
(1996) 12 AHC CK 0064

In the Allahabad High Court

Case No : Capital Sentence Reference No. 01 of 1996 connected with Crl.
Application Nos. 193/96 and 194/96

State

APPELLANT

Vs

Ram Surat & Ram Surat

RESPONDENT

Date of Decision : 03-12-1996

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 376, 511

Citation : (1996) 12 AHC CK 0064

Hon'ble Judges : D.K.Trivedi, J and N.S.Gupta, J

Final Decision : Disposed Of

Judgement

D.K. Trivedi, J.—This criminal appeal is directed against the judgment and order dated 2441996, passed by IInd Additional Sessions Judge, Bahraich, convicting the accused appellant Ram Surat under Section 302, I.P.C. and 376, I.P.C. read with Section 511, I.P.C. and awarding sentence of death and luyears R.I. respectively.

2. Criminal appeal No. 193 of 1996 was filed by the appellant Ram Surat through counsel against the judgment and order mentioned above and Criminal Appeal No. 194 of 1996 was filed by the appellant Ram Surat from jail against the said judgment and order. Capital Sentence Reference No. 1 was preferred by the Additional Sessions Judge, Bahraich. All these cases are now being heard and disposed of together.

3. The incident is alleged to have taken place on 1631994 at about 4.30 p.m. in village Ramma, Police Station KotwaliBhingra, district Bahraich. It is stated that on 16394, at about 4.30 p.m. the complaint ant Jai Jai Ram Pandey (P.W. 2) who is a Class IV employee in the Vetenary Hospital, Bhingra, had gone to give water to the pigs of the vetenary hospital. His wife Mainna (P. W. 1) had gone to collect bricks for his plot alongwith his one daughter aged about 9 years. It is alleged that deceased Km. Kamli aged about 13 years was washing utensils. The prosecution case is that on hearing the noise of BachavBachav coming from the

house of one Swami Yadav, the complainant's wife Marina called Sukhram Apm and others to save the mother of Ram Surat, because she was under the impression that Ram Surat was assaulting his mother. It is said that the complainant and his wife Marina and others including Sukhram (P.W. 3) reached at the house of Ram Surat and saw that Ram Surat was assaulting the deceased Kumari Kamli by Kulhari. It is further alleged that the witnesses tried to save Kamli, but they were threatened by the appellant and after threatening the witnesses he ran away from the scene of occurrence. The complainant, Jai Jai Ram Pandey (P.W. 2) thereafter got the report (Ex. Ka1) prepared and lodged the same at 5.55 p.m. at police station, KotwaliBhinga. The distance of the police station from the place of occurrence is four furlong. The F.I.R. was lodged in presence of the V B. Singh, S.I. Bhinga and thereafter investigation was entrusted to him. He immediately proceeded to the place of incident and directed S.I. Rang Upadhyay (P.W. 8) to prepare the inquest and other relevant papers for post mortem examination of the deadbody of the deceased Kamli. On his direction (P.W. 8) Rang Upadhyay prepared the inquest report and other relevant papers (Exh. Ka4 to 8) and sent the deadbody for autopsy through constable Ram Chandra, (P.W 4). The investigation officer, S.I. V.B. Singh thereafter, recorded the statements of the witnesses as well as called a photographer who took photographs of the dead body as well as place of incident. He also prepared site plan (Exh. Ka14). He was thereafter, transferred. After his transfer the investigation was handed over to P. 9 S.I. Paras Nath Singh. After completing the investigation, he submitted the chargesheet against the accused appellant Ram Surat.

4. The autopsy on the dead body of the deceased Km. Kamli was conducted by P.W. 6, Dr. R.S. Topwal on 17394, at about 2.30 p.m. He found the following antemortem injuries on the deadbody of the deceased Kamli.

