

(2019) 01 MP CK 0043

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 7332 Of 2018, CRRFC No. 15 Of 2018

Mahendra Singh Gond

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

Date of Decision : 25-01-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 354(5), 366(1)
Indian Penal Code, 1860 — Section 376(a)(b), 363
Protection Of Children from Sexual Offences Act, 2012 — Section 5(j)(n)
Evidence Act, 1872 — Section 6, 8

Citation : (2019) 01 MP CK 0043

Hon'ble Judges : P.K. Jaiswal, J;Anjuli Palo, J

Bench : Division Bench

Advocate : V.C. Rai, Mahendra Singh Gond, Siddharth Sharma, Bramhdatt Singh

Final Decision : Dismissed

Judgement

Anjuli Palo, J

1. The criminal appeal (CRA No.7332/2018) has been preferred by the accused Mahendra Singh Gond to set aside the impugned judgment of conviction and sentence. The criminal reference (CRRFC No.15/2018) has been referred under Section 366 (1) of Criminal Procedure Code, 1973 for confirmation of order of capital punishment of death awarded by the First Addl. Session Judge, Nagod, District Satna in S.T. No.11/2018, whereby the accused-Mahendra Singh Gond has been convicted under Section 363 of I.P.C. and sentenced to undergo R.I. for seven years and fine of Rs.5000/-, in default of payment of fine R.I. for three months under Section 376(a)(b) of I.P.C., he has been punished for death sentence.

2. In brief the prosecution case is that on 01.07.2018 at village Parasmaniya, Police Station Uchehra, the prosecutrix aged about 4 years, was sleeping on cot with her father in the courtyard of her house. At night about 10 pm, accused came there to meet with her father and conversation with him. Thereafter, he

went away. At about 12 pm Prahlad Singh/father of the prosecutrix went to natural call towards the pond. At that time prosecutrix was sleeping alone on the cot. When her father came back to his cot, he found the prosecutrix was not there, someone took her. Prahlad Singh and his family members searched the prosecutrix and found her in the field of Dheer Singh. She was injured and unconscious. She had not worn undergarment. They found blood stains on her frock and bleeding from her vagina. The accused getting a chance and took away the prosecutrix in the field side of Dheer Singh. From one hand he pressed her mouth and from another hand he fingering in her private part. The prosecutrix was attempted to cry but he pressed her mouth and committed rape with her. So that the prosecutrix sustained severe bleeding and injuries on her vaginal organs. The family members informed the police and brought her to the hospital. Police also reached in the hospital and lodged FIR against the appellant. Looking to the serious critical condition of the prosecutrix, Senior Doctors of the District Hospital and District Administration, Satna referred her to All India Institute of Medical Sciences, New Delhi for her treatment. After completion of necessary investigation, charge-sheet was filed against the accused before the competent court.

3. After committal of the case, learned Trial Court framed the charges against the appellant under Sections 363, 376(a)(b) of Indian Penal Code and Section 5(j)(n) of Protection of Children from Sexual Offences Act. The appellant abjured guilt. He pleaded his innocence. He stated that due to old enmity with the family of the prosecutrix, the police implicated him with concocted story and prepared false evidence against him.

4. The learned Trial Court after relying the testimonies of the prosecutrix and her family members along with medical opinion and DNA test report found the appellant guilty of committing aforesaid offences and sentenced as mentioned above.

5. The appellant challenged the findings of the trial Court on the ground that there is no direct evidence against him. Learned trial Court in hasty manner without giving proper opportunity of hearing to the accused, convicted him with capital punishment. The trial Court has not followed the principles of natural justice. The findings of the trial Court are contrary to the law and facts. The trial Court has not appreciated the defence of accused. It is also alleged by the appellant that the trial Court ignored the testimony of Dr. Prashant Yadav (PW/8) who examined the appellant and did not find any symptom of the offence. He further submitted that the Court has not considered the opinion of lady doctor, who did not give any definite opinion about the recent intercourse with the prosecutrix. There are some material infirmities in the prosecution case. Police did not find the actual offender. Hence, falsely implicated the appellant. No case is made out against him. Hence, his conviction is liable to be set aside and the appellant is entitled for acquittal from the charges leveled against him.

6. Learned Government Advocate for the State opposed the contentions of the

appellant and submits that, there is sufficient evidence is available on record to convict him in the aforesaid sections. Hence, the findings of the learned trial Court are just and proper, not warranted any interference by the appellate Court, hence, capital punishment should be confirmed.

7. Having heard learned counsel for the appellant as well as learned Government Advocate for the respondent-State at length.

8. Now, the questions arises (i) whether the appellant is rightly convicted by the trial Court' ? (ii) whether death sentence is a proper sentence for the appellant ?

