

(2015) 01 JH CK 0007

In the Jharkhand High Court

Case No : Cri. Appeal (D.B.) No. 102 of 2014 and Death Reference No. 1 of 2014

Rajiv Kumar Singh

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 12-01-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 354, 354(3), 366, 43
Penal Code, 1860 (IPC) — Section 302

Citation : (2015) 2 AJR 797

Hon'ble Judges : Rakesh Ranjan Prasad, J; Ravi Nath Verma, J

Bench : Division Bench

Advocate : Krishna Murari, for the Appellant; Shekhar Sinha, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. This Criminal Appeal as also the Death Reference arising out of the same case, were heard together and are being disposed of by the common order. This appeal is directed against the judgment of conviction dated 5-2-2014 and order of sentence dated 6-2-2014, passed by Sessions Judge, Dhanbad in S.T. No. 119 of 2013, whereby and whereunder, the appellant-Rajiv Kumar Singh on being found guilty for committing murder of a four year old child and was convicted for the offence punishable under Section 302 of Indian Penal Code and was sentenced to death and to pay a fine of Rs. 10,000/-, subject to its confirmation by the High Court.

2. The case of the prosecution is that the informant-Neoti Devi (P.W. 1) was residing in one of the rooms as tenant in the house belonging of Sankar Mandal at Mohalla-Kola Kusma. In other rooms, other tenants were residing. On 26-10-2012 at about 9:30 p.m. while the informant was sitting in her room and her two sons were sleeping there, the appellant suddenly entered into the room of the informant and pounced upon her but she having managed to come out of his clutches came rushing out of the room by raising alarm. Whereupon the

appellant out of anger inflicted several injuries over the head and neck of the informant's elder son namely, Abhijit Karmkar, aged about 4 years with "Fasuli" (a sickle meant for cutting vegetable). On seeing this, when the informant raised alarm, the appellant ran away from there and her two and half year old son could be saved from being killed by the appellant.

3. On getting information, Shakar Kamti-P.W. 5, Sub-Inspector of Police, came to the house of Shankar Mandal, where he recorded fard beyan (Ext. 1) of the informant - P.W. 1 at about 10:45 p.m., upon which a formal FIR (Ext. 6) was drawn against the appellant.

4. Shakar Kamti - P.W. 5, Sub Inspector of Police, took up the investigation during which, he seized blood from the place of occurrence under a seizure list (Ext. 12). On the next day, Investigating Officer arrested the appellant who made confessional statement before him. The confession made by the appellant led to recovery of jeans pant and shirt of the appellant from his room, which was seized under Seizure List (Ext. 7). On the same day, on the basis of the confession "fasuli" used in the crime, and also blood stained shirt of the deceased was recovered from behind a bush which was seized under Ext. 8. Those aforesaid materials, seized by the Investigating Officer, were sent to the Central Forensic Science Laboratory (CFSL), Kolkata for its examination. Meanwhile, Investigating Officer held inquest on the dead-body of the deceased-Abhijit Karmkar and prepared an inquest report, photocopy of which has been adduced in evidence as Ext. 4. Thereupon, the Investigating Officer after preparing the dead-body challan, sent the dead-body for post-mortem examination which was conducted by Dr. Swapan Kumar Sarak-P.W. 2 on 27-10-2012. Upon holding autopsy on the dead-body of the deceased, he found following ante-mortem external injuries over the person of the deceased:--

1. Incised wound:

- i. 2 1/2" x 1/4" trachea deep over middle of front of neck transversely,
- ii. 2" x 1/4" bone deep over right side of forehead to bridge of nose longitudinally,
- iii. 1 1/2" x 1/2" bone deep over middle of forehead,
- iv. 1 1/2" x 1/4" bone deep over left side of forehead longitudinally,
- v. 1 1/2" x 1/4" scalp deep longitudinally over left side of fronto parietal region of head,
- vi. 1" x 1/4" bone deep over left parietal region of head,
- vii. 1" x 1/4" scalp deep over right fronto parietal region of head,
- viii. 3" x 1/4" muscle deep over right frontal to zygomatic region of head,
- ix. 1" x 1/4" muscle deep over right zygoma,
- x. 3/4" x 1/4" muscle deep over left zygoma,

xi. 1" x 1/4" gum deep longitudinally over middle of both lips with absence (separation) of left upper incisor tooth and found absent.

