

A BANTU @ NARESH GIRI

v.

STATE OF M.P.

OCTOBER 17, 2001

B [M.B. SHAH AND DORAISWAMY RAJU, JJ.]

C *Penal Code, 1860—Sections 302 and 376—Prosecution under—Deceased last seen together with the accused—Conviction by Trial Court and High Court—Death sentence—Plea that death sentence is not justified since the case was not rarest of rare case—On appeal—Conviction upheld, but sentence commuted to life imprisonment.*

D The appellant was convicted for offence punishable under Sections 302 and 376 IPC, for having committed rape and murder of six year old girl. Death sentence was imposed on him. Deceased was last seen together with the accused-appellant by PW4, PW5 and PW10. Appeal against the conviction and sentence was confirmed by High Court.

E In appeal to this Court appellant contended that it was not justified to impose death sentence because the offence does not fall in the category of rarest of rare case, since the death was caused incidentally and unintentionally; and that on the date of incident his age was less than 22 years; and had no past criminal record.

Partly allowing the appeal, the Court

F HELD : In view of the evidence on record, it is evident that the High Court or the Sessions Court did not commit any error in appreciating the evidence led by the prosecution. Hence, the conviction of the appellant for the offences punishable under Sections 302 and 376 IPC is confirmed, but the death sentence is commuted to imprisonment for life. [301-D-E; 302-A]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 655 of 2001.

From the Judgment and Order dated 19.3.2001 of the Madhya Pradesh High Court in CrI. R. No. 2/2000 and CrI. A. No. 2161 of 2000.

H Tara Chandra Sharma (A.C.) for the Appellant.

Anoop George Choudhary, Ms. Divya Suri, Ms. Bharti Tyagi and Uma Nath Singh for the Respondent.

The Judgment of the Court was delivered by

SHAH, J. Being aggrieved and dissatisfied by the order passed by the High Court of Judicature at Jabalpur, M.P., the accused has filed this appeal. By the impugned judgment and order dated 19.3.2001, the High Court confirmed the judgment and order passed by the Additional Sessions Judge, Umariya in Sessions Case No. 117/99 convicting the appellant for the offence punishable under Sections 302 and 376 of Indian Penal Code and sentencing him to death.

It is the prosecution case that PW1 Mohan Lal Sahu when returned at his home at about 6.00 p.m. on 25th January, 1999, he found that his granddaughter (daughter of his late daughter) Jyoti aged about 6 years was not present in the house. He enquired about her from his daughter-in-law and other persons. He was informed that she had gone to visit cinema alongwith the accused. After some time when accused Bantu @ Naresh visited his residence, he enquired about whereabouts of Jyoti and accused stated that he did not know anything about Jyoti and that he had not taken her alongwith him for going to cinema. Thereafter, he and other family members and residents of the locality started searching Jyoti. During the search, few people in the mohalla told his wife that deceased Jyoti was seen accompanying the accused at about 4.00 p.m. and his wife informed him accordingly. Thereafter he along with his wife went at the house of accused to know the facts correctly but as the accused became angry on such enquiry, they came back. On being advised by the people from the neighbourhood, he lodged the report at the police station. Subsequently dead body of the deceased girl was noticed by PW 13 Sanjay Dube who was also neighbour of PW 1. The dead body was found lying in the bushes standing across the railway line. He noticed that underwear of the deceased was lying near the dead body and that there were blood stains and tooth mark on her cheek. He thereafter informed the police station. On the basis of the said information, investigating officer carried out necessary investigation. Thereafter, accused-appellant was charge-sheeted alongwith Balu @ Balram Goswami. The Additional Sessions Judge convicted the appellant but acquitted the other accused.

