

(2005) 01 OHC CK 0031

In the Orissa High Court

Case No : DSREF No. 2 of 2003 and JCRLA No. 130 of 2003

Krushna Naik

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 04-01-2005

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2005) 99 CLT 283 : (2005) CriLJ 1343 : (2005) 30 OCR 253 : (2005) 1 OLR 284

Hon'ble Judges : P.K. Tripathy, J;A.K. Samantray, J

Bench : Division Bench

Advocate : Pramila Mohanty, for the Appellant; A.N. Routray, Additional Government Advocate, for the Respondent

Judgement

A.K. Samantray, J.—The above noted DSREF (Death Sentence Reference) has been made u/s 366, Cr.P.C. by Learned Addl. Sessions Judge, Bhanjanagar on convicting accused Krushna Naik for the offence punishable u/s 302, IPC as per the judgment delivered on 6.12.2003 in Sessions Case No. 30 of 2001 arising out of Soroda P.S. Case No. 78 of 2000, and sentencing him to death. The said accused has challenged that order of conviction and sentence in JCRLA No. 130 of 2003. On consent of the parties, both the matters were heard analogously and disposed of by this common judgment, which will abide the result of both the cases.

2. The factual position reflected in the FIR and as presented by the prosecution, sans unnecessary details, runs as follows :

On 22.10.2000 at about 11 A.M. the informant Radhakanta Behera (P. W. 1) had been to the house of Chakradhar Malik (deceased) and there, during conversation, it was revealed by the deceased that Jhili, the wife of Banaro Malik had been raped by three persons of village Kesaripatna when she had been to take bath in river Bantuli on the previous day. Jhili, who was present in the house of Chakradhar Malik, also confirmed the allegation of sexual assault on her by

three persons and insisted a quick decision in the matter. There it was resolved that they would proceed to Kesaripatna with Jhili for identification of the offenders and would ask them as to why they sexually violated Jhili. As per the decision, deceased Chakradhar Malik, informant Radhakanta Behera, Prasanna Malik, Jhili and her husband Banaro Malik proceeded towards Kesaripatna. On the way Banaro Malik stayed back to attend call of nature and others including Jhili reaching the village found the three culprits at the village crossing (Chhak) and were identified by Jhili. When the informant confronted them with the allegation of rape on Jhili at river Bantuli and that the matter be reported to the police, the accused persons challenged the informant's authority to confront the matter when the victim was silent on that score. At this juncture, suddenly accused Krushna Naik dealt a fist blow to the left cheek of the informant and asked others to bring a "Kati" to kill him. He picked up a "Nimmo Medha" {a kind of wooden stick} and dealt a blow to the informant, which the informant warded off by gliding back and raising his arm, and as a result the blow fell on his right hand. Chakradhar Malik (the deceased) intervened and came over there to rescue the informant Radhakanta Behera and accused Krushna Naik dealt a blow by the "Medha" to the head of the deceased and the deceased fell down there on the road sustaining injury. In the meantime Arjuna Gouda arrived with a "Kati" and out of fear the informant and others rushed back to their village and informant came to the spot with the wife of the deceased and found the deceased lying dead and police had already arrived there. Oral information was lodged at the spot by the informant, which the police recorded (Ext. 9) and a case was registered and after investigation charge-sheet was submitted. All the three accused persons faced the trial pleading not guilty and the accused-appellant was found guilty u/s 302, IPC and was sentenced to death by the Trial Court but the two others were acquitted.

Throughout the trial accused persons adopted the exonerative plea of complete denial and alleged their false implication in the case. To substantiate the charge, prosecution examined as many as 13 witnesses and exhibited 12 numbers of documents and five numbers of incriminating materials as M.Os. 1 to V. They also examined two witnesses in their defence and that includes accused Arjuna Gouda (since acquitted).