Upon dissection:

Echymosis with blood clot was found beneath scalp over front parietal region of both sides of head. Sharp linear fracture 1" long found beneath external injury No. ii, iii, iv and v. Meninges intact and brain found pale. The above linear fracture found only involving with the outer table of skull. All soft tissues muscles, vessels and trachea beneath the external injury No. 1 found cleanly cut and full of blood clots. Both lungs pale and both ventricles of heart found empty. Stomach contained 500cc of partially digested pasty food. Urinary bladder found empty and all other internal organs found severely pale.

5. The doctor issued postmortem examination report (Ext. 3) with an opinion that the death was caused due to hemorrhage and shock as a result of cut throat injury, caused by sharp cutting weapon like that of fasuli.

6. The Investigating Officer recorded the statements of the witnesses and made inspection of the place of occurrence and after receiving CFSL report (Ext. 11) submitted charge-sheet against the appellant under Section 302 of Indian Penal Code which cognizance of the offence as aforesaid, was taken and the case was committed to the Court of Sessions where the appellant was put on trial.

7. During trial, the prosecution in order to prove its case examined altogether 5 witnesses. Of them, P.W. 1 - Neoti Devi is the informant who did testify almost in the same manner, as she had made statement in her fard beyan. P.W. 3-Tara Pado Mandal is the witness to the seizure of the blood from the room of the informant and also seizure of blood stained shirt and pant of the appellant from the room of the appellant, which had been kept concealed, and also to the seizure of "fasuli" as well as shirt smeared with blood belonging to the deceased from behind a bush. P.W. 4 - Gautam Dhibar has been declared hostile as he did depose that he is not aware as to who had killed the deceased. Investigating Officer-P.W. 5 during his evidence did identify residue of blood sample, shirt and pant, belonging to the appellant, as well as "fasuli" and shirt of the deceased over which same blood group had been found during chemical examination made at CFSL, Kolkata, as Exts. A, B, C, D and E respectively.

8. After closure of the prosecution case, the appellant was questioned under Section 313 of Cr.P.C. about the incriminating circumstances appearing against him to which he denied.

9. Thereupon, the trial Court have found the testimony of the informant-P.W. 1 fully trustworthy getting corroboration from the medical evidence, and also from the other facts, relating to seizure of blood from the place of occurrence, seizure of blood stained pant and shirt of the appellant, as well as seizure of "fasuli" and blood stained shirt of the deceased from behind a bush, recovered at the instance of the appellant and also from the CFSL report, did find the appellant

guilty for committing murder of the deceased and thereby the Court recorded the judgment of conviction.

10. Further, the court having found that an innocent four year old helpless child was murdered in a most cruel manner awarded death sentence to the appellant. Whereupon, the matter was referred to the High Court in terms of the provisions as contained in Section 366, Cr.P.C. for confirmation of the death sentence, awarded to the convict-Rajiv Kumar Singh, who on being aggrieved with the judgment of conviction and order of sentence, has also preferred the said criminal appeal.

11. Mr. Shri Krishna Murari, learned counsel appearing for the appellant, submits that the conviction is based on the sole testimony of an eye-witness though several persons were there as tenants in the house of Shankar Mandal but none seems to have come at the place of occurrence which does suggest that the occurrence may have taken place in the other manner than it has been projected by the prosecution and on account of this, the court should not have relied upon the testimony of the sole witness who can be said to be an interested witness.

12. Further, it was submitted that the appellant has never made any confessional statement, rather his signature was taken on a plain piece of paper which was converted into confessional statement by the police and as such, it is never the case that the confession made by the appellant led to recovery of incriminating articles and under the circumstances, the judgment of conviction and order of sentence is fit to be set aside.

