
(2016) 09 CAL CK 0065
In the Calcutta High Court

Case No : Death Reference No. 7 of 2015 In connection with C.R.A. 773 of 2015

State of West Bengal

APPELLANT

Vs

Tapas Mondal

RESPONDENT

Date of Decision : 02-09-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 366

Evidence Act, 1872 — Section 113B

Penal Code, 1860 (IPC) — Section 302, Section 304B, Section 498A

Citation : (2017) 1 CalLJ 504

Hon'ble Judges : Nadira Patherya and Debi Prosad Dey, JJ.

Bench : Division Bench

Advocate : Mr. Joy Sengupta, Mr. Partha Sarathi Basu and Mr. Arnab Sengupta, Advocates, for the Appellant; Mr. Manjit Singh, Mr. Pratik Bose and Mr. Pawan Kumar Gupta, Advocates, for the State

Final Decision : Allowed

Judgement

Patherya, J.—This death reference is directed against the order of conviction and sentence dated 8th September, 2015 and 9th September, 2015 passed by the Additional Sessions Judge, 3rd Fast Track Court, Berhampore in Sessions Trial No.12(12)08 and 02(01)12 arising out of Sessions Serial No.956 of 2008 whereby and where under the Trial Court sentenced the accused appellant to death for the offence under Section 302 I.P.C and for the offence under Section 304B I.P.C. to suffer R.I. for life and pay fine of Rs.10,000/- in default R.I. for two years and to pay fine of Rs.2000/- for the offence under Section 498A I.P.C. in default R.I. for four months. The sentences were to run concurrently. While passing of the said order a reference was made by the Trial Court under Section 366 Cr.P.C. and it is only pursuant thereto that the reference has been placed before us for confirmation of the death reference.

2. The accused appellant has also filed an appeal against the order of conviction and sentence which has been registered as CRA 773 of 2015. Both the death

reference being Death Reference No.7 of 2015 and Criminal Appeal No.773 of 2015 arise from the common order of conviction and is being disposed of by a common judgment.

3. The case of the prosecution is that one Bhabani Mondal was married to Tapas Mondal in the month of Magh 1412 B.S. according to Hindu rites and ceremonies. Although a demand was made for payment of Rs.80,000/- at the time of marriage a sum of Rs.50,000/- in cash was paid along with gold ornaments and other articles. Thereafter, the victim girl resided in her matrimonial home with the accused appellant. Out of the wedlock a male child Bikram was born. The victim girl was subjected to both physical and mental torture for non-payment of balance Rs.30,000/-. Despite such torture she continued to stay there and on 8th February, 2008 she came to her parental home with her baby and informed her parents that unless a sum of Rs.30,000/- was paid she would not be allowed to live and would be killed by the accused. The defacto complainant took the victim girl in the evening of the same day and assured the accused appellant that six months time be given for payment of Rs.30,000/-. Thereafter, he returned to his home and in the night of 9th February, 2008 the defacto complainant was informed that his daughter and his grandson have been murdered in the house of the accused appellant. He along with others reached the house of the accused appellant and found both the victim girl and her child lying on the floor with cut injury on the throat.

4. An F.I.R. was filed on 10th February, 2008 and Berhampore P.S. Case No.16 of 2008 dated 10th February, 2008 under Section 498A/304B/302/34 I.P.C. was registered, and investigation initiated. Inquest both under Sections 176 and 174 Cr.P.C. was conducted and body sent for postmortem. The accused appellant was arrested at 13:05 hours on 10th February, 2008 and based on his statement recorded (Exhibit-19) the offending weapon was recovered at 15:05 hours and seizure list (Exhibit-16) was prepared. After inquest the said dead body was sent by challan through the constable/homeguard for the purpose of postmortem. Postmortem Report was collected by the I.O. On completion of investigation a charge-sheet was submitted against the appellant, his mother, father and brother under Sections 498A/304B/302/34 I.P.C.

5. The case was thereafter committed to the Court of Sessions and transferred for disposal by Order No.2 dated 26th November, 2008. Charges were framed and the contents thereof were read over and explained to the accused appellant and the other accused persons to which they pleaded not guilty and claimed to be tried. Thereafter, the case was transferred to the Court of the Additional Sessions Judge, 3rd Fast Track Court, Berhampore for trial.