3. Relying on the ratio in the case of State of Tamil Nadu Vs. Rajendran, it is stated at the bar that on consideration of a death reference made u/s 366, Cr.P.C. the High Court, in exercise of the jurisdiction as provided in Section 368 read with Section 386, Cr.P.C. should evaluate the evidence on record afresh to find sustainability of the impugned judgment of conviction. That being the settled principle of law, we adopted the same. P.Ws. 1 to 5 are the eye-witnesses to the occurrence and all of them have stated in definite and clear terms about the blow dealt by accused Krushna on the head of deceased Chakradhar by means of "Nimmo Medha" and Chakradhar fell down and died at the spot. P.Ws. 6 and 7 are witnesses to the seizure of the "Medha" (M.O. I) and seizure of blood-stained earth and sample earth by the Investigating Officer. P.W. 9 is the Doctor who

conducted post-mortem examination on the dead body of the deceased and proved that report (Ext. 4), P.W. 10 is the other Doctor who examined the injured informant, P.W. 11 is a Police Constable who accompanied the dead body sent for post-mortem examination, P.W. 12 is the Investigating Officer and P.W. 13 is the SDPO, Bhanjanagar, who submitted the charge-sheet.

4. The Doctor (P.W. 9) who proved the post-mortem report, Ext. 4, indicated in his evidence that he found one lacerated wound on the vault of the scalp causing underlying fracture of skull of 5 cm. x 1/2 cm. On dissection, there was laceration of dura with haematoma in the anterior cranial fossa of 7 cm. x 4 cm. x 2 cm. There was trickling of blood from both the nostrils. Cause of death was due to intra cranial hemorrhage and injury was caused probably by the wooden stick (M.O. 1). The doctor also indicated that the injury was ante-mortem in nature. The evidence of the Doctor, P.W. 9 undoubtedly proved that the deceased suffered homicidal death. Accused/appellant in Jail Criminal Appeal does not challenge to such finding recorded by the Trial Court. In course of advancing argument in support of the death sentence, Learned Government Counsel referred to and relied on the cases of Molai and Another Vs. State of Madhya Pradesh, , Sushil Murmu Vs. State of Jharkhand, and the above noted case of Rajendran (supra). In all the above noted three citations the Apex Court has reiterated the principle that in view of the provision of law u/s 354, Cr.P.C, the appropriate punishment in case of an offence u/s 302, IPC is imprisonment for life and death sentence is an exception, which may be imposed only in rarest of the rare type of cases. In the case of Bachan Singh Vs. State of Punjab, a five judges Bench of the Apex Court while propounding such a principle and declaring that death sentence is not violative of Article 21 of the Constitution, have observed that :

"199. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are no intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

5. In the above context, we also want to put on record the principle enunciated

by the Apex Court in the case of Sushil Murmu (supra) in the following manner:

"20. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt."

xxx xxx xxx "22. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences."

6. Mrs. Pramila Mohanty, Learned Counsel for the accused-appellant, while not disputing to the aforesaid settled position of law, however argued that merely because the deceased suffered homicidal death, the appellant cannot be convicted u/s 302, IPC since he had no intention to kill the deceased, because there was no pre-meditation and the blow which was intended at Radhakani Behera (P.W. 1) being warded off, accidentally fell on the head the deceased, who succumbed to it. She further argued that the act of the appellant in the worst case would attract Exception to Section 300, IPC and such conviction u/s 302, IPC cannot be sustained in any view of the matter and the appellant may, at best, be convicted u/s 304, IPC. She relied on the case of *Shahadat v. State of U.P.* 2000 (1) Crimes 127. To further fortify her such contention she drew our attention to the cross-examination of P.W. 1 at Para 6 where the informant Radhakani Behera has deposed that the Thenga of Krushna struck on the head of Chakradhar when it was aimed to assault him (P.W. 1 Learned Addl. Govt. Advocate on the other hand pursuing his point focused to Para 4 of the evidence of P.W. 1 where he has stated that, "when the Thenga blow fell on the head of Chakradhar, he was standing at his left side and Prasanna (P.W. 2) and Jhili (P.W.3) were standing to his left." P.W. 1 has stated that out of fear he did not try to catch-hold of the Thenga of Krushna when he assaulted Chakradhar and they were at a distance of 16 cubits from Chakradhar when he was assaulted. He further submitted that the Thenga, the length of which is about three cubits, as stated by P.Ws., would at no stretch of imagination be said to be aimed at P.W. 1 and accidental hit on the head of the deceased who was at a considerable distance from P.W. 1. The stray statement of P.W. 1 at Para 6, to which Learned Counsel for the appellant attaches so much of importance, is nothing but an inadvertent slip on the part of the rustic witness.