Antemortem injuries:

1. Incised wound on left side of neck 8 cm x 3.5 cmx bone deep.
2. Incised wound on right side of neck on posterior aspect 4 cm x 2 cm x bone deep. All the structures underneath the injury were cut through and through, which included soft tissues, vessels, blood vessels and nerves, larynx and oesophagus and bones.
3. Incised wound on back of chest in outer scapular area, placed horizontally 4 cm x 2 cm x muscle deep.
4. Incised wound on back of chest in inter scapular area 1.5 cm below, injury No. 3. Size 3.5 cm x 2 cm x muscle deep.
5. Incised wound on left scapular region, 3 cmx 1.5 cmxbone deep.
6. Contusion on left cheek 4 cm x 2 cm just below left eye.
5. The Doctor found IIIrd and IVth cervical vertebra cut through and through

alongwith spinal cord and magos of cord. He also found 200 gms of semi digested food in the stomach. The Doctor was also asked to give comments about rape. He mentioned in his report that he had prepared vaginal slide and sent the same to Pathologist, of District Hospital Bahraich for examination. The doctor mentioned that no external marks of injury were seen on and around the exgental organs and breast. He also found no injury on face, breast or on private part of the deceased. The postmortem report (Exh. Ka1), P.W. 6, Dr. R.S. Tbpwal also stated that postmortem was conducted by him along with P.W. 7, Dr. M.A.R. Siddiqui and therefore, Dr. M.A.R. Siddiqui was also called and he also confirmed the post mortem report.

6. The prosecution in support of the case examined ten witnesses. Out of whom P.W. 1, Smt. Marina, P.W. 2, Jai Jai Ram Pandey and P.W. 3 Sukhram Chauhan are witnesses of fact. P.W. 4 constable Ramesh Chandra Rai brought the deadbody for autopsy to the District Hospital Bahraich. P.W. 5 Shailendra Kumar Sharma was photographer who took photographs on the direction of the Investigating Officer. P.W. 6 and P.W. 7, Dr. R.S. Topwal and Dr. M.A.R. Siddiqui are the doctors, who conducted autopsy and prepared postmortem report (Exh. Ka2). P.W. 8 Rang Upadhyay, S.I. prepared inquest report as well as other relevant papers, P.W. 9, Paras Nath Singh was the second Investigating Officer who submitted the chargesheet against the accused appellant. P.W. 10 V.P. Singh conducted the initial Investigation into this case.

7. On other hand the accused appellant denied the prosecution case and stated that he has been falsely implicated into this case, on enmity as well as on suspicion. He surrendered before the Court on 23393. The learned Trial Judge after considering evidence on record came to the conclusion that the prosecution successfully proved its case and found the accused appellant guilty for the offence punishable under Section 302, I.P.C. and 376, I.P.C. read with Section 511 I.P.C. and awarded sentence of death as well as 10 years R.I.. Aggrieved by the said judgment and order of the Trial Judge, the accused appellant filed the present appeal before this Court.

8. We have heard the learned counsel for the appellant and A.G.A. for State; considered their contentions and have gone through the facts and circumstances of the case.

9. The contention of the learned counsel for the appellant is that the learned Trial Judge committed an error in accepting the testimony of the three eyewitnesses, whose testimony as full of infirmities and contradictions. According to him these, three eyewitnesses are neither reliable nor trustworthy and they have implicated the accused appellant on the ground of suspicion. Secondly, the learned counsel for the accused appellant further contended that in this case no offence punishable under Section 376/511, I.P.C. is made out and the learned Trial Judge committed an error in convicting the accused under Section 376/511, I.P.C. Lastly it is also pointed out that in this case death penalty was not proper sentence and in fact the interest of justice would be met by awarding lesser

penalty. On the other hand, the learned Government Advocate very fairly pointed out that the prosecution case is fully proved under Section 302, I.P.C. and, therefore, the learned Trial Judge committed no illegality in convicting the accused appellant under Section 302, I.P.C.

10. The learned counsel for the accused appellant pointed out some discrepancies in the statement of the eyewitnesses and on the basis of the said discrepancies and contradictions, he contended that the testimony of these three eyewitnesses is not trustworthy. As regards, P.W. 1 it is pointed out that she admitted in her statement that house of accused Ram Surat is situated at a distance of 24 furlong. Therefore, this witness had no opportunity to reach there and witness the incident. It has also been pointed out that she admits to have recognized the appellant from his constitution of the body as well as of his clothes. From the perusal of the statement of P.W. 1, it appears that she has no idea of distance. It is not disputed that she is a rustic village lady. No doubt that she admits that she recognised the accused by his constitution and clothes. But the said statement appears to have been given by confusion, but if we carefully scrutinise the statement of this lady, we find that her testimony is consistent to the extent that accused is the only person who killed her daughter. Apart from this, there remains the testimony of two other eye witnesses. Their testimony cannot be discarded on any ground.