6. In all 19 witnesses were examined by the prosecution, and documents exhibited. The accused appellant was examined under Section 313 Cr.P.C. but no D.W. was adduced. Based on oral and documentary evidence the order of conviction and death sentence was passed. Being aggrieved by the said order of conviction and death sentence C.R.A. 773 of 2015 was filed by the accused

appellant and Death Reference Case No.7 of 2015 has been filed by the State.

7. Counsel for the accused appellant submits that the accused appellant is in no way connected with the offence alleged. He is innocent and has been falsely implicated. He on the night of 9th February, 2008 had gone to drop a relative and on the way back had dropped into Nabarang shop to buy materials needed to make idols. On return home he had found the dead body of his wife, the victim girl and his male child and being frightened he had left the P.O. P.W.1 the defacto complainant and father of the victim girl in the F.I.R. implicated the accused appellant and his family members but when he came to depose in Court he exonerated the in-laws of the alleged offence.

8. Being a case of circumstantial evidence it can be divided into three parts -

(i) Torture for dowry;

(ii) The couple lived together; and

(iii) Recovery of offending weapon under Section 27.

9. The medical evidence does not point to any one person. The evidence of the prosecution witness suffers from contradictions and inconsistencies with regard to unpaid dowry. The defacto complainant in the F.I.R. has stated that a demand for the balance sum of Rs.30,000/- out of the demanded sum of Rs.80,000/- was made by all but when he came to Court to depose he made no allegation against the in-laws and indicted only the accused appellant. Therefore, his evidence with regard to unpaid dowry cannot be relied upon.

10. Similarly, P.W.2 who is the uncle of the victim girl with regard to dowry is also not very convincing. He too has not canvassed the case of torture for dowry but has stated that the husband alone demanded money. As regards torture, his evidence is nothing but hearsay.

11. P.W.12 is the mother of the victim girl and she came to depose for the first time in Court, her 161 statement was not recorded. Therefore, her evidence ought not to be considered.

12. P.W.16 is the sister of the victim girl who has in cross-examination stated that except the husband none of the other family members inflicted torture on the victim girl. Being a sister and a relative of the victim girl her evidence so also the evidence of P.W.12, P.W.1 and P.W.2 cannot be relied on.

13. The neighbours of both maternal home and parental home have not thrown any light on this aspect. The evidence of P.W.6 is nothing but hearsay. P.W.10 has not said anything with regard to dowry demand or torture. His evidence with regard to dowry and torture is contradictory. P.W.1 needed six months time to pay balance 30,000/- and this was not objected to by the appellant. Therefore, there is no urgency or desperation on the part of the accused appellant as time was given by him to the defacto complainant to make payment of the balance amount. Motive is lacking and motive to kill an 8 month old male child is also

unknown. The visit of the victim girl to her parental home is also shrouded with inconsistencies. In the F.I.R. it has been stated that the victim girl came in the morning of 8th February, 2008 whereas in Court P.W.1 has deposed that the victim girl told him at 5 p.m. in the evening. P.W.2 (uncle) has also stated that the victim girl came in the evening and has denied her coming to the parental home in the morning. P.W.12 is silent on this issue of visit. As the dowry demand and torture is doubtful the prosecution has failed to prove the offence under Section 498A I.P.C. beyond reasonable doubt. There is no evidence that the appellant and the victim girl stayed together on 9th February, 2008. None saw them together. Therefore, the theory of last seen together will not apply in the instant case and the adverse presumption under Section 114(g) of the Evidence Act gets attracted. It is for the prosecution to prove that the accused appellant was in the room and without proving the same beyond reasonable doubt cannot invoke Section 106 of the Evidence Act, as held in *Tomaso Bruno and Anr. v. State of U.P.*, 2015 (3) CRLR 34. There is no evidence to show that the couple were present in the house. It is only a presumption that being husband and wife it is presumed that they were in the house. Therefore, Section 106 will not apply. The P.O. was surrounded by vacant land on all sides. This will appear from the evidence of P.W.7 and P.W.12 both of whom say that the P.O. was surrounded by vacant land and pond. P.W.1 and P.W.2 have also stated that the P.O., i.e., the house was not surrounded by a wall. The alibi though taken, whether it is true, was not proved but the prosecution has to prove its own case and at most an alibi will be an additional link.

14. The answers to questions 17, 18 and 114 put to the accused appellant while being examined under Section 313 Cr.P.C. be considered. They were honest and candid.

