

(2015) 03 UK CK 0069

In the Uttarakhand High Court

Case No : Reference No. 1 of 2013 and Criminal Appeal No. 492 of 2013

State of Uttarakhand

APPELLANT

Vs

Wajid

RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313

Evidence Act, 1872 — Section 6

Penal Code, 1860 (IPC) — Section 302, 342, 363, 366-A, 376

Citation : (2015) 3 UC 2250

Hon'ble Judges : Alok Singh and S.K. Gupta, JJ.

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.K. Gupta, J.—This judgment will adjudicate the appeal as well as the reference, captioned above, since both relates to the same judgment and order dated 29/31.10.2013, rendered by First Additional Sessions Judge, Haridwar in Sessions Trial No. 129 of 2013, State v. Wajid. Appellant was put to trial for the offences of Section 452 , 363 , 366-A , 302 , 342 , 376(a) and 376(2)(g) of the I.P.C., wherefore he has appropriately been sentenced including the capital one. The incident occurred within the territorial jurisdiction of Police Station Manglore, District Haridwar, and as a result thereof, an old lady named Ms. Momina, aged about 50 years, lost her life at the spot and in the same sequence, Ms. Rubina, a teen at the age of 13-14 years, also passed away. This spine chilling incident allegedly occurred in the intervening night of 18/19th February, 2013 when Smt. Farmida, mother of victim Ms. Rubina, was sleeping along with her daughter and her own mother Smt. Momina. The report lodged under the thumb impression of Smt. Farmida divulges that the appellant with his 2-3 unknown associates knocked the door of victim at about 1:30-2 AM of the night. The head of family Irshad (husband of PW 1), who was a driver by calling, was out of station in discharge of his duties. So in that way, he was not present in the house where only aforementioned three ladies were sleeping. PW 1 Ms. Farmida mistook the noise

of knocking as if her husband had returned. So, she opened the door innocuously. No sooner did the door was opened, accused persons thronged in the house pushing PW 1 aside. Hearing this commotion, Smt. Momina also woke up. Meanwhile, the appellant and his two associates forcibly drove Ms. Rubina with them and pushed her into the vehicle parked by them in front of the house. The hapless ladies Smt. Momina and Smt. Farmida endeavoured to get this offending vehicle stopped but all went in vain. Hearing the hue and cry, the neighbours and other villagers assembled at the spot but by that time, accused had fled away taking Ms. Rubina with them. It was revealed in the report that these two ladies strived to stop the vehicle and the accused persons, in their attempt to resist these two ladies, made their vehicle to run over Smt. Momina. With the result, she breathed her last at that very moment. After two hours, Ms. Rubina was left in the nearby vicinity, so she returned to her house in a very bad state. She embraced her mother and wept bitterly. She disclosed that accused Sajid and his associates took her in a room at an unknown place and at the strength of threat, she was administered some drinking substance. As per the FIR, she was ravished and thereafter, was subjected to rape at the hands of accused persons. After disclosing this all, the state of Km. Rubina became worsen and by that time, it had become dawn. So, she was shifted to the hospital where she was declared as brought dead. It was further disclosed by the complainant in the FIR that accused Wajid had an evil eye on her daughter. The dead body of Smt. Momina was also shifted to the government hospital and both the ladies were put under autopsy on 19.2.2013.

2. While doing post-mortem on 19.2.2013 at 2 PM on the dead body of Smt. Momina, the following ante-mortem injuries were noticed by the doctor: -

- "(1) Abrasion size 2x2 cm on lateral surface (left angle) of left eye.
- (2) Multiple abrasion size 25x10 cm on anterior and posterior surface of right forearm.
- (3) Abrasion size 35 x 20 cm on lower part chest and abdomen.
- (4) Abrasion size 5 x 6 cm on front of right knee.
- (5) Abrasion size 25x4 cm on anterior surface of right leg lower part.
- (6) Abrasion size 21 x 6 cm on top of left shoulder.
- (7) Abrasion size 4x4 cm on left lateral surface of abdomen.
- (8) Abrasion size 6 x 4 cm on front of left knee.
- (9) Abrasion size 24 x 5 cm on front of left leg lower part.
- (10) Lacerated wound size 1.5x1 cm on dorsal surface of both right index and right middle finger, crept + abnormal movement present, fracture at both fingers present."

