

(2022) 12 CAL CK 0028
In the Calcutta High Court

Case No : Death Reference No. 3 Of 2017, Criminal Appeal No. 207 Of 2017

State Of West Bengal

APPELLANT

Vs

Nemai Sasmal & Purnima Sasmal

RESPONDENT

Date of Decision : 13-12-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302
Code Of Criminal Procedure, 1973 — Section 428

Citation : (2022) 12 CAL CK 0028

Hon'ble Judges : Joymalya Bagchi, J;Ajay Kumar Gupta, J

Bench : Division Bench

Advocate : Souvik Mitter, Sreyashee Biswas, Anasuya Sinha, Pinak Kr. Mitra

Final Decision : Disposed Of

Judgement

1. Death reference and criminal appeal are directed against the judgment and order dated 28.02.2017 passed by learned Additional Sessions Judge, 2nd Court, Arambagh, Hooghly in Sessions Trial No. 37(8)/2012 arising out of Sessions Case No. 75/2012 convicting the appellants for commission of offence punishable under sections 302/34 of the Indian Penal Code and directing them to be sentenced to death and to pay a fine of Rs. 10,000/-, in default, to suffer simple imprisonment of one year more.

Prosecution case:-

2. Prosecution case against the appellants is to the effect that one Debjani Sasmal, a 14 year old girl, used to reside with her father, Nemai Sasmal (first appellant) and her step-mother, Purnima Sasmal (second appellant). After the death of her mother Reba, Nemai had transferred land in favour of Debjani and her elder sister Kumkum. Debjani was tortured by the appellants to give consent to the transfer of the land in favour of her step-mother. She was subjected to torture by the appellants. She was not given proper food and clothing.

3. On 30.05.2011, Amar Adak, maternal uncle of Debjani (P.W. 1) received

information that she was lying dead at the residence of the appellants. He rushed to the spot and found the child lying on the floor of the house. There was a black spot around her neck. Suspecting the appellants had committed the murder of her niece by strangulation, Amar lodged written complaint at the Khanakul Police Station resulting in registration of Khanakul Police Station Case No. 82/11 dated 30.05.2011 under sections 302/34 of the Indian Penal Code.

4. Inquest and post mortem were held over the body of Debjani. Post mortem was conducted by a team of doctors. They opined death may be due to strangulation by ligature. Final opinion was deferred awaiting viscera report.

5. In conclusion of investigation, charge-sheet was filed and charges were framed under sections 302/34 I.P.C. against the appellants. Appellants pleaded not guilty and claimed to be tried.

6. In the course of investigation, prosecution examined 11 witnesses and exhibited a number of documents.

7. In conclusion of trial, the trial Judge by the impugned judgment and order convicted and sentenced the appellants to death. Hence, the present reference and the appeal at the behest of the appellants.

Arguments at the Bar:-

8. Mr. Mitter with Ms. Biswas for the appellants submitted there is no direct evidence that the appellants committed the murder. Debjani was a minor and her consent was not necessary to transfer the property standing in her name. Hence, motive to commit the crime has not been proved. Witnesses stated about torture on the victim for the first time in Court. Cause of death has not been proved beyond doubt. Seizure of the ligature, i.e., orna is also in doubt. Witnesses made varying statements with regard to the colour of the orna. No evidence is forthcoming who informed P.W. 1 with regard to the death of her niece. It is unclear when the victim was murdered. Presence of the appellants and the time of murder have not been established. Chain of circumstances do not unerringly point to the guilt of the appellants. Hence, they are entitled to the benefit of doubt.

9. Ms. Sinha for the State submitted Debjani was a 14 year old girl. She had been murdered at the residence of the appellants. Apart from the appellants, there was no other adult member living in the house. Post mortem report states she was strangled. No foul smelling liquid was found in the stomach. This rules out the possibility of poisoning. Hence, non-availability of viscera report would not affect the opinion of the medical board regarding the cause of death, i.e. strangulation. Minor discrepancies in the depositions of witnesses would not affect the credibility of the case. Circumstances relied upon by the prosecution have been established beyond doubt. False plea of suicide taken by the appellants is an additional link to the chain of circumstances. No plea of alibi was raised by the appellants. On the contrary, step-mother, i.e., second appellant was

present at the residence at the time of inquest. Hence, the prosecution case is proved beyond doubt. Conviction of the appellants may be upheld and the sentence of death be confirmed.

Evidence on record:-

10. P.Ws. 1, 3 and 5 are the uncles of Debjani. P.W. 1 is the de-facto complainant. P.W. 8 is her married sister. P.W. 7 is the maternal aunt and wife of P.W. 1.