15. In respect of the recovery under Section 27 of the Evidence Act the signatures of two independent witnesses were taken but none of these supported the case of the prosecution. P.W.4 and P.W.11 have both admitted their signature but have categorically said that the recovery was not in their presence. Signature alone in the absence of recovery will not aid the prosecution. The statement of recovery under Section 27 is Exhibit-19 while recovery is Exhibit-16. The seizure list Exhibit-16 does not mention that on basis of statement under Section 27 of the Evidence Act, recovery was made. Disclosure statement did not bear signature and recovery memo though signed by the accused, the witness to recovery turned hostile. From the evidence of P.W.19 it will appear that the wrapper of the offending weapon was in damaged condition. The home-guard (P.W.9) did not find the "Daa" in Court and, therefore, did not identify it.

16. Reliance is placed on 1989 (supp) 1 SCC 74. The FSL report though detected human blood but did not match it. As held in *Bhupan v. state of M.P.*, (2002) SCC (Cri) 457, that if all the prosecution witness is disbelieved, the conviction cannot be based on recovery alone. P.W.1, P.W.2, P.W.12 and P.W.16 should not be believed because of the contradictions and inconsistencies in their evidence.

P.W.4 and P.W.11 have turned hostile and did not prove recovery though they proved their signature. Reliance is placed on the reported decision of Kalu Khan v. State of Rajasthan As the case is doubtful and as held in AIR (2014) SC 2745. the appellant be sentenced to R.I for life.

17. Counsel for the State submits that the death of the victim girl is under Section 304B I.P.C. Therefore, the presumption under Section 113B of the Evidence Act comes into play and the burden is on the defence to counter such presumption. The offence has been committed within the four walls of the house. The in-laws of the victim girl lived separately. Therefore, it would be within the special knowledge of the accused appellant as to who was in his house on the fated day. Nowhere has it been said that he was not at the P.O. on the fated day. Defacto complainant (father) when he came to the house being informed of the death of the victim girl did not find the accused appellant at the P.O. No explanation has been given by the accused appellant which would be necessary as the death occurred in the matrimonial home. "Sambandhi" is a local term used for elder brother-in-law by a brother in colloquial language. The accused appellant while being examined under Section 313 in answer to Q.13 has stated that he had gone to Nabarang shop but has not proved the alibi taken. Time of leaving has also not been given. Therefore, the presumption under Section 113B of the Evidence Act is applicable. More so, when the death occurs within less than 7 years of marriage and is immediate to the demand of dowry. P.W.1 can be relied upon and is a truthful witness as he deposed that the in-laws were in no way involved in the offence.

18. Section 27 of the Evidence Act deals with recovery which was made at 15:05 hours after recording the statement Exhibit-19 of the accused appellant on his arrest at 13:05 hours on 10th February, 2008. As held in State Govt. of NCT of Delhi v. Sunil and Anr., (2001) SCC (Cri) 248, a search may be made before respectable people but in a recovery no compliance of Section 100 is needed. Both the witnesses to the recovery of the offending weapon have turned hostile and as held in the reported decision, therefore, the evidence of the I.O. ought to be looked into which cannot be treated as unreliable. Exhibit-7 is the Daa (offending weapon) which had stains of human blood. P.W.11 and P.W.4 are signatories to the seizure list. Both have accepted their signatures on the said document. The signature of P.W.11 would not be needed for release of the body, as he is not a relative of the victim girl. It is because of this that he has been declared hostile. Reliance is also placed on a decision reported in Musheer Khan @ Badshaan Khan and Anr. v. State of Madhya Pradesh, (2010) 2 SCC 748 and (2012) 11 SCC 205 which has overruled the decision in Jaskaran's case. From the decision cited, the proposition that emerges is that recovery under Section 27 even if not signed is a valid document.

19. In support of Section 106 of the Evidence Act, reliance is placed on (2014) 12 SCC 211 and AIR 1956 SC 404. The parents of the accused appellant lived separate. There is no dispute that P.W.1 (father) came to leave the victim girl on

8th February, 2008 at her matrimonial home. It would be only within the special knowledge of the accused appellant with regard to what happened within the four walls of the house, as there was no third person therein. Therefore, the aid of Section 106 will have to be taken as held in (2006) 10 SCC 681 and Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106. When the facts are clear, motive is not of importance. While answering Q.114 while being examined under Section 313 Cr.P.C. the motive becomes clear i.e. the accused appellant not agreeing to the marriage and an obligation was cast on the accused appellant to explain the cause of death.