3. In the opinion of doctor, Smt. Momina lost her life on account of haemorrhage

and shock due to ante-mortem injuries on the vital organs. Duration of injury was opined to be 12-24 hours before conducting post-mortem, and this period matches with the date and time of occurrence. This autopsy report of is Ex.Ka-2.

4. Ex.Ka-3 is the autopsy of Ms. Rubina. The doctor probably could not examine the condition of her vagina because the stool was inserted into that part, however he found the contusion over anterio-lateral aspect of mid leg left having the size of 6 x 4 cm, which was violet in colour. Since the cause of death could not be ascertained, so her Viscera was preserved for chemical analysis. The doctor opined the death to have occurred 12-24 hours before the post-mortem, which too matches with the time of occurrence.

5. At the time of autopsy, the clothes of Ms. Rubina including her underwear were taken by the doctor, which in turn, were handed over to the police, for the purpose of chemical examination.

6. Accused Wajid was arrested on 19.2.2013 and his clothes were also taken by the police for chemical examination. Memo of that recovery is Ex.Ka-22 whereas his arrest memo is Ex.Ka-21. At the time of arrest, one stole of victim Km. Rubina, which was found missing by her mother at the time of return of her daughter Km. Rubina, was also recovered and the recovery of such stole has been depicted in the same arrest memo.

7. Investigation culminated into submission of chargesheet against the accused Wajid for the offences of section 452 , 363 , 366-A , 302 , 376 and 342 IPC and the Charge was accordingly levelled against him. He was put to trial.

8. Prosecution has examined PW 1 Smt. Farmida, complainant of the case, PW 2 Irshad, father of victim Km. Rubina, PW 3 Jamil, PW 4 Dr. Rajat Saini, PW 5 Dy. Inspector Deepak Nautiyal, PW 6 H.C. Ram Lal, PW 7 Mahendra Singh, PW 8 Inspector Pankaj Gairola and PW 9 G.B. Pandey, the then CO., Manglore.

9. PW 1 Smt. Farmida is the eyewitness of the case. She is the star witness of the incident. She has affirmed all the facts as disclosed in the FIR lodged by her which is Ex.Ka-1 in the same sequence, the same were stated by her in the report.

10. Learned counsel has pointed out very minor discrepancies in the statement of PW 1 recorded u/s 161 Cr.P.C. by the police during investigation as well as on both kinds of examination viz. chief and cross. We are of the view that when an illiterate and rustic village woman faces cross-examination in the witness box within four corners of a law court at the hands of a senior defence counsel, such discrepancies or minor contradictions are bound to occur. The Hon'ble Apex Court has held time and again that no criminal case is free from minor discrepancies or contradictions.

11. The stole recovered from the car of accused at the time of his arrest was identified by PW 2 Irshad to be of his daughter and the accused in his statement u/s 313 Cr.P.C. has not made any specific denial of his signatures on the recovery

memo of this stole as also about taking off his clothes by the police. When the clothes of accused and that of victim Km. Rubina were sent for chemical examination, the report given by the Forensic Science Laboratory, Ex.Ka-27, clearly reveals that semen was detected in Jeans pant and lower of accused as well as on the pullover and Salwar of deceased. The accused has not explained anything about detection of semen on such clothes while being examined u/s 313 Cr.P.C.

12. It is difficult to forget the spirit of Section 6 of the Evidence Act at this stage which makes the statement of PW 1 relevant and admissible in evidence in the nature of *res gestae*. Even the Hon'ble Apex Court in the case of *Krishan Kumar Malik Vs. State of Haryana*, has held that for bringing hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of *res gestae* must have been made contemporaneously with the act or immediately thereafter.

13. It was the chilly winter night and the victim Km. Rubina could return to her house within 2 hours of incident. Her hair were scattered and froth was oozing out from her mouth and nostrils. This fact has been disclosed in the first information report as well as in the deposition of PW 1. Looking to the facts and the time gap of this chilly dark night, the statement of Km. Rubina tendered to her mother just after the incident is well covered within the ambit of Section 6 of the Evidence Act, and such statement must always be considered as part of the evidence because Km. Rubina is no more and her voice has been disclosed through her mother, not only in the FIR but also in her deposition before the Court.

14. PW 2 Irshad, the father of Km. Rubina, when informed telephonically just after the incident by PW 1, then he advised his wife to set the law into motion only after his return. This was not unnatural on the part of an illiterate husband engaged in such a vocation like driving a truck. He cannot be expected to have an attitude of a literate and educated urban man. So, such instruction by PW 2 to his wife PW 1 for lodging the FIR only after his arrival was not unusual.

