail beds and lips were cyanosed. The face and conjunctiva were congested, 1" wide horizontal continuous ligature mark present near middle of neck. Base was brown and parchment like. On cutting skin underlying tissues were found bruised and infiltrated with blood and blood clots. There was fracture of thyroid cartilage with bruising of adjacent soft tissues. The mucosa of larynx and trachea was deeply congested.

On opening the chest cavity both the lungs were found deeply congested and exuded dark frothy blood on cutting.

Genital Findings

The labia majora showed bruising. The hymen had several recent tears. Vaginal swab was taken and sent to the department of pathology. These findings are of recent forceful sexual intercourse.

The doctor has opined that injury No. (1) was ante mortem, grievous and dangerous to life in ordinary course of nature and caused by pressure and constriction over neck by a soft ligature as tied around the neck.

The cause of death was asphyxia and shock due to strangulation. The time of

death was within 24-48 hours from the time of post mortem examination. He has proved the post mortem report which is Ext. 4.

14. Thus from the evidence of this doctor, it is clear that the deceased was raped and then murdered by strangulation. The doctor in his cross examination has stated that there was no mark of struggle on the body of the deceased but since the death was committed after sexual inter course, it is evident that the victim was not a consenting party to the sexual intercourse.

15. The doctor had performed the post mortem examination on 15.8.004 at 11.30 a.m. and according to him, death was caused within 24-48 hours. The prosecution case also is that the occurrence had taken place on 13.8.2004 in the evening. Therefore, the age of death given by the doctor corresponds to the time of the alleged occurrence.

16. In the post mortem report the doctor has noted that the body was in advance decomposition stage with peeling of skin and formation of foul smelling gases and maggots. The learned Counsel for the appellant, hence, submitted that the finding clearly shows that the death had occurred much earlier than given by the prosecution.

17. But the above submission does not appear to be tenable. It is evident that the doctor had formed his opinion regarding time of death on the dates including the above finding but no question had been asked to the doctor to show that the time elapsed since death given by him is not correct. Modi's Medical Jurisprudence and Toxicology, 22nd Edition, Page 234 also shows that from eighteen to thirty-six hours of the death, the gases collect in the tissues, cavities and hollow viscera under considerable pressure with the result that the features become bloated and distorted, the eyes are forced out of their sockets, the tongue is protruded between the teeth, and the lips become swollen and everted. A frothy, reddish fluid or mucus is forced from the mouth and nostrils. Ultimately, the features become obliterated and unrecognisable. In that Treatise it is further mentioned that flies such as common houseflies and blowflies, are attracted to the body, and lay their eggs especially in the open wounds and natural orifices. The eggs hatch into maggots or larvae within eight to twenty-four hours during hot weather.

18. In the face of the above view also, there cannot be any doubt that the opinion of the doctor is acceptable.

19. The evidence of I.O. (P.W. 6) is that on 14.8.2004 after recording the Fardbeyan of the informant he started for the place of occurrence. His evidence also shows that he found the dead body of the deceased lying supine in the maize field. He has stated that the place of occurrence is Amapur Diara. There were fields of the villagers of village Shahpur there. The maize crops were found there. The field of the informant was among those maize fields. His evidence also shows that the dead body was found in the maize field of the informant and the maize crops there were found broken and the grass trampled and while coming

to this place from ridge the maize crops were found broken and grass trampled. His evidence further is that the neck of the dead body was found tied with Dupatta. The eyes of the deceased were closed. Teeth visible, sticky substance was found in the urinary track. He has stated that he had prepared the Inquest report. (Ext. 2). In cross examination, he has stated that he had found bleeding injury on the forefinger of the right hand and blood in the urinary track and nose.

20. The evidence of the I.O., therefore, establishes that the occurrence had taken place at the alleged place of occurrence and that the victim was dragged upto that place.

21. So, in view of the evidence of the doctor and the I.O. there cannot be any doubt that the deceased was raped and then murdered on the alleged date at about the alleged time and at the alleged place.