20. Reliance is placed on (2007) 10 SCC 445 and Narendra v. State of Karnataka, (2009) 6 SCC 61. The alibi taken was false. This is an additional circumstance in the chain of events. Saraswati Puja had just gone by and his statement that he had gone to Nabarang shop to buy materials to make idol is false. There was no need for him to go to Nabarang and fleeing from the P.O. also goes against the accused appellant. As he was in the house at night, therefore, how his wife and child died was within his special knowledge which was not proved by the accused appellant. As each of the circumstance has been linked the order of conviction and sentence calls for no interference.

21. In reply Counsel for the accused appellant submits that as there was no torture or demand, therefore, the offence under Section 304B was not proved and the question of any presumption does not arise. Thakur Singh is distinguishable on facts as door was bolted from inside and the accused came out of her room such is not the case here. Section 106 should not be easily invoked. In (2006) 10 SCC 681 both were found together but such is not the evidence here. State Govt. of Delhi v. Sunil and anr. ,(2001) SCC (Cri) 248 in view of Paragraph 20 is distinguishable so also Musheer Khan's case in view of Paragraph 45.

22. Having considered the submission of the parties there is no eyewitness to the incident. The case is based on circumstantial evidence and the marriage between the victim girl and the accused appellant was solemnized two years before the incident. A male child Bikram, 8 months old was born to them. Before the marriage 80,000/- was demanded by the family of the accused appellant. At the time of marriage a sum of Rs.50,000/- was paid. From the evidence of P.W.1 and P.W.2 for the sum of Rs.30,000/- which was not paid at the time of marriage, torture was inflicted on the victim girl by the accused appellant. It is the evidence of P.W.1 that on 8th February, 2008 his daughter came to her parental home and told him that if Rs.30,000/- was not paid she would not be allowed to live. He took his daughter to her matrimonial home and sought for six months time to make such payment but no reply was given by the accused appellant. In cross-examination the incident of torture remained unshaken. He has stated that the victim girl informed him five to six times that the accused appellant inflicted torture upon her. He has also denied the suggestion put to him. P.W.2 is the uncle (Kaka) of the victim girl. He has stated that on 8th February in the evening

the victim girl came with her son to her parental house and told if the money is not given she would be murdered. As regards torture the evidence is nothing but hearsay. The evidence of the mother (P.W.12) cannot be relied on as she deposed in Court for the first time and was not examined by the I.O. P.W.16 is the sister of the victim girl who has in cross-examination affirmed cruelty on the victim girl from the date of marriage. She too has absolved the parents-in-law and brother-in-law of cruelty on the victim girl.

23. Section 498A I.P.C. makes "cruelty to woman" by her husband or relative of husband punishable and has described "cruelty" -

Explanation-(a)

XX

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

24. In the instant case the said ingredient of cruelty is apparent. From the evidence of P.W.1 and P.W.2 it is clear that the sum of Rs.30,000/- remained unpaid out of the initially demanded sum of Rs.80,000/-. It is for this 30,000/- that demand continued and the victim girl was subjected to torture as per the F.I.R. and the evidence of P.W.1 (father). She left her matrimonial home on 24th Magh (8th February, 2008) and visited her parental home to inform her parents that in the event the said sum was not paid, she would not be allowed to live as told to her by the accused appellant. This demand made was

- (i) within two years of marriage resulting in;
- (ii) death of the victim girl on 9th February, 2008;
- (iii) in unnatural circumstance;
- (iv) being subjected;
- (v) soon before her death on 8th February, 2008 or prior thereto to cruelty or harassment by her husband;
- (vi) for demand of dowry.

25. Therefore, the ingredients of Section 304B I.P.C. are satisfied. The ingredients of Section 498A I.P.C. are also present in the instant case. That demand was proximate to her death is also apparent. Therefore, the death of the victim girl can be termed as "dowry death" deemed to be caused by her husband, as in the instant case the inlaws have been exonerated of the offence by P.W.1 (father) and P.W.16 (sister).