11. P.W. 2, Jai Jai Ram Pandey is the complainant and father of the deceased. It is not disputed that this person has no enmity with the accused or had any reason to falsely implicate the accused. In fact, it is admitted that accused as well as witnesses had been on visiting terms with each other. P.W. 2 in his statement clearly stated that he reached the place of occurrence hearing the alarm and saw the accused assaulting the deceased with an axe. The testimony of P.W. 2, Jai Jai Ram Pandey is consistent and finds full support from the medical evidence as well as the circumstances of the case. He was cross-examined and during his cross-examination, nothing has come out on which basis it can be said that he is not telling the truth. The incident took place during day time and, therefore, the witnesses had no difficulty in recognising the accused. The testimony of P.W. 2 is further corroborated by the testimony of P.W. 3, Sukhram who was an independent witness. The statement of P.W. 3 is also consistent and finds full support from the medical evidence. He is totally an independent eyewitness and nothing had been suggested by the prosecution on which ground it can be said that he has falsely implicated the accused. The learned Trial Judge has also considered the evidence of this eye witness in great details and we find no illegality in the said finding. In the circumstances, we agree with the finding recorded by the learned Trial Judge that these three eyewitnesses are reliable witnesses to the extent of murder.

12. As regards the second question about the alleged rape is concerned, it has initially the case of the prosecution that accused committed rape and thereafter, he killed the deceased. The doctor who conducted autopsy on the dead body of

the deceased Km. Kamli found no sign of rape and in fact the medical evidence belies the theory of rape. The doctor in his postmortem report has clearly mentioned that the I.O. specifically asked his comment about the rape and he, therefore, prepared vaginal slide and sent to Pathologist for examination and confirmation. However, prosecution failed to produce any such report before the Court below. Apart from this, the doctor found no external marks of injury on the body of the deceased including the breast of the deceased. The I.O. also got photographs of the deadbody of the deceased by the photographers (P.W. 5) Satish Kumar Sharma who also proved the said photographs. The photographs also belie the theory of rape. The Sessions Judge also convicted the accused appellant under Section 376 I.P.C. read with Section 511 I.P.C., meaning thereby that the Sessions Judge also found no rape was committed but only attempt was made by the accused.

13. As regards the question of attempt to commit rape is concerned, we are of the opinion that prosecution fails to prove that accused lulled the deceased because she refused to fulfil his evil desire of sex. There is nothing on record to show that the deceased was killed for this purpose. The evidence of the three eye witnesses proves the prosecution case to the extent that the deceased was killed by the accused. All these witnesses failed to point out any definite motive for commission of the crime. The witnesses themselves stated that this was their inference that accused committed the crime for this purpose. The relevant portions of the statements of these witnesses are like this:

P. W.1.Smt. Marina.

14. The above mentioned statements of the witnesses clearly show that the witnesses were not definite on this point and they have stated only on the basis of their imagination and inference. No doubt this can also be one of the ground for the murder, but we cannot definitely hold that this was the only reason for murder of deceased Km. Kamli. As regards motive is concerned it differs in the mind of the different persons in different ways. In the instant case, as pointed out above, there is no enmity in between the parties. It is not a preplanned murder and nobody know how the deceased reached inside the house of the accused for this purpose.

15. The motive cannot be presumed in criminal law. It is settled law that suspicion, however strong cannot take place of legal proof. It is always the duty of the Court to avoid danger of being swayed by emotional considerations, however, so strong it may be. Apart from this, it is also not disputed that there was no complaint of this nature against the accusedappellant in the past. It is also an admitted fact that previously the accused never teased the deceased or any other girl of the village and, therefore, in the absence of any evidence that accused had any evil desire. It cannot be presumed that there was no other reason except the sinister desire of the accused. It is pointed out that the accused is a young man of 2021 years of age and it is proved that the deceased was killed inside the house of the accused. Therefore, it can be presumed that