11. P.W. 1, Amar Adak deposed Debjani used to reside with the appellants. After the death of her mother Reba, 29-30 satak of land was transferred in favour of Debjani and her elder sister, Kumkum. Debjani did not consent to transfer of the land to her step-mother. Hence, appellant used to inflict torture upon her. Upon hearing of the death of Debjani, P.W. 1 came to her residence. He saw a ligature mark around her neck. He lodged written complaint. Police seized orna in his presence. He signed on the seizure list (Exhibit 2).

12. P.W. 3, Bikas Adak deposed Debjani was subjected to torture by the appellants. They did not give proper food and clothing to her. Debjani used to complain to them. In order to grab the property transferred in her name, the appellants strangled her to death by an orna. Police seized a black coloured dupatta. He is a signatory to the inquest report.

13. P.W. 5, Ghanashyam Adak is another uncle of Debjani. He has corroborated his brothers, P.W. 1 and 3. He deposed mother of Debjani had been murdered. After the death of Reba, landed property was gifted to his nieces, Debjani and Kumkum by the first appellant. Thereafter, the first appellant married the second appellant. Both of them inflicted torture upon Debjani. They wanted to murder Debjani to grab the property. She was strangled by an orange orna. He found ligature mark around the neck. Around 4:00 p.m., he came to know about the death of Debjani.

14. P.W. 7, Mamata Adak is the wife of P.W. 1. She deposed appellants used to torture Debjani. They did not provide food to her. She was killed in order to grab the property which had been transferred to her after the death of her mother.

15. P.W. 8, Kumkum Maity is the elder sister of Debjani. She deposed her father used to torture their mother. She committed suicide. After death of her mother, she used to stay with her maternal uncles but Debjani used to stay with her father. Subsequently, her father married second appellant. They used to treat Debjani badly. She was beaten. She was not given proper food and clothing. They wanted to transfer the land gifted to Debjani in their favour. Debjani was unwilling. They strangled Debjani by an orna. She had seen the incident of torture on Debjani.

16. P.W. 9, Tarak Nath Mandal is a relation of P.W. 1. He has corroborated the evidence of the aforesaid witnesses. He is a signatory to the inquest report as well as seizure list.

17. Apart from the relations of Debjani, prosecution also examined P.W. 2, Ujjal Samanta a common acquaintance and P.W. 4, Chandi Majhi who claimed to be the grandfather of the victim girl by village courtesy. Both the witnesses have deposed with regard to the torture on the minor child. P.W. 2 stated Debjani was not given proper food or clothing. She was tortured to give consent to transfer the property in favour of her step-mother. He came to the spot and found mark around the neck of the body of Debjani. Similarly, P.W. 4 deposed he had seen Debjani weeping while going to school as her shoes were torn. He came to the spot and found Debjani lying with ligature mark around her neck.

18. P.W. 6, Dr. Subhadip Ghosh is a member of the medical board who conducted post mortem over the dead body of Debjani. He opined death may be due to strangulation by ligature. Final opinion was kept pending till receipt of viscera report. He proved the post mortem report (Exhibit 4).

19. P.W. 11, Atish Das, investigating officer deposed he had received anonymous call at the police station about the death. He went to the spot. He drew rough sketch map (Exhibit 8). He conducted inquest (Exhibit 3). He seized articles and arrested the appellants. He examined witnesses. He obtained post mortem report. He seized land deeds and submitted charge-sheet.

20. Let me see whether the prosecution has been able to prove its case beyond doubt.

Torture on Debjani:-

21. Debjani was a 14-year-old girl. She resided with her father (first appellant) and her step-mother (second appellant). Her mother Reba had died under unnatural circumstances. After the death of Reba, 29-30 satak of land was transferred in favour of Debjani and her sister Kumkum. Kumkum resided with her maternal uncles while Debjani stayed with her father and step-mother. Debjani was tortured by the appellants over transfer of the land standing in her name. Appellants wanted her to transfer the land in favour of her step-mother. She did not consent. As a result, she was tortured. She was not given food and clothing. P.W. 4, a co-villager of the appellants saw her weeping while going to school as her shoes were torn. P.W. 8, her sister stated she was tortured in her presence.

22. It is argued torture on Debjani on the score of transfer of property is improbable. First appellant being her guardian did not require her consent to transfer the property. I am unable to accept such proposition. Debjani was a minor girl. After the death of her mother, property had been transferred to her name and that of her elder sister who was married. Debjani did not agree to the proposal of transfer of the property standing in her name. This inconvenienced the appellants who subjected the minor girl to torture. Not only her relations but local villagers also deposed with regard to such torture. Minor embellishments or variations in their depositions do not affect the evidence on record with regard to the torture on the minor girl. Hence, torture upon Debjani as she was not willing

to transfer the property standing in her name in favour of her step-mother, i.e., the second appellant is proved.

