

(2006) 05 GAU CK 0103

In the Gauhati High Court

Case No : Criminal Death Ref. No. 3 of 2005 and Criminal Appeal No. 87 (J) of 2005

State of Assam and Another

APPELLANT

Vs

Kamen Sawra @ Mangra and Another

RESPONDENT

Date of Decision : 05-05-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 366
Penal Code, 1860 (IPC) — Section 302, 376, 376(2)

Citation : (2006) 2 GLT 459

Hon'ble Judges : P.G. Agarwal, J;A. Hazarika, J

Bench : Division Bench

Advocate : P. Bora and M. Nath, for the Appellant; P. Bora, for the Respondent

Judgement

P.G. Agarwal, J.—This appeal is directed against the judgment and order, dated 26.7.2005 passed by the learned Additional District and Sessions Judge, (Ad hoc), Lakhimpur in Sessions Case No. 86 (NL)/2004, whereby the accused Appellant has been convicted and sentenced.

2. We have heard Mr. P. Bora, learned Public Prosecutor, for the State of Assam and Mr. M. Nath, learned Amicus Curiae for the Appellant Kamen Sawra @ Mangra in Criminal Appeal No. 87 (J)/2005.

3. In Sessions Case No. 86 (NL)/2004 the accused Appellant Kamen Sawra @ Mangra was tried and convicted by the Additional District and Sessions Judge, (Ad hoc) Lakhimpur for the offence u/s 376 IPC and also u/s 302 IPC. The trial Court imposed the sentence of imprisonment for life for the offence u/s 376(2)(f) of the IPC along with a fine of Rs. 1000/- in default further imprisonment for six months. The accused was also convicted for the offence u/s 302 IPC and he was sentenced to death.

4. The Criminal Appeal No. 87(J)/2005 has been filed by the accused challenging the order of conviction and sentence whereas the Criminal Death Reference No.

3/2005 has been made u/s 366 Code of Criminal Procedure Both the matters were heard together and disposed of by this common order.

5. The facts:

Sumitra Baruah @ Pinu was an eight years old child who was adopted by Indreswar Panging and the teenaged girl used to stay in the house of Indreswar Panging P.W. 6. She was a student of class II and she also used to work as a domestic help. The accused Appellant Kamen Sawra was serving as a domestic help in the house of P.W. 6 which was a typical Missing "chung" house. The accused was given a room in the basement where he used to stay. On the date of occurrence i.e. 30.11.2002 there was a function in the house of Gopal Panging, which is situated nearby and as such all the family members had gone there and they were busy in the function. The accused Appellant was in the house. The deceased was also in the house watching TV with Dimple Panging P.W. 1, daughter of Gopal Panging. While these two girls were engaged in watching TV, the accused Mangra @ Kamen Sawra insisted on Dimple P.W. 1 to leave the place and even pushed her with a "birla" and ultimately P.W. 1 left the place and went home and informed her mother about the behaviour of accused Mangra. There was another young boy Dhanesh Doley who used to reside in the said house. Dhanesh Doley was also arrayed as an accused but he was acquitted by the trial Court and we find that this Dhanesh Doley had left the house around 11 AM to go to his native home and there is evidence to that effect. Around 5 PM on the date of occurrence the dead body of Pinu was found in the basement i.e. below the "chung" house of P.W. 6. It was completely naked and there was blood in the facial region". Police was informed and it transpired that the girl had been raped before death.

6. P.W. 3 is Tarun Taid a co-villager who came to the place of occurrence and found large public assembled there. The accused Mangra was found heavily drunken and P.W. 3 saw injury marks on the forehead and neck of the girl and her vagina was found ruptured. The clothes lying in the room were found stained with blood and there were blood marks on the clothes of the accused also.

7. P.W. 8 is Dr. Munidra Narayan Bordoloi who held the autopsy over the dead body of Pinu and found as follows:

(1) Bruise mark at the left side of the neck near the angle of the mandible size 3" x 2".