accused brought her inside his house for committing rape and further tried to rape her. These circumstances in our opinion did not clearly prove beyond any doubt that there was no other reason except sex. However, there is no evidence on record to show as to how the deceased reached the house of the accused. There is nothing on record to show that the deceased was brought by the accused inside his house. The photographs proved by P. W. 5 clearly show that the clothes of the deceased were found intact on her body and this circumstances also belies the theory of attempt of rape. No sign of resistance were found on the spot and, therefore, in these circumstances it is not possible to believe that the deceased was killed because she refused to fulfil the evil desire of sex of the accused appellant. No doubt possibility of killing the deceased for satisfying his evil desire cannot be ruled out, but the other possibilities too cannot be ruled out. Therefore, in our opinion the prosecution failed to prove beyond doubt that she was killed because she refused to fulfil the evil desire of the accused appellant. In criminal law, it is the duty of the prosecution to prove its case beyond any doubt and if any doubt in respect of any fact remains on record, then the accused is entitled to be given benefit of doubt. In these circumstances, it cannot be said that the fact of attempt to commit rape has been proved beyond any reasonable doubt.

16. Thus on the basis of the facts stated above, we are of the opinion that the prosecution has failed to prove its case to the extent of attempt to rape, meaning thereby the learned Trial Judge committed error in convicting the accused under Section 376, I.P.C. read with Section 511, I.P.C.

17. Now coming to the question of sentence, we are of the opinion that the death penalty cannot be said to be proper punishment in this case. The ends of justice would be met by awarding lesser punishment in this case. As pointed out above, the learned Trial Judge has awarded death penalty because he convicted the accused under Section 302 I.P.C. and 376, I.P.C. read with Section 511, I.P.C. After convicting the accused under Section 302, I.P.C. , and Sec. 376, I.P.C. read with Sec. 511, I.P.C. he considered the question of awarding sentence and awarded the sentence of death, but now the fact remains that accused is now convicted only under Section 302, I.P.C. and the conviction of the accused under Section 376, I.P.C. read with Section 511, I.P.C. is not sustainable. On this ground alone, the death penalty is not sustainable. It is settled law that while awarding the sentence of death the Court must keep in mind that death sentence is an exception and not a rule, and should award a death sentence only where Court comes to the conclusion that life imprisonment is not adequate sentence and death penalty is the only proper sentence.

18. Hon''ble Supreme Court in case of Bachan Singh v. State of Punjab, AIR 1980 SC 398 and Machhi Singh v. State of Punjab, AIR 1988 SC 957 formulated certain guidelines which are to be considered for awarding death penalty. Recently Hon''ble Supreme Court further reiterated the said guidelines in case of Kamla Tiwari v. State of M.P., 1996 Judgment Today 198. The said guidelines are

referred as follows:

1. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
2. 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.
3. 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 of life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
4. 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 weight age and just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised."

19. Keeping in mind the abovementioned guidelines, we now consider the question of imposition of death penalty. The learned Trial Judge has awarded death penalty because he found the accused appellant guilty under Section 302, I.P.C. and 376, I.P.C. read with Section 511, I.P.C. But now when conviction and sentence of the accused under Section 376, I.P.C. read with Section 511, I.P.C. is not sustained; therefore, in our opinion the death penalty is not warranted. The fact that the motive part assigned by the prosecution is not proved, therefore, in our opinion the death penalty is not sustainable. In this connection it will be proper to refer the case of Darshan Singh v. State of Punjab, 1988 SCC (Cri) 214. In which the Hon"ble Supreme Court committed the death sentence to one of the other coaccused against whom no motive was assigned. In the same case the Hon"ble Supreme Court confirmed the death sentence against the accused to whom the motive was assigned. In the instant case also the prosecution has failed to prove the motive part.

20. Again in case of Vithal v. State of Maharashtra, 1994 (Supplement) (1) SCC 639, the Apex Court reduced the sentence of imprisonment of life on the ground that the prosecution has failed to prove motive part.

21. After considering the above mentioned caselaw and taking on overall view and fact that accused has committed the murder of a girl of 13 years of age, it cannot be said that the death penalty is only adequate punishment and there is no other option. Therefore, in our opinion the reference sent by the Trial Judge, Bahraich has no merit and is, therefore, rejected. Accordingly the conviction of the appellant Ram Surat under Section 302, I.P.C. is confirmed, but he is acquitted of the charge punishable under Section 376,