13. Further submission, which was advanced on behalf of the appellant, is that this is not a fit case which can be branded as rarest of rare cases, as the prosecution case itself suggests that the act of the appellant, aged about 23 years, committing murder of the deceased, was never premeditated and, therefore, the Court should have taken all these factors into account as mitigating circumstances, but all these mitigating circumstances were not taken into account in right perspective and therefore, the sentence of death awarded to the appellant is fit to be set aside.

14. As against this, learned counsel for the State submits that the facts and circumstances are as such that there has not been an iota of doubt over the truthfulness of the testimony of the eye-witness-P.W. 1. Moreover, her testimony gets corroboration not only by the medical evidence but also by the factum of the seizure of the incriminating articles, mentioned above, and as such, the trial Court is absolutely justified in recording the judgment of conviction.

15. Further, it was submitted that the manner, in which four year old innocent and helpless child was murdered after being inflicted with a number of injuries, does suggest that it was committed with all brutality and with sense of inhumanity and hence the appellant does not deserve any less sentence than the death sentence and therefore, the trial Court has rightly awarded the sentence of death to the appellant.

16. Having heard learned counsel for the parties and on perusal of the record, we do find that according to the informant-P.W. 1, mother of the deceased, while she was sitting in her room and her two sons were sleeping, the appellant suddenly entered into the room and pounced upon her with ill-will but she got herself out of his clutches and ran away by raising alarm. Upon it, the appellant on being infuriated, inflicted several injuries to her 4 year old child-Abhijit Karmkar with "fasuli" as a result of which he died immediately. No doubt several tenants were there in the house but none has come at the place of occurrence after incident but that does not make any dent in the testimony of P.W. 1, as a number of reasons would be there for the persons who did not come to the place of occurrence time of which was 9:30 p.m. that too at the end of October. The testimony of the eye-witness gets corroboration from the medical evidence, as the doctor did find a number of injuries caused by sharp cutting weapon like that of "fasuli" and also from the fact that the blood was found at the place of occurrence and the shirt and pant, belonging to the appellant, seized from the room of the appellant, having blood-stain and also "fasuli" and the shirt, belonging to the deceased, smeared with blood, were all having same blood group as per the CFSL report (Ext. 11) and thereby this can be said to be a full proof case wherein not an iota of doubt is there over the culpability of the appellant and thereby the trial court has rightly convicted the appellant for the offence punishable under Section 302 of Indian Penal Code.

17. Now coming to the point of sentence, it be recorded that the trial Court after taking into account a number of cases, including the cases of Bachan Singh Vs. State of Punjab, AIR 1980 SC 898 : (1980) CriLJ 636 : (1982) 1 SCALE 713 : (1980) 2 SCC 684 : (1980) SCC(Cri) 174 : (1983) 1 SCR 145 , Machhi Singh and Others Vs. State of Punjab, AIR 1983 SC 957 : (1983) CriLJ 1457 : (1983) 2 Crimes 268 : (1983) 2 SCALE 1 : (1983) 3 SCC 470 : (1983) 3 SCR 413 , Sunil Damodar Gaikwad Vs. State of Maharashtra, (2014) 2 AD 485 : (2013) 4 RCR(Criminal) 261 : (2013) 11 SCALE 232 : (2014) 1 SCC 129 : (2014) 2 SCJ 230 and also the other decisions and by applying the principle, laid down in these cases, did record that there is no any mitigating circumstance except the young age of the convict, whereas only aggravating circumstances are there whereby murder of innocent child was committed and the manner in which multiple injuries were caused to a helpless boy in helpless situation shocks the conscience of humanity and thereby thought it fit to award the death sentence to the appellant.

18. Under the circumstances, it is to be decided as to whether this case falls in a category of rarest of rare cases justifying capital punishment?