Cause of death:-

23. P.W. 6 is one of the members of the medical board who held post mortem over the dead body of the deceased. Board opined death may be due to strangulation by ligature. He proved the post mortem report (Exhibit 4). A non-continuous ligature mark over right side and in front of the neck is noted in the post mortem report. The aforesaid finding is corroborated by the notings in inquest report (Exhibit 3). Ocular version of all witnesses also endorse the presence of a ligature mark on the neck of the victim. Overwhelming evidence on record corroborating the findings in the post mortem report leave no doubt in my mind that the victim suffered death due to strangulation by ligature.

24. Mr. Mitter argued opinion of the medical board was tentative and not final. Perusal of the post mortem report would show that the final opinion had been reserved subject to the examination of viscera. No viscera report was placed during trial. Failure to do so, in the factual matrix does not affect the findings of the medical board regarding the cause of death. There was no smell of poison in the abdomen as noted in the post mortem report. Under such circumstances, non-production of the viscera report does not have any real and substantial impact with regard to the cause of death.

25. Strangulation by ligature is ordinarily homicidal [Modi's Text Book of Medical Jurisprudence and Toxicology, 10th Edition by N.J. Modi]. There is no evidence that the body of the victim was found hanging in the house. This rules out the possibility of suicidal death. Thus, in my opinion cause of death of the victim is due to strangulation by ligature and homicidal in nature.

26. It is also argued that the time of death has not been proved. Prosecution case is that the victim was murdered in the night between 29-30. 05.2011. Thereafter, post mortem was conducted between 11:00 p.m. to 1:20 p.m. on 31.05.2011. Though P.W. 6 (a member of the Board) did not specify the exact time of death, it is relevant to note there was no rigor mortis or putrefication found on the body which would rule out the prosecution case that the death had occurred in the night between 29 – 30.05.2011.

27. Ligature, i.e. orna (dupatta) was also recovered from the place of occurrence. Colour of the orna has been described as orange-violet in the seizure list (Exhibit 2). In view of the variegated colour of the orna, witnesses have described it as light brown, orange or black as per their perception. This would not improbabilise the prosecution case with regard to recovery of the ligature from the place of occurrence.

Presence of the appellants in the house:- Whether proved:

28. It is strenuously argued there is no evidence that the appellants were present when the victim was murdered. I am unimpressed by such submission.

Incident occurred at the residence of the appellants in the night between 29-30.05.2011. They were the only adult residents of the house. It is all but natural that the appellants were present in the house at the time of occurrence. No evidence is forthcoming that there was any other person in the house on the fateful night. No plea of alibi was also taken by the appellants.

29. On the other hand, second appellant, step-mother of the victim girl, was found in the house when the inquest was held over the dead body of the minor girl.

30. These circumstances lead to the only irresistible inference that none other than the appellants were present in the house on the night when the victim was murdered.

31. The authorities relied upon by the prosecution are inapposite. In *Prasanta Biswas vs. State of West Bengal* 2019 SCC OnLine Cal 2275 the victim was found lying in the lap of the appellant's mother. She was not interrogated and the best evidence was withheld. In this backdrop, the Court held the prosecution has failed to prove its case beyond doubt. In the present case, appellants were the only adult members in the house when the victim was murdered. They came out with a false explanation of suicide which reinforces the incriminating circumstances proved against them.

32. In *Joydeb Sarder vs. State of West Bengal* 2018 SCC OnLine Cal 12586 prosecution failed to prove the accused was alone in the room with the deceased. Appellants herein were the only adult members in the room where the minor child was strangled to death. No plea of alibi was taken by them.

33. In *Jose @ Pappachan vs. The Sub-Inspector of Police, Koyilandy & Anr.* (2016) 10 SCC 519 the cause of death was doubtful. Under such circumstances, benefit of doubt was extended to the accused. Post mortem report and other attending circumstances proved in this case leave no doubt in one's mind the victim suffered homicidal death due to strangulation.

34. Similarly, in *Joydeb Patra & Ors. vs. State of West Bengal* (2014) 12 SCC 444 prosecution case of poisoning was not established. Under such circumstances, accuseds were held not guilty. Here, cause of death being established as strangulation, the cited case is distinguishable on facts.

35. In *Biswajit Mondal vs. The State of West Bengal* (2017) 2 C Cr LR (Cal) 311 prosecution relied upon 'last seen' circumstance and a confession made by the appellant at the police station. This Court held the confession was inadmissible and extended the benefit of doubt. Since all the incriminating circumstances have been proved beyond doubt, the case is of little help to the appellants.

