

BHAIKON @ BAKUL BORAH
v.
STATE OF ASSAM
(Criminal Appeal No. 194 of 2008)

MAY 3, 2013

[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

Penal Code, 1860 – ss.302 and 376 – Rape and murder – Trial court convicted the accused and imposed death sentence and life imprisonment for offences punishable u/ ss.302 and 376 respectively – High Court confirmed the conviction, but reduced the death sentence to life imprisonment and the sentence of life imprisonment to 7 years imprisonment – Held: Version of the eye-witness is reliable and the same is corroborated by evidence of another witness and also by medical evidence – Hence, conviction and sentence awarded by High Court upheld.

Sentence/sentencing – Remission of sentence of life imprisonment – Held: Life imprisonment means imprisonment for whole of the life subject to the remission power granted under Articles 72 and 161 of the Constitution – When death sentence is commuted to life imprisonment, executive power of remission to be exercised cautiously, taking note of the gravity of the offence – Constitution of India, 1950 – Articles 72 and 161.

The appellant-accused was prosecuted for committing rape and murder of the victim. PW-1 was the eye-witness to the incident. Trial court convicted the appellant-accused u/ss. 376 and 302 IPC and sentenced him to death for the offence punishable u/s. 302 IPC and to life imprisonment (RI) for the offence punishable u/s. 376 IPC. The accused preferred appeal and the trial court preferred Death Reference. High Court disposed of the

A appeal and the Death Reference by confirming the conviction and altering the death sentence to life imprisonment and the sentence of life imprisonment to imprisonment for 7 years.

B In appeal to this Court, the appellant-accused contended that conviction could not have been based upon sole testimony of PW-1 as the same is not reliable; that in view of the remarks of the doctor (PW9 who conducted post-mortem of the deceased) to the effect that no-mark of sexual violence was found on the genital organs of the deceased, the conviction u/s.376 was unsustainable; and that inasmuch as the High Court modified the death sentence into imprisonment for life, the authorities ought to have released him after expiry of a period of 14 years.

D Dismissing the appeal, the Court

E HELD: 1. The trial court and the High Court rightly held that there was no reason to disbelieve the version of PW-1 (the eye-witness) and the corroborative evidence of PW-2, (father of the deceased). In the same way, the injuries noted by PW-9 also support the prosecution story though he has noted that there was no sign of injury on the genital organs of the deceased. Therefore, in view of oral and documentary evidence led in by the prosecution, particularly, the evidence of PWs 1, 2 and 9 as well as the statement of co-villagers, the conclusion arrived at by the trial court and affirmed by the High Court is acceptable. [Paras 11 and 12] [506-E-G]

F 2.1. Life imprisonment means imprisonment for whole of life subject to the remission power granted under Articles 72 and 161 of the Constitution of India. However, for adequate reasons, it is for the executive authorities to exercise their power provided under the Constitution, in an appropriate case. [Paras 15 and 16] [507-F-G; 508-

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B-C]

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Life Convict @ Khoka Prasanta Sen vs. B.K. Srivastava and Ors. (2013) 3 SCC 425; Mohinder Singh vs. State of Punjab (2013) 3 SCC 294; Sangeet and Anr. vs. State of Haryana (2013) 2 SCC 452; Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat (2011) 2 SCC 764: 2011 (1) SCR 829; Chhote Lal vs. State of Madhya Pradesh (2011) 8 SCR 239; Mulla and Anr. vs. State of Uttar Pradesh (2010) 3 SCC 508: 2010 (2) SCR 633; Maru Ram vs. Union of India and Ors. (1981) 1 SCC 107; State of Madhya Pradesh vs. Ratan Singh and Ors. (1976) 3 SCC 470: 1976 (0) Suppl. SCR 552; Gopal Vinayak Godse vs. State of Maharashtra AIR 1961 SC 600: 1961 SCR 440 – relied on.

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2.2. When death sentence is commuted to imprisonment for life by the appellate court, the concerned Government is permitted to exercise its executive power of remission cautiously, taking note of the gravity of the offence. [Para 17] [508-C-D]

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Swami Shraddananda (2) @ Murli Manohar Mishra vs. State of Karnataka (2008) 13 SCC 767: 2008 (11) SCR 93; Sahib Hussain @ Sahib Jan vs. State of Rajasthan 2013 (6) Scale 219 – relied on.

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Case Law Reference:

(2013) 3 SCC 425	relied on	Para 15
(2013) 3 SCC 294	relied on	Para 15
(2013) 2 SCC 452	relied on	Para 15
2011 (1) SCR 829	relied on	Para 15
(2011) 8 SCR 239	relied on	Para 15
2010 (2) SCR 633	relied on	Para 15
(1981) 1 SCC 107	relied on	Para 15

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A	1976 (0) Suppl. SCR 552	relied on	Para 15
	1961 SCR 440	relied on	Para 15
	2008 (11) SCR 93	relied on	Para 17
B	2013 (6) Scale 219	relied on	Para 17

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 194 of 2008.