26. Although Counsel for the accused appellant contended that there were contradictions and inconsistencies with regard to the offence under Section 498A

I.P.C. in the evidence of P.W.1 and P.W.2, but in the evidence of both P.W.1 and P.W.2 the element of demand finds mention. P.W.2 is not aware of the torture inflicted upon the victim girl and it is quite possible that being the uncle he was not told of the torture. It must not be forgotten that the reason for torture was demand of money which could not be satisfied by the father (P.W.1). Therefore, it was natural for her to tell her father of the torture inflicted and the evidence of P.W.1 (father) as regards torture cannot be discarded. He cannot be termed as "an unreliable witness" as in the F.I.R. he had indicted the in-laws and the accused appellant for commission of offence and when he came to depose he exonerated the in-laws honestly and indicted only the husband in the offence. Demand for dowry is evident from the evidence of P.W.1 and P.W.2. P.W.1 has also stated that he agreed to make payment of the balance sum and he informed the accused appellant of the same when he went to drop his daughter in her matrimonial home on 24th Magh, 1412 B.S. to which the appellant remained silent. Therefore, the prosecution has been able to prove the case of dowry demand through the evidence of P.W.1 and P.W.2 and infliction of torture through the evidence of P.W.1.

27. The ingredients of Section 304B I.P.C. has been satisfied as will appear from the above, and the presumption under Section 113B of the Evidence Act comes into play.

28. The accused appellant and the victim girl lived separate from the parents of the accused appellant, therefore, except the couple and their child, there was none residing at the P.O. The murder occurred in the night and at night the victim girl was in her matrimonial home in the custody of her guardian, the husband accused appellant, who has not introduced the presence of a third person in the house on the fated day at the fated time. An alibi though taken was not proved. In fact, the alibi taken could also not be believed as the accused appellant was an artisan who made idols. According to him he had gone to drop a relative in the house of his maternal uncle. Neither the maternal uncle or any member of his house has been examined. From his uncle's house he went to Nabarang to buy materials for his work. This would not be necessary as according to P.W.1 saraswati puja had just gone by and till April there would be no need of idols. This is also an incriminating circumstance. Therefore, the prosecution was able to prove the case for the offence under Section 304B I.P.C. vis-?-vis the victim girl beyond reasonable doubt.

29. There is no eyewitness in the instant case and is based on circumstantial evidence. Each of the circumstance is inextricably linked to each other without a delink. The couple were married for about 2 years and had a male child. They lived separate to the in laws. 80,000/- was demanded at the time of marriage, out of which 50,000/- was paid and 30,000/- remained to be paid. Torture was inflicted on the victim girl and on 8th February, 2006 the victim girl visited her parental home and informed that if 30,000/- was not paid she would not be allowed to live. P.W.1 (father) took her to her matrimonial house and sought 6

months time to pay the said sum. The accused appellant remained silent. He was at home. On 9th February, 2008 at about midnight P.W.1 (father) was informed of the death of his daughter and grandson. Therefore, the death was prior thereto, and according to the accused appellant he had gone to Nabarang shop to buy materials for making idol and on his return found the dead body of his wife and child, and escaped. P.W.1 (father) and P.W.2 (uncle) reached the house of the victim girl at about 1:30 a.m. on 10th February, 2008 and did not find the accused appellant. At 7:45 a.m. an F.I.R. was filed, inquest made, postmortem conducted and the accused arrested. A recovery statement was made and "Daa" recovered. The offending weapon was sent for FSL and human blood was found on it. In the 313 examination the accused/appellant did not adduce evidence to prove his innocence nor the alibi taken. Therefore, each circumstance is linked without being delinked and in the absence of any delink in the chain of circumstance Section 106 of the Evidence Act is brought into play. The victim girl lived with the accused appellant separate from her in-laws, and seeing that P.W.1 had got the victim girl married to the accused appellant. The incident took place prior to 12/12:30 a.m. as at this time P.W.1 was informed of the death of the victim girl. At night a wife is supposed to be in the custody of her husband and it is for the husband to explain how the incident occurred. At the time of inquest the bodies of the victim girl and the child were found in the bedroom of the couple on their bed with cut injury. In the postmortem report the cut wound was found in the middle of the front of the neck upto the back and the death was homicidal and ante mortem in nature. The presence of any third party has not been introduced or suggested by the accused appellant. An alibi though taken has not been proved. P.W.1 did not find the accused appellant when they reached the P.O. The accused appellant has stated in his 313 examination that he hid himself as he was frightened on seeing the dead bodies. This is an unnatural conduct on the part of the accused appellant being the husband of the victim girl. No attempt was made to either inform the police, file an F.I.R. or take the victim girl and her child to the hospital. A question arises that why would a person be frightened or need to hide himself if he had not committed an offence.

30. P.W.1 (father) took the victim girl to her matrimonial home on 24th Magh evening. According to him on the same day at 12 midnight he was informed that the victim girl had died.

