
(2013) 07 MP CK 0071

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 1435 of 2012 and Criminal Reference No. 01 of 2012

Sunil

APPELLANT

Vs

State of Madhya Pradesh
 Additional Sessions Judge Vs
Sunil

RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302, 363, 367, 376(2)(f)

Citation : (2013) 07 MP CK 0071

Hon'ble Judges : Shantanu Kemkar, J;Mool Chand Garg, J

Bench : Division Bench

Advocate : Praveen Newalkar, for the Appellant; R.S. Parmar, Learned Panel Lawyer, for the Respondent

Final Decision : Dismissed

Judgement

1. In view of the detailed judgment pronounced today by this Court in Criminal Reference No. 01/2012 (In reference of Additional Sessions Judge, Manawar, District Dhar v. Sunil s/o. Bhuria Balai), this criminal appeal is dismissed. The appellant's conviction under Sections 302, 363, 367 and 376(2)(f) of the IPC is maintained. A copy of the said judgment be retained in this appeal also.

Shantanu Kemkar, J.

2. The Additional Sessions Judge, Manawar, District Dhar vide impugned judgment dated 05.12.2012 passed in Sessions Trial No. 414/2012 has awarded the death sentence to Sunil s/o. Bhuria and has made a reference of the proceedings for confirmation of death sentence by this Court. Feeling aggrieved by his conviction and sentence awarded by the impugned judgment, the accused has preferred Criminal Appeal No. 1435/2012. This order will govern the disposal of the reference as also of the criminal appeal.

3. The relevant facts of the case are that on 31.10.2012, the victim, a girl aged

four years, whose parents had gone for earning their livelihood, was playing with two other girls of the family, aged six years and three years, in the courtyard of her house. Shyamlibai (PW-4), grandmother of the victim, was keeping watch on them. At 02.00 PM, appellant Sunil, who is cousin of victim's father, residing next to the house of the victim came there. He lifted the victim to take her with him and started walking away. On being objected by Shyamlibai and Kamal, who is real uncle of the victim who also at that time arrived at home to take his lunch, the appellant replied that he is taking her to her parents. He then fled away with the victim. The appellant was seen on the way taking the girl with him by Santosh (PW-2), Mukesh (PW-3). At 05.00 PM, parents of the victim came back to home. On being inquired about the girl, they told that the appellant did not bring her to them. The appellant, who was also present at that time, did not say anything regarding whereabouts of the girl. Thereafter, parents of the girl along with Kamal, Paro, Santosh, Mukesh and Sanjay started search of the victim. Initially, the appellant was also searching the victim with them, but then he disappeared.

4. When the girl was not found till 11.00 PM, a report was lodged at 11.10 PM at Police Station, Manawar against the appellant, which was registered as Crime No. 578/2012 for offence u/s 363 of the Indian Penal Code. The Police started search of the missing girl from 12.00 in the night. Next day i.e. on 01.11.2012 at about 08.15 AM, the appellant was found hiding himself in the sugarcane field of Babulal. He was arrested vide arrest memo Ex. P/6. On his memorandum Ex. P/7, the dead body of victim was recovered from the field of Mohan Patidar. Panchayatnama Ex. P/8 was prepared. Clothes and the blood stained soil were seized vide seizure panchnama Ex. P/9 and Ex. P/10. Spot map Ex. P/2 was prepared.

5. Further investigation was carried out by the Police and after its completion, charge-sheet was filed against the appellant u/s 302, 201, 367 and 376(2)(f) of the Indian Penal Code. The dead body of the victim was sent for postmortem examination. As per the opinion of the team of the doctors, who conducted the postmortem, the cause of death of the victim was asphyxia because of throttling and the nature of the death was opined to be homicidal in nature. The postmortem report is Ex. P/14. In Ex. P/14, the vaginal findings were to the effect that Vulva and vaginal were found swelled; labia majora and minora were swelled and blood stained; hymen was ruptured at 6 O'clock position with perineal tear about 1.5 x 0.3 cm at 6 O'clock position; vaginal orifice was open and blood stained; and blood clot was seen in vagina. On being asked by the Police, a query report was also given by Dr. Saurabh Borasi, who conducted the postmortem, in which it has been stated that (a) the injuries found around face, neck and around nipple are may be due to nails and tooth; (b) according to vaginal findings suggest that sexual intercourse must be done; and (c) sexual intercourse must be done within 24 hrs.

