
(1980) 09 GAU CK 0009
In the Gauhati High Court

Miss Lulano Lotha

APPELLANT

Vs

The State of Nagaland

RESPONDENT

Date of Decision : 09-09-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 25

Penal Code, 1860 (IPC) — Section 299, 302, 318

Citation : (1981) CriLJ 522

Hon'ble Judges : D. Pathak, Acting C.J.; K.N. Saikia, J

Bench : Division Bench

Judgement

K.N. Saikia, J.—Miss Lulano Lotha, a Naga tribal girl, appeals from jail against her conviction for infanticide, concealment of birth and secret disposal of dead body, under Sections 302 and 318, I.P.C. and concurrent sentences of life imprisonment and two years S. I., respectively.

2. The following facts transpire from evidence on record: On 9-9-1974 P. W. 5, D. S. Rawat, Officer-in-Charge North P. S., Kohima, received a telephonic information to the effect that there was a suspicious human placenta lying in the nallah located below Greenland Hotel and above the New Market, Kohima. He made G. D. entry No. 49 dated 9-9-1974 (not produced) and accompanied by ASI, R. Chaberliang, T. S. C. Japhohol Angami and Constable Sanicho Chaheasang (None examined) went to the spot and discovered some material suspected to be human placenta, collected it from a nallah behind the house of Mrs. Videtsenuo Angami (P. W.) in a coloured plastic bag, and sent the same to the Medical Officer, Civil Hospital, Kohima with a requisition slip (Ext. P. 2). He continued to search the nearby area to recover the dead body of the child, if any or the mother and ultimately traced Miss Lulano Lotha (the appellant) on 11-9-1974 at Kohima town near one Khasi Hotel. On being questioned, the girl, according to P. W. 5, confessed that she gave birth to a child, killed it squeezing its neck and wrapped it with her half shirt and concealed it behind a bush, whereto she led the witness, who recovered the dead body in presence of Hazeto Angami (P. W.

1) and others. At 5 P. M. on 11-9-1974 he (P. W. 5) held inquest over the dead body, photographed it and sent the accused-appellant to hospital for medical examination with a requisition slip (Ext. P. 2). He also challaned the dead body for post-mortem examination with a letter (Ext. P. 5) soliciting report on specified points.

3. Afterwards, he examined some other witnesses, arrested the accused-appellant and submitted a report, (Ext. P. 7) with F. I. R. No. 13 of 12-9-1974 (Ext. P-6) at 11.15 A. M.

4. Dr. Meren Jamir (P. W. 2), Assistant Surgeon, examined the accused-appellant physically including her private part on 11-9-1974 and found that she had recently given birth (within 2/3 days) to a child. The witness states, "It appeared to be a natural delivery. She did not complain pain. There was no sign of injury or struggle on her body. Post delivery fluid, I could find". It may be noted that he examined the accused-appellant on police requisition (Ex. P. 2) on the body of which he gave his notes. That requisition reads as follows:

To.

The Medical Superintendent,

Civil Hospital, Kohima,

Sub : Medical Examination report,

Sir, I have the honour to send herewith the female noted below for favour of medical examination and furnishing the result thereof as quickly as possible to prove the case of infanticide. She may also be given necessary treatment. In addition the following points may also be explained:

Miss Lulano Lotha, D/O. Lechamo Vill. Tsungiki, P.S. Wokha. District - Wokha.

Yours faithfully, Sd/- D. S. Rawat. 11-9-1974 Officer-in-Charge, Kohima North Police Station, NAGALAND.

- 1). Whether there are signs of recent Delivery in her - Yes.
- 2). The blood found on the cloth or genital region should be examined and blood group may be determined:- Collected.
- 3). Whether she delivered matured child, Depends upon the weight of the baby.
- 4). Are there any signs of forced labour to cause the delivery - Yes,
- 5). What may be the actual gaps between time of examinations and delivery - 3 (three) days (approx).
- 6). Are there general physical changes and local signs - Yes.
- 7). Whether the period of puer (illegible) (torn) can be determined and if so it may be noted - Third day (approx).

8). Whether any signs of poison or dangerous drug used for causing delivery or killing the child are present in the person of the female. - Not detectable clinically.

9). What may be the age of female - About 18 years.

10). What may be the possible age of child which might have emp (illegible) from her uterus - cannot be told.

11). Whether there is bleeding from her uterus or not? If so what is the cause of such bleeding? Yes, Post Partum bleed-ing (Tochea).

Sd/- Dr. I. Meren A.O. 11-9-1974 Assistant Surgeon (I), Naga Hospital, Kohima, Medical Officer.

From the text of the requisition (Ext. P. 2) there is no doubt that it was of solicitous nature. All the questions could not be answered. There is no subsequent report on blood group.