31. P.W.2 (uncle) has stated that the victim girl came to her parental home on 8th February, 2008 and on the same day her father took her to her matrimonial home. It was on the next night at 12/12:30 that they were informed of murder of the victim girl and they reached the house at 1/1:30 a.m. The F.I.R. was filed on 10th February, 2008 at 7:45 hours. This makes the visit of the victim girl on 8th February, 2008 more believable than as stated by P.W.1 (father) on 24th Magh. The F.I.R. was also filed on 10th February, 2008.

32. Even if the date of incident mentioned by P.W.1 (father) is not believed will not in any way affect the prosecution's case as the prosecution has proved the

case of torture through the evidence of P.W.1 and the demand of 30,000/- through the evidence of both P.W.1 and P.W.2.

33. Though motive remains in the mind of the accused appellant and is not disclosed but in the instant case motive is apparent. The marriage between the accused appellant and the victim girl was arranged but the accused appellant had not consented to the marriage. The in-laws also insulted him and called him insane, all of which he tolerated. When P.W.1 sought for 6 months time to pay Rs.30,000/- the accused appellant remained quiet. Therefore, motive is apparent.

34. Besides the victim girl, Bikram, the 8 month old child of the couple was also killed. There would be no reason for any third party to kill the infant as the infant was not of an age where he would recognize his mother's killer. On the other hand, the marriage between the couple was not as per the wishes of the accused appellant. This has been admitted by him while being examined under Section 313 Cr.P.C.

35. P.W.1 in his evidence has stated that the accused appellant had a competitor but the accused appellant made better idol. This could be no reason for the competitor to kill the wife and child of the accused appellant as the competition was with the appellant's art and in keeping the accused appellant alive the art of the accused appellant also remained alive.

36. From the aforesaid, therefore, it is evident that the offence was committed by the accused appellant and the only question that needs to be considered is justification in sentencing the accused appellant to death for an offence under Section 302 I.P.C.

37. The doctor (P.W.18) has also opined that the death was homicidal and ante mortem in nature. Death sentence as held in *Gurvail Singh @ Gala and anr. v. State of Punjab*, AIR (2013) SC 1177 is to be awarded in the rarest of rare cases.

38. The factors to be considered are:-

(i) Aggravating and mitigating circumstance as laid down in *Rejendra Pralhadrao Wasnik v. State of Maharashtra*, (2012) 4 SCC 37 and balancing both the circumstance.

(ii) Application of the "crime test", "criminal test" and "R-R test" as laid down in *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546.

39. In the instant case the following aggravating circumstance emerges namely:-

- (1) The appellant killed his wife and minor child;
- (2) Breached the trust reposed in him; and
- (3) All for want of money demanded and its non-payment.

40. Contrary to the aforesaid, the mitigating circumstance that exists are:-

- (a) The marriage was arranged against the wishes of the appellant by his parents;
- (b) There is no previous criminal record against him prior to the commission of offence;
- (c) There is also nothing on record to show that he cannot be reformed or rehabilitated;
- (d) When his demand for money was not met it was the last straw;
- (e) His in-laws considered him as insane and spoke insulting words against him.

41. When the two circumstance mentioned above is balanced, the scale tilts in favour of the mitigating circumstance and against confirmation of death sentence, by applying the "crime test", "criminal test" and the "R-R test", as discussed in *Shankar Kisanrao Khade v. State of Maharashtra*, (2013) 5 SCC 546

-

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare test (R-R test). R-R test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

42. On application of the R-R test it is seen that the following factors were not considered namely that the appellant did not have any criminal antecedent, he was not a menace to society, no expert evidence was called for ruling out the possibility of the appellant being reformed or rehabilitated and that sentence of life imprisonment would be inadequate.

43. Therefore, the death sentence imposed is converted to R.I. for life and the

term of imprisonment is fixed to 20 years in view of the murder of the innocent 8 month old Bikram whose life was nipped in the bud, before it had barely started, and who could have neither resisted the assault nor even recognised the assailant. On completion of the 20 years imprisonment subject to the remission earned and considering the number of years served, the authorities will consider the release of the appellant.

44. The sentence under Section 498A and Section 304B I.P.C. as modified stands confirmed and shall run concurrently.

45. In view of the aforesaid CRA 773 of 2015 is allowed to the extent mentioned above and Death Reference answered accordingly.

Debi Prosad Dey, J.—I agree.