15. In the very morning of next day, PW 2 Irshad returned home and requested the police for initiation of appropriate action in the matter and it was all a helpless father could do.

16. However, the police had gathered information in the very morning of 19.2.2013 and had come into motion. Even PW 5 S.I. Deepak Nautiyal has stated the fact that on the instructions of S.H.O., he immediately rushed to the spot in the very morning at 7:30 A.M.

17. Learned counsel for the appellant has vehemently insisted that at the beginning of cross-examination of PW 5, he has stated that at 7:30 AM, he got the oral report, and then the Chick was reduced into writing allotting a crime

number but the said Chick or the crime number was never disclosed, much less producing the same on the file. This argument is totally baseless for the reason that when PW 5 disclosed that the Chick report was reduced into writing at 7:30 A.M. allotting a crime number, no subsequent question was asked from that Sub Inspector as to where that FIR was, so that to render opportunity to him to explain the further state of affairs. So, in the dark, we are unable to extend benefit of this contradiction to the accused in the cross-examination of PW 5, more so, even a Sub Inspector who remains-indulged in detecting several crimes within the territorial jurisdiction of his police station and even otherwise, he is also a human being. Memory of even a literate and well educated person, many a times, plays false. So, such contradictions cannot brush aside the entire prosecution story which has been in the evidence produced by the prosecution.

18. It is pertinent to mention that when viscera of Km. Rubina was examined by the Forensic Science Laboratory, the report whereof is Ex.Ka-26, the entire stomach, intestine, liver, kidney, spleen and lungs were found embedded with a poison inasmuch as in the nature of Aluminum Phosphide and when this question was asked from the accused u/s 313 Cr.P.C., no satisfactory reply could be offered by him to explain this fact, with the result, that the finding of poison in the entire viscera matches with the disclosure of victim Km. Rubina to her mother PW 1 that she was forcibly administered some poisonous drink.

19. The incident was so inhumane inasmuch as the fecal matter was inserted into the vagina of this little girl in order to frustrate the medical examination as regards commission of rape on her body. PW 4 Dr. Rajat Saini, who conducted the autopsy, has also well proved the injuries found on the body of victim.

20. PW 3 Zamil Ahmed is the neighbourer of PW 1 and PW 2. He has also corroborated the fact that hearing the screams of ladies duo, he immediately came out from his house and found that the accused had taken away Km. Rubina running over the vehicle on Smt. Momina. After two hours, when Km. Rubina returned, she was physically and mentally very bad state; she then disclosed the entire brutal incident which she was forced to suffer at the hands of the accused and his associates. This way, the statement of PW 3 also corroborates the evidence of PW 1 Smt. Farmida and other documentary evidence available on record.

21. Learned counsel for the appellant next argued that appellant was facing some animosity at the hands of PW 2 Irshad because the latter was expelled from his services by his previous employer at the instance of accused. It was further suggested that PW 3 being a neighbour since, had illicit relations with PW 1 Smt. Farmida and such extramarital relations so much so in compromising position were witnessed by both deceased ladies, hence the incident has been caused by PW 3 himself hatching conspiracy with PW 1 and the appellant has been falsely implicated. This argument is wholly unsubstantial and cannot be accepted taking into account the entire facts as well as this ghastly incident besides the formidable testimony whereby it has been proved by the prosecution

before the law Court. Moreover, no reliable evidence has been produced by the appellant to display this so called hostility.

22. Thus, on a considerate analysis of the aforesaid facts and circumstances of the case, we find that there is no infirmity as regards arriving at the finding of guilt of appellant Wajid by the Trial Judge for the above offences, but at the same time, we feel that still the offence committed by him does not fall under the category of rarest of rare. Thus, we hereby reduce the sentence of capital punishment of appellant Wajid to that of life imprisonment for the offence of Section 302 IPC. Rest of the sentences awarded to the appellant/accused are, however, left intact.

23. It is made clear that the modification in sentence has been made with a clarification that the appellant Wajid shall suffer incarceration for the whole life till he is alive and he shall not be granted any remission ever on any score for the offence of Section 302 IPC.

24. Thus, the appeal preferred by the appellant/accused Wajid fails and at the same time, the reference sent by the Trial Judge is disposed of accordingly. Let a copy of this judgment and order along with the LCR be sent to the Court concerned for compliance.