5. Dr. Zakie Votso (P. W. 3) Assistant Surgeon-I, Kohima examined the dead body of a baby identified by S. I. L. Angami at 1.30 P. M. on 12-9-1974 receiving Ext. P. 5, which reads as follows:

To

The Medical Superintendent,

Civil Hospital, Kohima, Nagaland,

Sub:- Sending of Dead body of a Male baby for Post-Mortem Examination.

Ref:- Enquiry of Kohima North P.S. dated 9-9-1974 in connection with suspected secret disposal of a baby under suspicious circumstances.

Sir.

I have the honour to send herewith dead body of a baby as per dead body challan along with copy of Inquest Report for favour of P. M. Examination and furnishing the result thereof early, in the interest of police Investigation. In this connection I am to add that one Placenta was found on 9-9-1974, in the new market area just below the Dimapur Kohima Road. The suspected mother Lulano Lotha, sent for medical examination in the night (11-9-1974) and the dead body of the child are also as per circumstances suspected to be having nearest relation and hence the said relation, may be established by Medical Science by examining all the three to find out the truth in the interest of Police Investigation. Further it is requested that the following points may also be clarified while P. M. report is prepared:

Q:- Whether the child was still-born or live-born? If live born what was the cause of the death? Whether death was homicidal and if so was it due to deliberate acts?

What may be intrauterine age at which it was born? What is the length of Cord

attached to the Navel? Whether the cord is cut or torn?

Whether the cord found with Placenta sent on 10-9-1974 is separated from the Navel of the dead body in question?

Whether this dead child was recently delivered by Miss Lulano Lotha sent for Medical examination on 11-9-1974.

Yours faithfully, Sd/- D. S. Rawat, INSPECTOR 11-9-1974. O.C. Kohima (North) P. S.

N. B. Possibly blood grouping may be determined from the B/stains available with the child's body and clothes.

Received on P.M. Report from P.S. North. Sd/-. Illegible, Medical Superintendent, Naga Hospital, Kohima.

6. P. W. 3 deposes: "The body was decomposed as far as I remember. It had died about 48 hours before I examined. There was ecchymosis in front of the neck. Internal Examination revealed that lung was expanded. Other things were normal. The cause of the ecchymosis appears to be some external force applied to the neck. It is possible that neck was pressed with the hand. The cause of death appears to be asphyxia due to strangulation. It was full term baby. It was born alive, I think. After examination, I prepared post-mortem report (Ext. P-I) Ext. P I/I is my signature". In cross-examination he again says that he could not ascertain the stage of rigor mortis as the body was decomposed. He also says that ecchymosis was so prominent that it would negative the suggestion of its being post mortem.

7. In the post-mortem report he reports that the condition of subject as decomposed and no visible external wound was found. Both lungs expanded and ecchymosis in front of the neck. In the report it is said:

Right lung:- Expanded and Ecchymotic - Left lung:- Expanded and Ecchymotic. Lungs Float in water (In pieces).

As to the cause of death it says -

The dead New Born child appears to be full term baby.

The baby appears to have breathed for sometime before death. The cause of death is due to asphyxia.

8. The police submitted charge-sheet No. 59/75 dated 4-8-1975 under Sections 302 and 318, I.P.C. and when explained, the accused-appellant pleaded guilty and prayed for mercy on 18-8-75. Even then the trial Court proceeded to record evidence. Prosecution examined 8 while defence examined no witness.

9. There is no eye witness to the occurrence. No witness has deposed to have seen the accused-appellant carrying or giving birth to any child or wrapping and concealing it, as alleged. P. W. Smt. Neikerunuo Angami, only saw the O. C.

carrying a plastic Bag, which belonged to her, containing something inside it, presumably a placenta. P.W. Smt. Videsenuo, a house wife, was standing below T. C. P. Gate, but did not see any child being thrown by anybody.

10. The statement of the accused on record (page 125 of 1/3 file - page 26 of paper book) does not bear any signature of the Presiding Officer of the Court and is also undated. It may not be permissible to found conviction solely on its basis.

11. The trial Court in a brief judgment referring to the confessional statement recorded by P. W. 6 and the accused's statement u/s 313, Cr. P.C. convicted the accused-appellant under Sections 302 and 318, I.P.C. and sentenced her to life imprisonment and two years simple imprisonment, respectively. The sentences are to run concurrently, Hence this appeal from jail.

12. As we find the discussion of the evidence by the trial Court, rather brief, we proceed to appreciate the evidence ourselves.