From the evidence on record, the Sessions Court as well as High Court

- A arrived at the conclusion that the accused Bantu was neighbour of complainant Mohan Lal Sahu and was on visiting terms with him. After considering the other evidence, the Court held that on the evening of the day of occurrence the accused visited the house of PW1 and he took the deceased Jyoti for visiting cinema. As Jyoti was not found at evening time and accused informed PW1
- B that Jyoti had not accompanied him, the report was lodged at the police station. During the course of investigation by the police, accused absconded and was not found in his house from 9.30 p.m. to 3.30 a.m. He was arrested on the next day evening by the police.
- C The Sessions Court and the High Court relied on the evidence of PW6 Vimla, daughter-in-law of PW1, PW4 Ravi, nephew of PW1 and PW5 child witness and held that deceased had gone with the accused after coming from the school.
- D PW4 Ravi Kumar Lalla is nephew of PW1 Mohanlal Sahu. He stated that he is resident of Ratheli, District Umari and PW1 resides at Khalesar. He further stated that on the day of incident, he was present at the house of his uncle. When he was taking tea, accused Bantu, whom he was knowing, also reached there. Accused asked him that he wanted to take Jyoti to show her cinema and he forbid the accused. After a short while, he left for his home but
- E he returned as he had forgotten his bag there. On the way, he noticed accused going towards the bazaar holding the hand of deceased Jyoti, PW5 Vivek Kumar Sahu 8 years old son of Vijay Kumar and grandson of PW1. He identified the accused in the court and stated that at about 4.00 p.m. he and deceased Jyoti had come to home from school. After keeping school bag in the
- F house, Jyoti went away to play. He was attending to his natural call on the drain near his house. He saw accused Bantu alongwith Jyoti. He enquired from Jyoti as where she was going and she told him that she was going with accused Bantu to see picture. He forbid Jyoti and told that mother would beat her, on which Jyoti replied that she had taken permission from her grandmother. He informed
- G the same to his mother and grand-mother. In cross-examination, he denied the suggestion that he was giving his statement at the instance of his mother and grand mother. PW10 Manju stated that on the day of incident at about 3.00 to 4.00 p.m., he was sitting on the steps of the ghat of river, which is also called Rajrang ghat of Khalesar. He saw accused Bantu catching of a girl and carrying
- H her, who was wearing school uniform. On enquiry, accused informed him that

he was going at his brother's residence. He disclosed the fact to the people in the mohalla and neighbourhood. He came to know about the dead body of a girl lying near the railway line on 26th January at about 12.00 - 1.00 p.m. In the cross-examination, to the question that why he did not tell the police about the place where the dead body was lying, he replied that every body remains afraid of police and why should one invite trouble, but when the police called him and made enquiry from him he told them the truth.

PW8 Dr. (Smt.) S. Thakur who carried out post-mortem examination noticed that deceased was in a school uniform and she stated that three doctors who had examined the dead body arrived at the conclusion that rape had been committed and the murder of deceased was committed by pressing her nose and mouth and obstructing breath of the deceased. PW9 Dr. A.P. Dwivedi had examined the accused and noticed that there was thin mark of scratch on the upper portion of penis.

The learned counsel (*amicus curiae*) appearing on behalf of accused appellant, appointed by us to assist the Court has taken us through the entire evidence. After going through the same, we do not find that the High Court or the Sessions Court committed any error in appreciating the evidence led by the prosecution. Hence, we confirm the conviction of the appellant for the offence punishable under Sections 302 and 376 IPC.

However, the learned counsel for the appellant submitted that in any set of circumstances, this is not the rarest of the rare case where accused is to be sentenced to death. He submitted that age of the accused on the relevant day was less than 22 years. It is his submission that even though the act is heinous, considering the fact that no injuries were found on the deceased, it is probable that death might have occurred because of gagging her mouth and nostrils by the accused at the time of incident so that she may not raise hue and cry. The death, according to him, was accidental and unintentional one. In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor it can be said that he will be a grave danger to the society at large. It is true that his act is a heinous and requires to be condemned but at the same time it cannot be said that it is rarest of the rare case where accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence.

A In the result, we confirm the conviction of the appellant under Section 302 IPC but modify the sentence by commuting the sentence of death to an imprisonment for life. For the offence punishable under Section 376 IPC, he is sentenced to undergo rigorous imprisonment for 10 years. Both the sentences to run concurrently. The appeal is partly allowed accordingly.

B Lastly, we mention and appreciate the proper assistance rendered by the learned amicus curiae.

K.K.T.

Appeal partly allowed.