9. In Ex.P/7 the date of birth of the prosecutrix is 01.03.2014. In this regard testimony of Santosh Namdeo (PW/4) is unchallenged, hence, found reliable. As per Ex.P/7 and unrebutted testimony of her parents viz mother Mamta Singh Gond (PW/19) and father Prahlad Singh Gond (PW/20) it is proved that at the time of the incident on 1. 07.2018, the prosecutrix was aged about 4 to 4½ years and she was minor.

10. Prosecutrix (PW/18) and her parents Prahlad Singh (PW/20) and Mamta Singh (PW/19) categorically stated about the incident and corroborated the testimony of each other. In this regard, Prahlad Singh (PW/20) father of the prosecutrix and his wife/mother of the prosecutrix Mamta Bai (PW/19) clearly deposed that on the date of incident at night the prosecutrix was sleeping with her father Prahlad Singh (PW/20). At about 9 pm appellant/accused came to their house and met with Prahlad Singh. After some time, he went away then Prahlad Singh went to the pond for natural call and at that time he left alone the prosecutrix on cot. When he came back to his cot, he found that the prosecutrix was missing. Then, he called his wife and asked her about the prosecutrix. With the help of his brothers, they searched the prosecutrix, after knowing that the appellant was came there, the brother of Prahlad Singh went to search him, but he did not find the appellant. While coming back to their house, they found the prosecutrix in unconscious condition at the field of Dheer Singh. Her family members brought her to house. They found bleeding from her vagina. She was not worn underwear that time. Hence, her mother worn her another underwear.

11. Other witnesses Acchche Lal (PW/2) and Sunil Singh (PW/3) have also corroborated their testimony. Sunil Singh (PW/3) deposed that Prahlad Singh told him that Mahendra came to his house just before the incident which relevant under Sections 6 and 8 of the Indian Evidence Act. Anoop Singh (PW/14) clearly deposed that on 1. 07.2018 at about 11:00 pm, he saw the appellant near the house of Prahlad Singh. Hence, they had a doubt that appellant would have committed the offence. Acchche Lal (PW/2) and Sunil Singh (PW/3) also corroborated the physical condition of the prosecutrix. Just after the incident, both the witnesses also saw the bleeding from her vagina and her injuries.

12. Learned counsel for the appellant has failed to rebut the testimony of all the above witnesses in their cross-examination. Further, we do not find any material infirmities in their testimony.

13. Dr. A.P. Singh (PW-9) stated that on 02.07.2018 at CHC, Uchehra at about 05:40 am, Prahlad Singh brought the prosecutrix for her treatment that time she was partly unconscious. During her checkup he found clotted blood around her vaginal parts and some injuries in private parts. After giving primary treatment to the prosecutrix, he referred her to the District Hospital, Satna and prepared medical report (Ex.P/16). Both the MLC reports (Ex.P/11 and Ex.P/6) are similar. Then they informed the incident to the police. Police came to the spot and brought her to the District Hospital, Satna where her father lodged FIR (Ex.P/26) against the appellant.

14. Sundarlal Rawat (PW/15) ASI established that Acchchelal who is the close relative of prosecutrix promptly informed to Police Chouki Parasmniya. The appellant took away the prosecutrix and committed rape with her. Sunderlal Rawat (PW/15) also stated that just after he went to the village and saw the prosecutrix in critical condition, hence, he brought her to the District Hospital Uchehra along with her parents and informed the SHO, Uchehra about the incident.

15. Abhilasha (PW-13) Sub-Inspector corroborated the testimony of parents of the prosecutrix and deposed that on 02.07.2018, she received an information that the prosecutrix was admitted in District Hospital, Satna. She reached there and lodged Dehati Nalishi and FIR against the appellant. She sent the prosecutrix for medical examination.

16. Dr. Preetika Singh (PW/5) medically examined her on 2nd July, 2018. At the time of her medical examination, she found severe bleeding from her vagina. She further found some abrasion on her back and her hymen was ruptured in fourth degree. Perineal tear reached upto rectum. Rectum was also ruptured. There is swelling on her private part. She prepared two vaginal slides and sealed her frock and undergarment for examination. She also took her sample of blood, nails and hairs and Buccal smear from inside of her mouth for DNA examination and sent all the articles to the police.

17. On the contrary with the contention of the appellant that the doctor has not given any definite opinion about intercourse. Dr. Preetika Singh (PW/5) clearly opined that the prosecutrix was subjected to sexual assault and recent intercourse. She further explained that with the team of other lady doctors Dr. Rekha Tripathi and Dr. Pathak, they examined the prosecutrix and found injury on her anal canal admeasuring about 5 x 3 cm, her anal sphincter was entirely torn. Similarly, her vagina entirely ruptured upto anus. Her hymen totally ruptured. All the injuries are caused to the prosecutrix within 24 hours from her medical examination.