22. The most important question, however, is whether the appellants committed those offences.

23. In this regard the evidence of P.W. 2 is that on the alleged date she had gone to Amapur Diara along with his elder sister Chanda to cut the maize crops of Basudeo Mandal. After the cutting of the crops was over, leaving the bundles of maize received as wages there, Chanda Devi went to her own maize field. Appellants Ashish Mandal and Chandradeo Mandal came there and drove her (witness) away and dragged her sister. She has further stated that she kept on watching them hiding behind the maize crops and Bhaganda plants. The appellants pushed her sister down and both raped her. Her sister was screaming for help. They hit her with butt of the Pistol and then tied her neck with Dupatta. She has further stated that she then came back home by boat and narrated the occurrence to her mother and then on the next morning she along with her parents went to the field. Her cross examination shows that Diara is at a distance of four miles from her village and that seven persons altogether were cutting the crops in the field of Basudeo Mandal and they cut the crop till 12 O'clock and at about 3.30 p.m. they were given wages in the shape of bundles of maize crops.

24. P.W. 1 has stated that on the alleged date her daughter Chanda (deceased) and Khushbu had gone together to the field of Basudeo Mandal for cutting maize crops at Amapur Diara. Sugia Kumari, Yogi Kumari, Narmada Devi, Lalo Devi and others of their village were also with them. Her maize field was also there in Amapur Diara. At about 7.0 p.m. her daughter Khushbu Kumari returned and narrated that appellants Ashish Mandal and Chandradeo Mandal came to her maize field where her daughters had gone, and appellant Chandradeo Mandal dragged her daughter Chanda away inside the maize crops and drove her (Khushbu) away from there. She has also stated that one day prior to that, Chanda had told her that Ashish, Mandal had called her to lift the bundles of maize but she did not go there. This witness has then stated that after returning to her house in the evening Khushbu had told that appellants Chandradeo Mandal and Ashish Mandal had dragged Chanda in the maize field and committed rape

on her and tied her neck with Orhni. The further evidence of this witness is that they did not go to the Diara in the night and in the next morning she along with her husband and Khushbu went to Diara and saw Chanda lying dead in the maize field. She was un-dressed.. Her undergarments and salwar were un-tied. There was blood in the Salwar. Her Dupatta was tied in her neck. This witness has then stated that her husband remained at the place of occurrence and she and Khushbu went to the police station at about 10.0 a.m. and the S.I. recorded her statement. She has stated in her cross examination that her maize field is at a distance of 25-30 bighas from the field of Basudeo Mandal.

25. P.W. 4 has stated that his leg was sprained one day prior to the occurrence. He, hence, on the date of occurrence was going to Diara to set right his leg when he saw both the appellants going towards the Diara. He returned to his house at 2.0 p.m. and at 7.0 p.m. his daughter Khushbu returned and told that she and Chanda after doing their work had gone to see their own field when the appellants came together and they dragged Chanda in the middle of the field and drove her (Khushbu) away. She (Khushbu) then sat hiding herself behind a ridge of the field of Basudeo Mandal. She further told that both the appellants committed rape on her sister and assaulted her with butt of the rifle and tied her neck with the Dupatta. His evidence, then is that as it became night and dark, he went to the police out post but he was told to come in the morning. In the morning he went to the place of occurrence and found his daughter lying dead. His wife and Khushbu went to the police station. He has also stated that he found the Salwar of his daughter open and blood had fallen.

26. Thus, from the evidence of the above witnesses, it appears that Khushbu (P.W. 2) had given an eye witness account of the occurrence as far as the dragging away of Chanda, committing rape on her and tying of Dupatta around her neck and that though her mother (P.W.1) is a hearsay witness, the evidence of P.W. 2 is that she had narrated the occurrence to her mother and the evidence of P.W. 1 is that Khushbu had narrated the above incidents to her. So, the evidence of P.W. 1 corroborates the testimony of P.W. 2. P.W. 2 has been cross examined regarding her previous statement before the I.O. and she has stated that she had stated before the I.O. that she was watching the occurrence by hiding herself behind the plant of Bhaganda and had also stated that Ashish Mandal dashed her and began to commit rape whereas P.W. 6 (I.O.) has stated that Khushbu did not state before him that Ashish Mandal committed rape on Chanda after dashing her down nor did she state that she was watching the occurrence after hiding behind the Bhaganda tree. But as provided u/s 145 of the Evidence Act, in order to contradict the evidence of a witness to his previous statement, the attention of the witness must be drawn to those part of his previous statement which are to be used for the purpose of contradiction, and that this provision has not been complied with in this case. So, it cannot be said that there is any contradiction in the two statements of this witness in this regard.