19. Before coming to the conclusion, it would be profitable to take notice of the decision rendered in a case of Bachan Singh (supra) wherein Their Lordships while determining the constitutional validity of death penalty, examined the sentencing procedure embodied in sub-section (3) of Section 354, Cr PC and held as under:--

"164. (b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence."

20. In the case of Machhi Singh and Others Vs. State of Punjab, AIR 1983 SC 957 : (1983) CriLJ 1457 : (1983) 2 Crimes 268 : (1983) 2 SCALE 1 : (1983) 3 SCC 470 : (1983) 3 SCR 413 , it was held by the Hon"ble Supreme Court that the case fell in the category of the rarest of rare cases calling for capital punishment since the victim of murder was an innocent child who could not have or had not provided even an excuse, much less a provocation for murder or the murder was committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner which aroused intense and extreme indignation of the community. The motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof are factors which normally weigh with the court in awarding the death sentence terming it as the rarest of rare cases.

21. Subsequently, the Hon"ble Supreme Court in a case of Sangeet and Another Vs. State of Haryana, AIR 2013 SC 447 : (2013) CriLJ 425 : (2013) 1 Crimes 25 : (2013) 1 RCR(Criminal) 114 : (2012) 11 SCALE 140 : (2013) 2 SCC 452 did observe that the circumstances of the criminal referred to in Bachan Singh appeared to have taken a bit of back seat in the sentencing process and held that despite Bachan Singh, the "particular crime" continues to play a more important role than the "crime and criminal". The conclusion, which was arrived at by Their Lordships, is as follows:--

"1. The application of aggravating and mitigating circumstances needs a fresh look. This court has not endorsed that approach in Bachan Singh. In any event, there is little or no uniformity in the application of this approach.

2. "77.2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review."

3. "77.3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become Judge-centric sentencing rather than principled sentencing."

4. "77.4. The Constitution Bench of this Court has not encouraged standardisation and categorization of crimes and even otherwise it is not possible to standardize and categorise all crimes."

22. The Hon"ble Supreme Court in a case of Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra, AIR 2012 SC 1377 : (2012) CriLJ 1917 : (2012) 1 Crimes 342 : (2012) 3 SCALE 182 : (2012) 4 SCC 37 : (2012) AIRSCW 1939 : (2012) 2 Supreme 196 while taking notice of the principle enunciated in Bachan Singh Vs. State of Punjab, AIR 1980 SC 898 : (1980) CriLJ 636 : (1982) 1 SCALE 713 : (1980) 2 SCC 684 : (1980) SCC(Cri) 174 : (1983) 1 SCR 145 and Machhi Singh and Others Vs. State of Punjab, AIR 1983 SC 957 : (1983) CriLJ 1457 : (1983) 2 Crimes 268 : (1983) 2 SCALE 1 : (1983) 3 SCC 470 : (1983) 3 SCR 413 did observe as follows:--

"Though law enunciated by this Court in a recent judgment has already noticed that elaborates the principles that were stated in Bachan Singh (supra) and thereafter in Machhi Singh (supra) case. Aforesaid judgment primarily discussed this principle into two different components and one being aggravating circumstances while the other being the mitigating situation.

The Court would consider the cumulative effect of both these aspects and normally it may not be very appropriate for the Court to decide the most consequent aspect of the sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance two is the primary duty of the court. It will be appropriate that the Court altogether has come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and proper and effective and meaningful reasonings by the Court, as contemplated under Section 354(3), Cr.P.C."

"Aggravating circumstances -- (Crime test)

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society."

Mitigating circumstances -- (Criminal test)

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life; would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though the prosecution has brought home the guilt of the accused."

23. Again we may refer to a decision rendered in a case of Amrit Singh Vs. State of Punjab, AIR 2007 SC 132 : (2007) CLT 520 Supp : (2007) CriLJ 298 : (2006) 10 JT 1 : (2006) 11 SCALE 309 : (2006) 8 SCR 889 Supp wherein the Hon''ble Supreme Court commuted death sentence to that of life imprisonment in a case where a 7-8 years old girl was raped and murdered by the accused aged 31 years. The Hon''ble Supreme Court did notice the manner in which the deceased was raped and murdered, but held that it could have been a momentary lapse on the part of the accused, seeing a lonely girl at a secluded place and there was no premeditation for commission of the Crime. Thus, we can say that "criminal test" was applied in favour of the accused in place of death sentence.