6. The appellant on being arrested by the Police was medically examined. As per

the medical report Ex. P/16, he was held to be capable of committing sexual intercourse. Two semen slides, pubic hairs and underwear were preserved, which along with other articles relating to the victim seized by the Police vide Ex. P/9 were sent for chemical analysis to Forensic Laboratory vide letter Ex. P/28. FSL report Ex. P/30 confirmed presence of semen on top (Article A), pant (Article B), slide (Article G), swab (Article H) of victim and underwear (Article E) and slide (Article J-1) of appellant.

7. On completion of the investigation, the Police filed charge-sheet against the appellant. The trial Court, after appreciation of the material brought on record, held the appellant guilty of rape and murder of the victim. Keeping in view the heinous nature of crime committed by the appellant, who was the uncle of the girl, the trial Court convicted and sentenced him with death penalty for offence u/s 302 of the Indian Penal Code and also convicted him for two years RI u/s 363; seven years RI u/s 367 and ten years RI for offence u/s 376(2)(f) of the Indian Penal Code with default clauses.

8. Shri Praveen Newalkar, learned counsel for the appellant argued that in the absence of any cogent and reliable evidence against the appellant, the trial Court could not have convicted him for the alleged offence; in the alternative, he submitted that the appellant being a young person, aged 25 years, the death sentence awarded against the appellant u/s 302 IPC be not confirmed and it be converted into life imprisonment.

9. On the other hand, Shri R.S. Parmar, learned Panel Lawyer for the respondent, has supported the impugned judgment of conviction and the sentence awarded to the appellant. He argued that the trial Court has properly appreciated the evidence and has rightly recorded the findings about conviction. He also argued that looking to the gruesome crime committed by the appellant, the death sentence awarded by the trial Court deserves to be confirmed.

10. Undisputedly, the appellant is cousin (Mausera Bhai) of the victim's father. Thus, he was uncle of the victim. Kamal (PW-1), who had lodged the first information report, had stated that he along with the other family members had gone for work of agricultural labour in the field of Pannalal. At about 02.00 PM, when he had come to house for taking meals for himself and to carry it for other family members, the appellant had taken the victim with him on the pretext of taking her to her parents. When at 05.00 PM the parents of the girl returned, the girl was neither with them. A report was lodged in the night. Next day in the morning, on being searched, Sunil was found in the field of Babulal. On being asked about the victim, he told that after committing rape on her, she has been murdered by him and her dead body has been thrown in the field of Mohan. Thereafter, at the instance of the appellant, the dead body of the victim was seized. He has explained in his cross-examination that he had seen the appellant taking the victim with him at 02.00 PM, when he reached home.

11. Santosh (PW-2) is the witness, who had seen the victim with the appellant at

about 02.00 PM on the way after she was being taken by him from her house. He stated that at 05.00 PM when members of family came back from the work, they were enquiring about the whereabouts of the victim. On that, the appellant had stated that he after taking the victim with him, slept under the tree and it is not known to him that where the victim had gone from that place. Mukesh (PW-3) has also supported the version of Santosh (PW-2) about the victim's last seen together on the way with the appellant at about 02.00 PM.

12. Shyamlibai (PW-4), grandmother of the victim, from whose custody the appellant had taken the victim with him, has supported the prosecution story. She had stated that when she was sitting in the courtyard, appellant came and lifted the victim for being taken with him. On being asked, he replied that he is taking the victim to her parents in the field. At that time, her son Kamal had come. He also asked the appellant as where he is taking the victim. At about 05.00 PM, when the victim's parents and other family members came back to home, it was informed by her parents that she is not being brought to them by appellant Sunil. On being asked to Sunil, who was there at that time, he informed that after taking the girl with him, he had slept under a tree, at that time, the victim went away and that he is not aware as to where she has gone. Sanjay (PW-5) has also supported the prosecution version about the incident.

13. Dr. Saurabh Borasi (PW-8) proved the cause of death to be asphyxia because of throttling and in relation to neurogenic shock, the nature of death to be homicidal. As per his evidence, there was sexual assault with the victim. He proved the injuries and the vaginal findings of the victim.

14. Having regard to the aforesaid, it is clear that the prosecution case is based upon the circumstantial evidence. It has now been well settled that a conviction can be based solely on the basis of circumstantial evidence. Where a case rests squarely on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of the accused or the guilt of other person. The circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature and all the circumstances should be complete and there should be no gap in the chain of evidence.