27. But though, P.W. 2 has stated that she had seen the commission of rape and tying of Dupatta around the neck of the deceased and this has been corroborated by the evidence of her mother, there is no whisper in the Fardbeyan that Khushbu had seen the commission of rape and tying of Dupatta or she narrated about these to her mother. Therefore, this is a clear development in the prosecution story. Then if the girl would have stated the above facts to her mother, her parents definitely would not have left the matter lying. They must have taken prompt steps to search out the victim and take action against the culprits. But the prosecution case in the Fardbeyan is that as it had become night and they had to cross 3 Km. wide river, they did not go to the Diara.

28. P.W. 4 has, indeed, stated that he went to the police out post but he was told to come in the morning. But if P.W. 2 would have stated regarding the rape or assault or tying of Dupatta around the neck, the witness being father must have insisted the police to accompany him to the place of occurrence. They must not have, remained contended with the above reply of the police. The police would have also made atleast some entry in this regard but the evidence of the I.O. is that no such entry was made.

29. So, it cannot be said that P.W. 2 had seen the victim being raped or assaulted or her neck being tied by Dupatta.

But even if it be, disbelieved that Khushbu had seen commission of rape, assault, murder, the evidence of P.W. 2 is consistent that in her presence the deceased was dragged inside her maize field. Though, she is a child witness and can be easily tutored, a child witness is not necessarily an unreliable witness and at best the evidence of such witness should be corroborated by other evidence and it appears that the evidence P.W. 2 has been corroborated by P.W. 1. The evidence of the I.O. also corroborates the evidence of P.W. 2 as he had found the dead body in the maize field of the informant and maize crops broken from the ridge upto the place of occurrence. So, though there is no other eye witness, the evidence of P.W. 2 is sufficient to prove that Chanda Kumari was dragged by the appellants in the field of the informant. The evidence of the doctor also shows that at about that time the deceased was raped and murdered. Therefore, when soon after dragging of the victim by the appellants, she was raped and murdered and there is no explanation from the appellants as to what happened to the deceased after she was dragged by them, the presumption would be that the persons dragging were responsible for the above offences.

30. It may be mentioned here that as already stated that the evidence of P.W.4 (father of the victim) also is that his daughter had narrated about the occurrence to him. But P.W.2 herself has not stated that she had narrated the occurrence to him. So, his evidence is hearsay and is not of much consequence.

31. The next question that arises is whether both the appellants were responsible for the rape and murder committed on the daughter of the informant.

32. In this connection as already stated the evidence of P.W. 2 (Khushbu Kumari)

is that both of them had dragged her sister to the maize field. The evidence of P.W. 1 shows that Khushbu had given the names of both the appellants to her as the persons dragging Chanda. As regards this from the Fardbeyan, it appears that Khushbu had taken the name of the appellant Ashish Mandal as the person dragging Chanda and she nowhere named Chandradeo Mandal before the informant. Therefore, there is contradiction in this respect. The learned A.P.P., hence, submitted that when the evidence in court is consistent that the appellant Chandradeo Mandal was also with appellant Ashish Mandal and there is no contradiction in the evidence of P.Ws. 1 and 2 in Court and the statement u/s 161 Cr.P.C., it has to be accepted that both the appellants had dragged the girl and committed the offences. He also submitted that as the daughter of the informant was killed, it is quite probable that she was mentally shocked and disturbed and omitted to name the appellant Chandradeo Mandal otherwise there is no reason as to why at the end she stated in the Fardbeyan that both the appellants committed the offences.

33. The submission of the learned. A.P.P. at first sight, of course, appears to be convincing but the evidence of the S.T. P.W. 6, who had recorded the Fardbeyan is that after recording of the Fardbeyan, the same was read over to the informant. So, if there would have been any omission in the name of the offenders, the omission in this case could be easily detected. The Fardbeyan also shows that on the way to Amapur Diara her husband had told the informant that he had seen appellants Ashish Mandal and Chandradeo Mandal going together towards Diara. In his evidence P.W.4 has also stated this. Therefore, it is also possible that out of suspicion, the informant took the names of both the appellants as the culprits. The evidence of the I.O. also shows that he had recorded the further statement of the informant and the statement of Khushbu on 16.8.2004, i.e. two days after the occurrence. So, there was chance of embellishment in those statements. The Fardbeyan was the first version of the incident and the above omission is a vital one. Therefore, the possibility cannot be ruled out that the name of appellant Chandradeo Mandal is subsequent addition and when there are two possibilities, the possibility which favours the accused should be given effect to.