24. In case of Rameshbhai Chandubhai Rathod Vs. The State of Gujarat, AIR 2011 SC 803 : (2011) CriLJ 1458 : (2011) 2 JT 33 : (2011) 1 RCR(Criminal) 728 : (2011) 1 SCALE 757 : (2011) 2 SCC 764 : (2011) 1 SCC(Cri) 883 : (2011) 1 SCR 829 : (2011) AIRSCW 1026 , the Hon''ble Supreme Court commuted death sentence to life imprisonment of the accused committing rape and murder of a girl of 8 years. It was found that the accused at the time of the commission of crime was 27 years old and possibility of reformation could not be ruled out. Thus, the criminal test was applied considering the age of the accused and possibility of reformation of the accused being there.

25. Applying another mitigating circumstances in a case of Surendra Pal Shivbalak pal Vs. State of Gujarat, (2004) CriLJ 4642 : (2004) 8 SCALE 145 : (2005) 3 SCC 127 : (2005) 1 UJ 232 , the Hon''ble Supreme Court commuted death sentence to that of life imprisonment in a case where the accused aged 36 years had committed rape and murder of a minor girl. The Hon''ble Court having noticed that at the time of occurrence, the accused had no previous criminal record and that he would not be a menace to the society in future, commuted the death sentence into life imprisonment.

26. In the line of those cases, the case of Amit @ Ammu Vs. State of Maharashtra, AIR 2003 SC 3131 : (2003) CriLJ 3873 : (2003) 1 JT 423 Supp : (2003) 135 PLR 400 : (2003) 6 SCALE 244 : (2003) 8 SCC 93 : (2003) 2 SCR 285 Supp : (2003) 2 UJ 1404 : (2003) AIRSCW 3980 : (2003) 5 Supreme 576 be referred to wherein the Hon''ble Supreme Court again commuted death sentence to life imprisonment in a case where the accused aged 20 years had raped and murdered a girl of 11-12 years. The Hon''ble Court having noticed that the accused had no previous criminal track record and also there was no evidence that he would be a danger to the society in future, "criminal test" was applied; absence of previous track record and danger to the society were considered to avoid death sentence.

27. Thus, having noticed all those decisions rendered by the Hon''ble Supreme Court, referred to above, the Court, before coming to the conclusion as to whether the death sentence or the life sentence be awarded, is duty bound to consider the cumulative effect of both, mitigating circumstances as well as aggravating circumstances, and after balancing if the Court finds that it is the

rarest of rare cases and that imposition of any other punishment, i.e. life imprisonment would be completely inadequate and would not meet the ends of justice, death sentence be awarded.

28. Keeping in view the principles laid down in the cases referred, to above, if those tests are applied, we do find that though aggravating circumstances are there in the case, as it was a murder of a four years" helpless and innocent child and brutality of the crime is evident from the number of injuries, inflicted upon him, but at the same time, mitigating circumstances are also there. Admittedly, there was no animosity between the appellant and the informant, rather the relationship was quite cordial indicating that the act of the appellant was momentous and that it was never a pre-planned murder as admittedly, the appellant had not come with any weapon and that he was 23 years old at the time of judgment and thereby the possibility of reformation could not be ruled out and that no previous criminal record of the appellant is there and as such, he would not be a menace to the society in future. Thus, the mitigating circumstances appearing in the case outnumber the aggravating circumstances.

29. In such circumstances, the appellant never warrants to be awarded with death sentence. Accordingly, death sentence, awarded to the appellant, is commuted to life imprisonment.

30. Thus, this Cr. Appeal stands dismissed with commutation of death sentence into life imprisonment. Accordingly, Death Reference is answered in the aforesaid term.