(2) Bruise mark present at the middle of the neck at the level of the cricoids cartilage, size 1 1/2"x1".

On Section of cricoids cartilage fracture of the cricoids cartilage was found.

The injuries were ante mortem in nature and caused by strangulation.

(3) Two numbers of cut injuries present one at the glabella (middle of the forehead) size 1 1/2"*1 /4*1/4 and another above the left eye brow size1

1/2"*1/4*1/4".

The injuries caused by sharp object and ante mortem in nature.

(4) Vulva was swollen, hymen was absent, posterior vaginal wall ruptured size 1 1/2"x1/2"x1/4" caused by blunt object, clotted blood present at the vaginal canal.

Vaginal smear shows no spermatozoa, smear was examined by pathologist vide slide No. 182 dtd. 2.12.02.

Injury was ante mortem in nature and caused by blunt object.

8. In the opinion of the doctor, the deceased died of asphyxia as a result of strangulation.

9. The medical evidence thus supports the prosecution allegation that the victim girl was physically violated and the girl died thereafter due to strangulation. The medical evidence has not been seriously challenged and in view of the oral and medical evidence on record, we have no hesitation to hold that an eight years old girl fell victim to human lust and she has been done to death in a most brutal manner.

10. In the present case, there is no eye-witness to the occurrence and the entire prosecution case rests on the circumstantial evidence. The law regarding basing conviction on circumstantial evidence has been laid down in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, wherein the five golden principles have been laid down as below:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and must be or should be proved" as was held by this Court in Shivaji Sahabao Bobade and Another Vs. State of Maharashtra, where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved and

(5) There must be a chain of evidence so complete as not to leave any

reasonable ground, for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These five golden principles, if we may say so constitute the Panchasheel of the proof of a case based on circumstantial evidence.

11. In the present case, the prosecution has relied on the following circumstances to bring home the charge:

- (1) The accused used to reside in the same house in which the deceased used to live.
- (2) The deceased was in the company of P.W. 2 watching TV but the accused somehow forced P.W. 2 to leave the house.
- (3) The circumstances of last seen together i.e. the deceased was last seen alive in the company of the accused.
- (4) There were blood marks in the room of the accused.
- (5) The wearing apparels of the accused also contained blood marks.
- (6) The post crime conduct where the accused was found under the influence of liquor after the incident.
- (7) The report of the Forensic Science Laboratory Ext. 3 corroborates the fact that the blood found on the clothes of the accused and on the clothes lying in the room of the accused contained human blood.

12. In this case, the prosecution has examined as many as nine witnesses and the prosecution witnesses have deposed about the various circumstances. Moreover, some of the basic facts are admitted by the accused in his statement u/s 313 Code of Criminal Procedure. The fact that the accused used to work in the house of P.W. 6 and that on the date of occurrence there was a function in the house of P.W. 5 and the fact that Pinu's dead body was found in the basement of the house have all been admitted by the accused. So far the conduct of the accused to force P.W. 2 Dimple to leave the house is concerned, the teenaged girl a student of class v. has categorically stated and deposed about the same. Her statement was also recorded earlier u/s 164 Code of Criminal Procedure and we find absolutely no reasons to disbelieve this girl. From the evidence of P.W. 2 the circumstance of last seen together also stands fully established. All the prosecution witnesses including the investigating police officer have deposed that the bed sheets lying in the room of the accused and the wearing apparel of the accused were stained with blood and these were seized and the report of the Forensic Science Laboratory Ext. 3 was received to the effect that the clothes contained human blood. The owner of the house Indreswar Panging P.W. 6 has categorically stated that the room was used by the accused.

13. So far the allegation of rape and causing of death due to strangulation is

concerned, the medical evidence is very categorical and there is no room for any doubt whatsoever that the poor girl was violated and then strangled to death. The trial Court has written a detailed judgment narrating the various circumstances and the evidence on record and has given cogent reasons for accepting the prosecution testimony. The circumstances have been established by the prosecution and they lead to only one conclusion that it was the accused Appellant and no one else who caused death of the deceased, an innocent victim.