34. In view of the discussions made above, the appellant Chandradeo Mandal, atleast is entitled to benefit of doubt. But so far as appellant Ashish Mandal is concerned the evidence of P.W. 2 corroborated by other evidence and circumstance as referred to above proves beyond doubt that he dragged Chanda Kumari inside the maize field and committed rape on her and then murdered her.

35. It may be mentioned here that the evidence of P.W. 4 (husband of the informant) is that in the night of the occurrence he had gone to the police station and stated all the facts to the Sub Inspector of Police. The evidence of P.W. 1 also is that her husband had gone to the police station that night. But the evidence of P.W. 6 is that he did not find anywhere mentioned that any type of information regarding the occurrence was given on 13.8.2004 at the police station. The

evidence of P.Ws. 1 and 4 also is that when P.W. 4 went to inform the police, he was told to come in the morning. P.W. 4 has not stated that his statement was recorded. Therefore, there is no merit in the submission that the prosecution has intentionally suppressed the first F.I.R. of the case.

36. In this case again no independent witness has been examined. But though P.W. 2 is a child and an interested witness, as she was with the deceased and her evidence is unimpeachable that in her presence appellant Ashish Mandal forcibly took the deceased away and drove her away, this evidence together with the other evidence and circumstances mentioned above is quite sufficient to prove the guilt of Ashish Mandal. There is also no evidence that any other witness had seen the appellant dragging the deceased. So non examination of any other witness is not material.

37. The evidence of D.W. 1 is that the house of the informant is west of his house and in the month of August (8th month of the year) at 6.0 a.m. in the morning he heard hulla that Chanda Kumari was missing and on 14th he came to know that the dead body was lying at Amapur Diyara. It appears from his cross examination that the girl was missing from the morning of 13.8.2004. But no such suggestion has been given either to the informant or her husband by the appellants. The appellants in their statements u/s 313 Cr.P.C. also have not taken this plea. Therefore, the evidence of D.W. 1 appears to be an after thought and cannot be relied upon.

38. Thus, considering all the facts, circumstances and evidence on record, it appears that the prosecution has been able to prove beyond reasonable doubt that appellant Ashish Mandal committed rape on the deceased and then murdered her as alleged by the prosecution. The learned Additional Sessions Judge was, hence, quite justified in convicting him for rape and murder. The order of conviction passed against this appellant u/s 376 of the Indian Penal Code is thus maintained. and conviction u/s 302/34 of the Indian Penal Code is altered to offence u/s 302 of the Indian Penal Code. So far Chadradeo Mandal, however, as mentioned above, he deserves benefit of doubt and thus he is acquitted of the charges u/s 376 and 302/34 of the Indian Penal Code. The order of conviction and sentence passed against him, therefore, is set aside.

39. So far the sentence of death passed against appellant Ashish Mandal, no doubt the crime committed by him is of heinous nature. But it is not rarest of the rare cases. In this regard the decision of the Supreme Court in the case of Amit @ Ammu Vs. State of Maharashtra, may be referred to. In that case a girl of 12/13 years was raped and murdered. The accused was sentenced to death. The Supreme Court reduced the sentence of death to sentence of imprisonment for life. The Supreme Court, considering that the appellant was a young man of 20 years at the time of incident and that he was a student and there was no record of any previous heinous crime and there was no evidence that he would be a danger to the society if death penalty is not awarded, held that it was not a rarest of rare cases.

40. In this case also the girl was aged about 18 years and the appellant Ashish Mandal was a young man of about 25 years, and there is nothing to show that he has any criminal history or that he cannot be reformed and would be a threat to the society if death penalty is not-awarded. So, in view of the above decision of the Supreme Court, the learned trial court was not justified in awarding death penalty to appellant Ashish Mandal.

41. The death penalty awarded against him is thus set: aside and it is ordered that the appellant Ashish Mandal would undergo imprisonment for life for the offence u/s 302 of the Indian Penal Code and rigorous imprisonment for ten years for the offence u/s 376 of the Indian Penal Code and both the sentences would run concurrently.

42. The death reference is accordingly rejected. Criminal Appeal No. 587 of 2005 filed on behalf of appellant Chandradeo Mandal is allowed and Criminal Appeal No. 544 of 2005 filed by appellant Ashish Mandal is dismissed with modification in sentence in the manner indicated above. The learned trial court is directed to release appellant Chandradeo Mandal forthwith in this case.