36. In *Reena Hazarika vs. State of Assam* (2019) 13 SCC 289 the prosecution case hinged only on the 'last seen' circumstance. The cited case is distinguishable as the victim is a minor child who was strangled to death in the house where appellants were the only adult occupants.

Circumstances proved:-

37. In the light of the aforesaid discussion, prosecution has been able to prove the following circumstances:-

- i) Debjani used to reside with the appellants in the house. There was no other adult member staying with them;
- ii) She was tortured by the appellants as she did not consent for transfer of the landed property standing in her name in favour of her step-mother. This gave motive to the appellants to do away with the minor girl;
- iii) Debjani was strangled by an orna in the house on the night between 29 -30.05.2011. No one apart from the appellants and their six year old son were present at that time;
- iv) Post mortem and other attending circumstances establish death was due to strangulation by ligature (which is ordinarily homicidal) and ante mortem in nature;
- v) Ligature, i.e. orna was recovered from the place of occurrence;
- vi) Appellant did not report the incident to anyone;
- vii) They came out with a false explanation regarding cause of death, i.e. suicide during trial which is an additional link to the chain of incriminating circumstances.

These circumstances have been proved beyond doubt and irresistibly point to the guilt of the appellants. Hence, I uphold the conviction of the appellants. Death sentence – whether justified:-

38. Trial Court has imposed sentence of death upon both the appellants.

While doing so, the Court referred to *Machhi Singh vs. State of Punjab* (1983) 3 SCC 470 and held an innocent child was murdered for gain in a cold blooded manner by persons who were in a dominating position or position of trust. Hence, death sentence was justified.

39. While coming to such conclusion, the Court glossed over the following observations in *Machhi Singh* (supra):-

"38. In this background the guidelines indicated in *Bachan Singh* case [(1980) 2 SCC 684] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh* case:

"(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) 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'.

(iii) 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 for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) 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.

39. 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?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

40. On an incorrect appreciation of the ratio in Machhi Singh (supra), the Court came to the conclusion if the crime fell in one of the aggravating categories cited therein, death sentence has to be invariably imposed.

41. Gravity of the offence is not the only determining factor for imposition of sentence. In this regard, it may be worthwhile to recount the sage advice of the Apex Court in the case of Bachan Singh vs. State of Punjab (1980) 2 SCC 684 that the extreme penalty of death ought not to be awarded unless the alternate option of life imprisonment is unquestionably foreclosed:-

"209. ... Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of

human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

42. Apart from observing that the convicts had a minor child, the Court did not advert to other mitigating factors or the probability of the convict being reformed and rehabilitated.

43. The Court has singularly failed to embark into an enquiry whether there was possibility of reformation and rehabilitation of the appellants and the alternate option of life imprisonment was wholly foreclosed. A hurried and cryptic sentence hearing without proper opportunity to the convicts to present their case and lead evidence (if necessary) is an anathema to death penology. There is divergence in judicial opinion whether death sentence may be imposed on the same day after pronouncement of conviction [In Re: Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered while Imposing Death Sentences, 2022 SCC OnLine SC 1246]. But there is no second opinion that the Court must give a real and substantial opportunity to the convict to present his case and apply its mind to the aggravating as well as the mitigating circumstances before imposing the extreme penalty of death.

44. Even in cases where a minor has been murdered by a parent or person in trust, the Apex Court after taking a holistic view of all circumstances refrained from imposing the extreme penalty.

45. In *Brajendrasingh vs. State of Madhya Pradesh* (2012) 4 SCC 289 convict suspected the fidelity of his wife and killed their three young children. Sentence of death imposed upon him was converted to life imprisonment.

46. Murder of three children of his sister-in-law by the convict also did not qualify the rarest of rare (ROR) test justifying death penalty [*Vijay Kumar vs. State of Jammu & Kashmir*, (2019) 12 SCC 791].

47. In the present case, prosecution has placed nothing on record to show that there is no possibility of rehabilitation or reformation of the appellants and the alternate option of life imprisonment is wholly foreclosed. Report from the correctional home shows their behaviour and conduct is cordial and satisfactory. This reinforces my belief that the appellants have a high possibility of reformation and rehabilitation which rules out the extreme penalty of death.

48. Balancing the aggravating and mitigating circumstances, I modify the sentence imposed upon the appellants and direct they shall be sentenced to life imprisonment and pay a fine of Rs. 10,000/- each, in default, to suffer simple imprisonment of one year more.

49. Death Reference No. 3 of 2017 and Criminal Appeal No. 207 of 2017 are, accordingly, disposed of.

50. Period of detention suffered by the appellants during investigation, enquiry

and trial shall be set off from the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

51. A copy of the judgment along with L.C.R. be sent down to the trial Court at once for necessary action.

52. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

I agree.