As regards the information leading to discovery in the confessional statement before the Investigation Officer (P. W. 5), apart from Section 25 of the Evidence Act, we consider it unsafe to act upon it on two grounds:- Firstly, it is without material corroboration by other independent evidence and it does not appear to be natural. Secondly -, there are contradictions. The confession is said to have led to the discovery of the dead body of a child made in presence of P. W. 1, Haizotho who is a witness arranged by the I. O. P, W. 5 deposes that the accused-appellant stated that the child was born alive, cried twice and that she squeezed the child's throat with her left, hand and killed it; thereafter she wrapped the child after ensuring the death in her half shirt, torn (tore?) the "Spinal" cord and kept the child in a bush above the Kohima-Dimapur road and below the Medical Directorate approach road, P. W. 1 does not give the details. According to P. W. 1. P. W. 5 requested him to accompany for witnessing something. "On Dirnapur road near fire stock of Mr. Zelhob Angami, the accused opened up a bush and there was dead body of child which was newly born. The body was wrapped up in a half shirt, white in colour. The accused said in Assamese that this was her child. She said that after delivery, she had hidden it there". Thus there are material discrepancies in the information leading to discovery. In her statement u/s 313, Cr, P.C. when she was asked: The dead body of the child was recovered by police on your indication on 11-9-1974 near Kohima Dimapur Road. Have you anything to say?" the answer was "yes". This is equivocal. It may mean that she had something to say about it. It is not otherwise on record that the accused-appellant of Kohima knew Assamese. We also take into account the fact that despite the confession claimed to have been made on 11-9-1974 the charge-sheet was submitted only on 4-8-1975.

13. Then comes the question of the Judicial Confession. According to P. W. 6, Judicial Magistrate, 1st Class the appellant was first produced before him for the purpose of recording confession on 8-11-1974 when he gave her 24 hours time for reflection. She was next produced before him on 15-11-1974 when he again

warned her and recorded her statement without the help of an interpreter. According to P. W. 6 the accused appellant was brought straight from judicial custody on 15-11-1974 by Court police.

The statement recorded in English runs as follows:

I have forgotten the date and month but it was midnight at about 1 A. M. of one Monday 1 delivered one Male child near my house located in New Market Area, Kohima. Immediately after the child was born I squeezed the throat of child three times with my left hand and as a result the child died. Then I wrapped the dead body of the child with one cloth and deposited the-dead body in the Jungle nearby.

On scrutiny of the form for recording confession it is found that before making her statement she was placed in charge of an armed Police constable. At what time she was produced on that day and at what time the statement was recorded is not clear. The magistrate has not put his signature at the. end of Column 10, which also does not show where the accused was forwarded to. We have doubts about the statement being voluntary. The statement is recorded in English. There is nothing to show that it was properly interpreted, nor is there anything to show that the Magistrate read the Naga-Assamese version and it was admitted to be correct. In his deposition P. W. 6 says. "I recorded her statement without the help of an interpreter as probably she spoke in Naga Assamese which language I can understand". This leaves us in great doubt as to whether her statement was correctly translated and recorded, the Magistrate himself being not sure about the language in which it was made. The statement itself is brief and is in line with what the accused is claimed to have made before P. W. 5. There is nothing to show that she was given adequate time for reflection on 15-11-1974, or that she was free from influence of Police. The warning given on 8-11-1974 was so distant in time that it could not be expected to have any effect on the date of recording the statement. She was also left in charge of an armed police constable. She is not shown to have had any advice at that stage. From all these factors we are inclined to disbelieve as involuntary the entire confessional statement imputed to an unsophisticated Naga Tribal girl in the most distressing situation she unfortunately fell.

14. The confessional statement having been discarded, the only material left is her statement u/s 313, Cr. P.C. which is unsigned and undated and we do not consider it expedient to found conviction solely upon it. Besides, the question No. 4 was:

Why have the prosecution witnesses deposed against You?

Answer:- I do not know why they have deposed against me". This is equivocal. Again, at the end of each question she was asked - "Have you anything to say?" and the answer invariably was - "Yes".

15. Even if the statement is taken into consideration it is not established that the

child was born alive and was not stillborn. Medical evidence also does not prove it beyond doubt.

16. P. W. 3, Dr. Zkivotso said - "It was born alive I think". His opinion was also not definite when he said: "The cause of the ecchymosis appears to be some external force applied to the neck. It is possible that neck was pressed with the hand. The cause of death appears to be asphyxia due to strangulation". In face of this evidence we do not consider it safe to conclude that the child was born alive and was strangled to death by the accused appellant. In the post mortem report there is the indication that both the lungs were expanded and ecchymotic and floated on water (in pieces). The Doctor, however, says that the body was in a decomposed condition. He says that the ecchymosis on the neck might be due to strangulation, but he has not explained as to why the lungs should also have been ecchymotic. By any standard the opinion expressed is not certain and definite. It was also given in reply to specific questions formulated by the I. O.