18. Expert doctors were called for her treatment. A team of 4 doctors from the Medical Hospital, Jabalpur reached there. Dr. Preetika Singh (PW/5) examined her and case was referred to All India Institute of Medical Sciences, New Delhi. All the facts are narrated by Dr. Rekha Tripathi in MLC report Ex.P/11. The

opinion of Dr. Singh and medical report Ex.P/11 itself proved that the minor prosecutrix was subjected to the severe sexual assault. The word "sexual assault" may not be used in Ex.D/2 her hospital admission card, but from the testimony of Dr. Preetika Singh and facts narrated in Ex.P/11 and her treatment prescription, we are not inclined to disbelieve the testimony of Dr. Prateeka Singh.

19. In our opinion, learned counsel for the appellant during the cross-examination of Dr. Preetika Singh challenged her testimony only on the irrelevant facts. In her examination, she clearly stated that all the injuries found on the prosecutrix were fresh in nature. They were caused within 24 hours from her medical examination.

20. During investigation on 3rd July, 2018, police interrogated the appellant before Santosh Kuhwaha (PW/1) and Acchche Lal (PW/2). Before these two witnesses, the appellant confessed and stated that before committing rape with the prosecutrix, he fingering in the vagina of the prosecutrix till the blood oozing out. Due to which and intercourse by the elderly man with such a minor girl, the prosecutrix was unconscious. Hence, he thrown underwear of the prosecutrix nearby bush and went away from the spot.

21. Abhilasha Nayak, S.I. (PW/13) further stated that on the memorandum of the appellant Ex.P/1 she recovered underwear of the prosecutrix from the spot which was blood stained then she arrested the appellant. Hence, his confession is relevant and also very material to connect the appellant with the crime. Both the witnesses Santosh Kushwaha (PW/1) and Acchche Lal (PW/2) are the villagers of the same village where the appellant was residing. They have no enmity with the appellant nor police was biased against the appellant to involve him in this heinous crime. Hence, we inclined to rely on the aforesaid evidence.

22. It is very important to note that the prosecutrix (PW/18) herself identified the appellant in the Court and stated that he had committed rape with her. Looking to the age of the prosecutrix which is four years, we cannot expect from her to give a detailed statement. We rely on her testimony along with other evidence which is sufficient to establish the crime of the appellant.

23. Sushri Kiran Kiro, Investigating Officer (PW/21) arrested the appellant and sent him for medical examination. Dr. Prashant Yadav (PW-8) medically examined the appellant on 03.07.2018. He found that the appellant was capable of performing intercourse. Doctor also found injury on his finger of left hand of about 0.5x0.5' and some abrasion on his thumb and on 1st and 2nd finger of his left hand. He also prepared semen slide of the appellant and seized his under garment. He sealed the article and handed over them to the police.

24. Medical evidence also corroborated the confession of the appellant which established that by fingering in the vagina of the prosecutrix, such type of injury was caused on his finger. At the request of SDOP (Ex. P/17), Dr. A.P. Singh (PW/9) collected blood sample from the appellant on 03.07.2018 for DNA examination. He sealed the blood samples of the appellant before Sunil Singh

and Sushri Kiran Kiro and handed it over to the police. He also verified the presence of appellant in Ex. P/18 and signed the same. Sushri Kiran Kiro, Investigating Officer (PW/21) recovered blood stained soil from the spot i.e. the field of Dheer Singh.

25. Dr. Mahendra Singh, Scientist (Scene of Crime), FSL Unit Satna explained that he also investigated the scene of occurrence at the field of Dheer Singh. He found some bushes and small plants on the spot. He found dried blood stains and signs of friction. At a distance of about 4-5 ft. they found another dried blood stains. The house of the prosecutrix was situated at distance of about 525 ft. from the spot. He further explained that the house of the prosecutrix was made of mud. There was no gate. After inspecting the spot, he conducted Benzodine test, the result of which came out positive due to the presence of blood in the soil. All the articles recovered by the police were sent for medical examination at FSL, Sagar. This entire evidence is found unrebutted.

26. Sushri Kiran Kiro, Investigating Officer (PW/21) further stated that she sent a draft to FSL, Sagar for DNA test of the prosecutrix and the appellant. DNA report is Ex.P/21. Dr. Anil Kumar Singh found that in vaginal slide of the prosecutrix and her undergarment he found similar DNA profile of male. Similarly, he found similar DNA profile on the nails of the prosecutrix. He further found hairs on the undergarment of the prosecutrix with similar DNA profile of nail. All the DNA profile which were found on vaginal slide and undergarment of the prosecutrix are similar with the DNA profile of the appellant. In this regard, learned trial Court rightly considered and relied on the DNA test report Ex.P/28 to P/30 in the impugned judgment.

27. We do not find that while examining DNA profile of the prosecutrix and the appellant, any mistake is committed by the scientific officer nor it was challenged by the appellant. Presence of similar DNA, on the vaginal swab and undergarment of the prosecutrix is directly linked the appellant as he committed rape with the prosecutrix.