15. To prove its case, the prosecution has examined Kamal (PW-1), Santosh (PW-2), Mukesh (PW-3), Shyamlibai (PW-4) and Sanjay (PW-5) apart from other witnesses. The evidence of all these witnesses which are about the incident is consistent. It has been duly proved that the victim was taken by the appellant and was last seen with the appellant. He took her from the courtyard and was seen on the way taking her with him by the witnesses Santosh (PW-2) and Mukesh (PW-3). The witnesses had deposed that when all the family members including the parents of the victim came back from the field, the appellant was also there, but the victim was not there. On being inquired from the appellant, he could not give a satisfactory explanation about the whereabouts of the victim. All of them started her search, for some time the appellant was with them, but

then he disappeared. In the circumstances, a report was lodged against the appellant at the Police Station. During the search in the morning, he was found hiding in the field of Babulal. Arrest memo was prepared by D.V.S. Nagar (PW-11) in the presence of witnesses Sanjay (PW-5) and Kailash. The postmortem report, evidence of doctor and the FSL report supports the prosecution case.

16. The entire oral evidence as well as the medical evidence completely connects the appellant with the commission of the crime of rape and murder. In the absence of any satisfactory explanation by the appellant, in whose custody, the minor child was, we have no hesitation to hold that the appellant is guilty of commission of rape and murder of the victim, a girl aged four years. Looking to the opinion of the doctor in the postmortem report about the sexual assault and the FSL report, in our considered view, the trial Court has committed no error in convicting the appellant, as aforesaid. The circumstances enumerated by the trial Court for holding the appellant guilty of the offence, are rightly found to be proved by it.

17. Now, the question which requires consideration is whether the present case would fall in the category of "rarest of rare case", so as to justify awarding of capital punishment to appellant Sunil.

18. In the case of Kamta Tiwari Vs. State of M.P., in somewhat similar circumstances, when the accused who was close to the family of the deceased to whom the victim used to call "uncle" had committed rape and murdered the innocent hapless girl of four years, the Supreme Court while maintaining the award of death sentence by treating the case as "rarest of rare case" has held that when an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes.

19. In the case of State of U.P. Vs. Satish, , the Supreme Court upheld the death sentence in a case where the victim aged less than 6 years, was raped and thereafter murdered, treating it to be "rarest of rare case". In the case of Shankar Kisanrao Khade Vs. State of Maharashtra, considered various judgments of the Supreme Court on the issue, including Gurvail Singh @ Gala and Another Vs. State of Punjab, , Bachan Singh Vs. State of Punjab, , Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra, Devender Pal Singh Vs. State National Capital Territory of Delhi and Another, Kamta Tiwari Vs. State of M.P., and Machhi Singh and Others Vs. State of Punjab, it has been held by the Supreme Court that aggravating circumstances (crime test) and mitigating circumstances (criminal test) were to be taken into account while deciding the issue of

imposition of death penalty. It held that to award death sentence, even if both the tests are satisfied as against the accused, the Court has to finally apply "rarest of rare case test", which depends on perception of the society and not judge centric i.e. whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of cases like rape and murder of minor girls intellectually challenged, suffering from physical disability old and infirm women with those disabilities etc. The Courts award death sentence because situation demands due to constitutional compulsion, reflection by the will of the people and not judge centric. It was further held the aggravating circumstances, to name few are that the offence was committed on the victim, who is innocent helpless or a person relies upon the trust of relationship like a child helpless woman and is inflicted with the crime by such a person. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society. Some of the mitigating circumstances enumerated in the case of Shankar Kisanrao Khade v. State of Maharashtra (supra) are the manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course as well as the chances of the accused of not indulging in commission of the offence against and the probability of the accused being reformed and rehabilitated and the condition of the accused shows that he was mentally disturbed. The Supreme Court clarified that the aggravating and mitigating circumstances shown are not exhaustive but are only illustrative.

20. Having regard to aforesaid legal position, we have to ex-amine as to whether the present case is a fit case calling for award of capital punishment. The contention of the appellant that the appellant is a young person aged 25 years, and as such, lenient view deserves to be adopted, cannot be accepted as the age of the accused cannot be a determinative factor by itself. The victim was niece of the appellant, thus he was fatherly figure for the victim. The crime was committed in cruel, diabolic and brutal manner. The innocent girl aged four years was subjected to such a barbaric treatment by the appellant, who was her uncle. Having regard to the vulnerability of the victim and the gruesome nature of the crime, we have no hesitation in holding that this case falls in the category of "rarest of rare case" where the sentence for death of appellant has rightly been awarded by the trial Court and such a sentence eminently was desirable, which in our considered view, not only deters others from committing such atrocious crime, but also manifest society's abhorrence of such crime. This case not only shocks the judicial conscience but even the conscience of the society and in our view, the nature of crime and the situation demands award of death sentence to the appellant. As a result, the reference made by the trial Court in regard to the death sentence awarded by it to appellant is answered in affirmative and we hereby confirm the same. The appellant's conviction under Sections 302, 363,

367 and 376(2)(f) of the IPC is maintained. The appeal filed by the accused/appellant is hereby dismissed.