7. At this juncture we make it clear and specific that a precedent is to be followed

subject to its applicability to the facts and circumstance available at hand. In the case of Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another, the Apex Court has propounded that:

"12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

xxx xxx xxx Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

8. In view of the above-mentioned contention of Learned Counsel, we carefully examined the evidence on this score. In his FIR it is the consistent case of RW. 1 that when deceased raised oral protest to the assault on him by the accused, the accused challenging his authority dealt blow by the "Medha" on his head. In his cross-examination, at Para 4 he has also repeated the same thing and his statement shows that an isolated blow aimed at the deceased was dealt by the accused and it fell on his head. Apart from the evidence of P.W. 1 directly attributing infliction of blow on the head of the deceased to the appellant, there is eye-witness account of RWs. 2, 3, 4 and 5 which is clear, cogent and categorical that an isolated "Medha" blow aimed at the deceased was dealt on his head by the accused-appellant. Nothing contradictory has been elicited from any of them in cross-examination to doubt their veracity on this matter.

9. Law is trite and there is no controversy over the proposition that where the following requirements are satisfied, culpable homicide would not be murder;

- (i) Without premeditation in a sudden fight;
- (ii) In the heat of passion upon a sudden quarrel;
- (iii) Offender has not taken undue advantage; and
- (iv) Offender has not acted in a cruel and unusual manner.

Single blow in some cases may entail conviction u/s 302, IPC in some cases u/s 304, IPC and in some other cases u/s 326, IPC. The question with regard to nature of offence has to be determined in the facts and circumstances of each case.

10. On a thorough examination of mass of evidence of the eye-witnesses, which is clinching and goes unassailed on the question of blow dealt by accused

Krushna on the vault of scalp of the deceased, we are unable to find from the circumstances of the case any of the requirements satisfied whereas law mandates satisfaction of all the four requirements mentioned above. On the other hand, all the circumstances are against the appellant and when no provocation was offered by the accused or even slightest altercation between them, the appellant has dealt "Medha" blow on the head of the deceased when he simply raised oral protest trying to rescue the informant. The blow was dealt by the accused-appellant with full knowledge that the blow on his head by means of the "Medha" might, in the ordinary course of nature, result in his death. The finding recorded by the Trial Court, in our considered view, is well founded and as such it does not warrant any interference and is therefore confirmed.

11. The next crucial question that comes for our consideration is, whether for the conviction u/s 302, IPC the extreme penalty of death is warranted, which has been awarded by the Trial Court.

In a preceding paragraph of this judgment, we have taken note of the guidelines from the Apex Court. Therefore, the following question has to be asked and answered to determine whether the present case is a rarest of the rare cases of murder warranting imposition of death sentence. That question is whether the act of the accused is brutal, inhuman and disproportionately shocking. At the risk of repetition of the sequence of events, we note that the prosecution party had come to the occurrence village to ascertain the identity of the culprits of the offence of rape. After the accused was spotted as one of the culprits and he was confronted with that accusation, that he retaliated and dealt the blow. In the language of the Apex Court, every murder is cruel and therefore the aforesaid act of the accused is cruel in committing the murder, but it does not appear to be a rarest of the rare types of murder. Under such circumstance, we are unable to agree with the view taken by the Trial Court for imposing death sentence on the accused Krushna Naik. We find from the impugned judgment that the allegation of rape against accused Krushna has weighed much in his mind so as to impose the death sentence. We make it clear that it is not a case of rape followed with murder, as in the case of Sushil Murmu (*supra*) and to that extent the facts of the present case is distinguishable from the said case.

12. In course of hearing on the merit of the impugned judgment and order of conviction, we allowed the parties to address the Court even on the question of sentence. As already noted in a preceding paragraph, accused Krushna Naik pleaded for a conviction u/s 304, IPC whereas Learned Government Counsel reiterated for confirmation of the death sentence. We find that the death sentence is not proportionate and according to the provision in Section 354, Cr.P.C. for the offence u/s 302, IPC imprisonment for life is the normal sentence. Thus, while upholding the conviction of the accused Krushna Naik, we sentence him to undergo imprisonment for life. Accordingly, the Death Sentence Reference is discharged and the Jail Criminal Appeal is allowed in part by modifying the Death Sentence to imprisonment for life.

P.K. Tripathy, J.

13. I agree.