14. We concur with the reasons given by the trial Court and hold the accused person guilty of the offence punishable u/s 376(f)(2) and also u/s 302 IPC.

15. Now coming to the question of death sentence, the law has been laid down by the Apex Court in the case of Bachan Singh Vs. State of Punjab, and Machhi Singh and Others Vs. State of Punjab, In the case of State of Rajasthan Vs. Kheraj Ram, the Apex Court has observed that the Courts are required to draw up a balance sheet of aggravating and mitigating circumstances and thereafter consider the matter whether the facts of the particular case warrants imposition of death sentence which can be imposed only if it is held that the case falls under the category of rarest of rare case. The Apex Court held:

31. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have 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. In order to apply these guidelines, inter alia, the following questions may be asked and answered: (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

....

35. A convict hovers between life and death when the question of gravity of the offence and award of adequate, sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the Court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing him innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.

36. The principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less

important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment need not be disproportionately great, which is a corollary of just deserts, is dictated by the same: principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

16. In the impugned judgment, the learned trial Court has not conducted the above exercise and has also not given any reasons as to why the death sentence is warranted except holding that the case falls under the category of rarest of rare case.

17. The aggravating circumstances as well as the mitigating circumstances appearing against the accused are:

Aggravating Circumstances:

- (1) The victim is an eight years old girl.
- (2) She has been raped and killed by strangulation.
- (3) The victim did not provoke or invite the incident.
- (4) The rape and murder was barbaric and gruesome.

Mitigating Circumstances:

- (1) The accused had no motive to kill the girl.
- (2) The accused did not try to cover up or flee the scene.
- (3) The killing was not made for any reward or gain.
- (4) The accused had no animus or ill-will.
- (5) There was no pre-plan of the accused leading to the incident.
- (6) The incident took place at the spur of moment.

18. The question which needs to be de-termined is whether in the facts and circumstances of the present case, it belongs to the rarest of rare category. In the case of Ronny @ Ronald James Alwaris Etc. Vs. State Of Maharashtra, the Apex Court observed:

The obligation of the Court in making the choice of death sentence for the person who is found guilty of murder is onerous indeed. But by sentencing a person to death, the Court is giving effect to the command of law which is in public interest whereas in committing murder or being privy to commit murder, even if it be a vengeance for another murder, the convict is violating the law which is against public interest.

19. In the case of Kheraj Ram (Supra) the Apex Court observed:

The changes which the Code has undergone in the last three decades clearly

indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment.

The Court further observed:

It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most permanent role in determining the sentence to be awarded.

20. Thus, the murder was not committed in a dastardly manner. It was not also for any motive or reward or pecuniary gain. On the other hand, the main aggravating circumstances for imposing a sentence of death is that the victim was innocent teenaged girl and the incident has shocked the conscience of the society. As stated above, the crime was committed by the accused Appellant at the spur of moment, and, as an innocent life has been lost, the accused must suffer. But the question is whether this man's life should be put to an end or he may be given a chance to live. On compassionate analysis of the facts and circumstances, we are of the view that the sentence of imprisonment of life shall meet the ends of justice and sentence of death may not be confirmed.

21. In the result, the Death Reference is answered in the negative, as we decline to confirm the sentence of death imposed by the trial Court. The accused Appellant is convicted and sentenced as under:

(i) For the offence u/s 302 IPC, sentenced to imprisonment for life and to pay a fine of Rs. 2000/-, in default to further imprisonment for one month.

(ii) For the offence u/s 376(2)(f), sentenced to imprisonment for life and to pay a fine of Rs. 2000/-, in default to further imprisonment for one month.

Both the sentences shall run concurrently.

22. The Death Reference and the Crimi-nal Appeal stands disposed of as aforesaid.

23. Send down the records.