17. Modi in his Medical Jurisprudence and Toxicology, Twentieth Edition, Page 380, dealing with infanticide writes:

Strangulation- This is also a common form of child murder. During the act of strangulation far greater violence is used than necessary, and severe marks of abrasions and contusions with extravasation of blood in soft tissues are usually found on the neck.

No such abrasions and contusions have been recorded in this case. No external injury was found. As regards the floating of lungs in pieces Modi observes:

Hydrostatic Test - As long as its limitations are recognised this is a helpful test and should be performed. It is based on the fact that the specific gravity of the unrespired lungs varies from 1.04 to 1.05, and that of the respired lungs is 0.94 owing to their volume being increased due to the presence of air. The foetal lungs therefore, sink in water, and those, that have breathed float.

Two objections, however, have been pointed out, namely, (1) The expanded lungs may sink from disease or from atelectasis, and (2) the unexpanded lungs may float from the presence of putrefactive gases from artificial inflation. Putrefaction is the process of rotting.

Floating of lungs in pieces can, therefore, by no means be a sure test of a child having been born alive.

18. Under Explanation (3) to Section 299, I.P.C. the causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

19. Under this provision it is necessary to prove not only that the child breathed and was therefore a living child but also that it breathed after it had wholly or

partially emerged from its mother's womb. In the absence of definite proof of the child being alive and having breathed after it was born, the mother cannot be convicted of culpable homicide.

20. The mental condition of the mother at birth of a child may not enable her to know for certain whether the child is born alive. Glanville Williams in Text book of Criminal Law (London, 1978) discussed the English law of infanticide as distinguished from murder, as follows:

At common law, infanticide by the mother was murder, but there were generally circumstances of mitigation which prompted a widespread desire for change in the law.

The present law rests on the Infanticide Act, 1938:

Where a woman by any wilful act or omission causes the death of her child under the age of 12 months, but the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then...she shall be guilty of ...infanticide.

Discussing about the puerperal mental disturbance he writes:

Puerperal psychosis" appears in the books, but at the first sign of depression the baby is removed from its mother, so that women now rarely kill their babies from this cause.

In Sanctity of Life and the Criminal Law Williams criticised the Infanticide Act as follows:

It may be said to be an illogical compromise between the law of murder and human feeling. It recognises inadequacy of the present law of insanity for the case of infanticide, and has the advantage of sparing the woman the agony of a murder trial where there are strong circumstances of mitigation. Yet it allows the conviction of a woman who may in fact have been afflicted by puerperal mania, a real temporary insanity, If the woman was insane, the verdict should be one of insanity and conviction should be out of the question.

21. Thus there is no doubt that immediately on delivery of a child the mother suffers from a mental depression verging on temporary insanity and she may not be in a position to observe the condition of the child minutely at birth. Considering from this angle, unless it is otherwise proved beyond reasonable doubt that the child was born alive, it is unsafe to convict the accused-appellant of murder. The standard of proof should be commensurate with the gravity of the crime.

22. In India infanticide is included in murder. It is therefore, incumbent on Courts to apply the law cautiously in cases of infanticide in the interest of justice. In the instant case in the face of the Doctor's vacillating opinion about stage of rigor

mortis in the body, the state of the lungs, and whether it was born alive, there being no other reliable evidence, the accused-appellant must be given the benefit of doubt and acquitted of the charge of murder.

23. The charge of murder having failed, the charge u/s 318, I.P.C. has to be seen. Section 318 provides as follows:

318 Concealment of birth by secret disposal of dead body - Whoever, by secretly burying or otherwise disposing of the dead body of a child where such child dies before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description of a term which may extend to two years, or with fine, or with both.

24. The judicial confession being discarded, there is no other evidence to connect the accused-appellant with the dead child, P. W. 2 deposed that the accused-appellant did not complain of any pain in her private part. This creates doubt about her alleged recent delivery. Nobody has deposed to have seen her pregnant during the possible gestation period. The letters written by the I. O. to the doctors were of solicitous nature, so much so, that medical findings themselves may have been tinged. The connection with the placenta was also not established. Charge u/s 318, I.P.C. must, therefore, fail.

25. The plea of guilty with prayer for mercy taken by this teen-aged forlorn tribal girl after charge may have been the result of plea bargaining by someone, which cannot be encouraged for it conceals the truth, creating false hopes and fears. The plea as well as the consequent statement must be rejected on this ground also.

26. We have given due weight to the demeanour of the accused-appellant recorded and appreciated by the trial Court and we noted that it recommended the case to the State Government for clemency. We, however, find that the prosecution has failed to prove the charges beyond reasonable doubt, and consequently, we acquit the accused-appellant of the charges under Sections 302 and 318, I.P.C. She shall be set at liberty forthwith. The appeal is allowed.

D. Pathak, Actg. C.J.

27. I agree.