28. Therefore, in our considered opinion, learned trial Court rightly convicted the appellant for committing offence punishable under Sections 363, 376(a)(b) of Indian Penal Code and Section 5(j)(n) of Protection of Children from Sexual Offences Act. Hence, his conviction under these sections is hereby maintained.

29. Learned counsel for the appellant submits that the case of the appellant is not covered in the purview of 'rarest of rare case'. He placed reliance in the case of Ram Deo Prasad vs. State of Bihar (2013) 7 SCC 725, in which death sentence was converted into life imprisonment. But, facts of the present case are different, therefore, aforesaid conversion is not appropriate in the case at hand. The Hon'ble Supreme Court considered the norms of 'rarest of rare case' in various judgments. After following the decision of the Bachan Singh v. State of Punjab AIR 1980 SC 898 in the case of Machhi Singh v. State of Punjab [AIR 1983 SC 957], the Constitution Bench of the Supreme Court has held as follows:-

"In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case:

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime';
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;
- (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

[Also see Muniappan Vs. State of Tamil Nadu : (2010) 9 SCC 567, Dara Singh Vs. Republic of India : (2011) 2 SCC 490, Surendra Koli Vs. State of UP : (2011) 4 SCC 80, Sudam Vs. State of Maharashtra : (2011) 7 SCC 125.]

30. Learned counsel for the appellant urged that the appellant is only aged about 28 years. He has no criminal antecedent. For awarding appropriate punishment to him all the relevant factors should be considered. In the present case, the appellant had sexually assaulted a small girl aged about 4½ years in brutal manner and raped her. From the injuries caused by him to the child after putting hand on her mouth, there is ample possibility that she may died.

31. In case of Purushottam Dashrath Borate Vs. State of Maharashtra [(2015) 3 SCC (Cri.) 326], the Hon'ble Supreme Court has held that,

"The age of the accused persons, their family background and lack of criminal antecedents cannot be said to be the mitigating circumstance, the nature of heinous offence and cold and calculated manner in which it was committed by the accused person. The agony suffered by the family of the victims cannot be ignored."

32. Such incident will have an everlasting effect on the mind of the prosecutrix. The injuries caused to the prosecutrix who is aged only 4 ½ years will also cause her mental and physical agony in her lifetime.

33. In case of Mukesh Vs. State (NCT) of Delhi [(2017) 6 SCC 1], the Hon'ble Supreme Court has held that -

"Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large."

"Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.

In *State of M.P. v. Munna Choubey and Anr.* (2005) 2 SCC 710, it was observed as under:

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal v. State of Tamil Nadu* (1991) 3 SCC

471. Another significant development in the sentencing policy of India is the 'victim-centric' approach, clearly recognised in *Machhi Singh* (Supra) and re-emphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: *Gurvail Singh @ Gala and Anr. v. State of Punjab* (2013) 2 SCC 713; *Mohfil Khan and Anr. v. State of Jharkhand* (2015) 1 SCC 67; *Purushottam Dashrath Borate and Anr. v. State of Maharashtra* (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In *Mohfil Khan* (supra), this Court specifically observed that 'it would be the paramount duty of the Court to provide justice to the incidental victims of the crime - the family members of the deceased persons.'

34. In present scenario where day-by-day such type of crime continuously increased, reformatory ideas are totally ineffective. Justice demands that the Court should impose punishment befitting the crime so that it reflects public

abhorrence of the crime.

35. It is not in dispute that at the time of the incident the appellant was working as a teacher. Hence, it is expected from him that he live and act according to his moral liability so that he teach the students in noble manner. It could not be conceived from a person who is performing the pious duty of a teacher, who is expected to nurture the character and morality in children of the nation, to commit such kind of heinous act which tantamount to moral turpitude also.

36. After considering the entire facts and circumstances of the case and also mitigating circumstances, we come to the conclusion that the instant case clearly comes within the category of the "rarest of the rare case". Hence, the capital punishment is a proper punishment for the appellant. Any other punishment is absolutely inadequate. In the light of principle laid down by the Supreme Court in above various cases, we confirm the capital punishment awarded by the learned trial Court to the appellant and the manner of the execution of the death sentence as prescribed by the learned trial Court is proper under Section 354(5) of Cr.P.C.

37. Accordingly, appeal filed by the appellant is hereby dismissed.

38. Let a copy of this judgment be retained in the file of the connected Criminal Appeal No.7332/2018.

39. The office is further directed to sent a copy of the judgment forthwith to the trial Court for taking necessary appropriate action in accordance with law.

40. Before parting, we must put on record our unreserved appreciation for the valuable assistance rendered by the learned Amicus Curiae in the present case.

Appeal dismissed and Reference answered accordingly.