C From the Judgment & Order dated 26.09.2006 of the Gauhati High Court (the High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh) at Gauhati in Criminal Appeal No. 67 of 2006.

D Pandit Parmanand Katara, Abhishek Sharma, C.K. Sucharita, Kusum Lata Sharma for the Appellant.

Navnit Kumar, Avijit Roy, Corporate Law Group for the Respondent.

The Judgment of the Court was delivered by

E **P. SATHASIVAM, J.** 1. This appeal is filed against the judgment and order dated 26.09.2006 passed by the Division Bench of the Gauhati High Court in Criminal Death Reference No. 1 of 2006 along with Criminal Appeal No. 67 of 2006 whereby the High Court disposed of the appeal preferred by F the appellant-herein by confirming his conviction and altering the sentence of death to imprisonment for life passed by the Court of Ad-hoc Additional Sessions Judge, Lakhimpur at North Lakhimpur dated 18.03.2006 in Sessions Case No. 40(NL) 03 for the offence punishable under Sections 302 and G 376 of the Indian Penal Code, 1860 (in short 'IPC').

2. Brief facts:

H (a) As per the prosecution case, on 29.03.2000, at around 12 noon, one Rupamoni Dutta (the deceased), aged about 22

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years, r/o Mauza Talwa, Village Kakattiup, PS Lakhimpur, Assam went to the field near an embankment to attend her goats. When she did not return home, Ganesh Dutta (PW-2), father of the deceased, went in search for her. After enquiring about her daughter in the house of his elder brother, Khira Dutta, PW-2 started searching for her along the embankment. While returning, he heard a loud laughter at the farm house of the appellant-accused. Thereafter, he returned home and called for his daughter but when he found that she did not return, he again went to the embankment and shouted for her. On hearing this, the appellant came out of the farm house and looked at him. Then, PW-2 came down the embankment by a path where he saw his daughter lying dead on the left side. There was cut injury on her chin and blood was also oozing from her body.

(b) On seeing this, he raised alarm and his son - Bhaba Kanta (PW-3) came there and they tried to lift her. By that time, other people from the village also gathered there. The appellant-accused also came and enquired. Thereafter, they brought home the dead body. On being informed, Anand Ozah, Sub-Inspector of Police, Panigaon Police Outpost, came and seized the wearing apparels of the deceased and prepared a seizure list. After holding inquest over the dead body, the same was sent for *post-mortem* examination.

(c) On the same day, PW-3, brother of the deceased, lodged a written complaint with the police at Panigaon police out-post. A case was registered vide G.D. Entry No. 389, at North Lakhimpur P.S. During the course of investigation, the police seized the underwear of the deceased stained with semen on that very day. The appellant-accused Bhaikon @ Bakul Bora and Balin Saikia (PW-1) were also apprehended and interrogated.

(d) On 30.03.2000, at about 9.30 a.m., the police alleged to have seized a blue underwear of the appellant-accused suspected to have been stained with semen. They also seized one bed sheet, a sporting and a 'dao' from the farm house of

A the appellant-accused and prepared a seizure list. The seized
underwears of both the appellant and the deceased were sent
to FSL for examination. The post mortem was conducted on
the dead body by Dr. Tulen Pagu (PW-9), who submitted a
report stating that the victim died of asphyxia as a result of
B throttling. He also stated that the vaginal smear showed no
spermatozoa.

(e) On 31.03.2000, the Magistrate recorded the statement
of PW-1 under Section 164 of the Code of Criminal Procedure,
1973 (in short 'the Code'). After conclusion of the investigation,
C the police submitted charge-sheet against the appellant-
accused under Sections 376 and 302 of the IPC. The case was
committed to the Court of Ad-hoc Additional Session Judge,
Lakhimpur and numbered as Sessions Case No. 40 (NL) of
2003.

D (f) The Additional Sessions Judge, Lakhimpur, by order
dated 18.03.2006, convicted the appellant under Sections 376
and 302 of IPC and sentenced him to death for the offence
punishable under Section 302 of IPC and rigorous
E imprisonment (RI) for life for the offence punishable under
Section 376 of IPC along with a fine of Rs. 10,000/-, in default,
to further undergo RI for a period of 1 (one) year.

(g) Challenging the order of conviction and sentence, the
F appellant preferred Criminal Appeal No. 67 of 2006 and the
trial Court preferred Death Reference No. 1 of 2006 before the
High Court.

(h) By impugned judgment dated 26.09.2006, the High
Court disposed of the appeal preferred by the appellant-
G accused by confirming his conviction and altering the sentence
of death to imprisonment for life for the commission of offence
punishable under Section 302 of IPC along with a fine of
Rs.1,000/-, in default, to further undergo imprisonment for 1
(one) month and for the offence under Section 376 of IPC, the
H High Court sentenced him to imprisonment for 7 years.

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(i) Being aggrieved, the appellant preferred this appeal by way of special leave petition before this Court and leave was granted on 18.01.2008. A

3. Heard Mr. Parmanand Katara, learned senior counsel appearing for the appellant-accused and Mr. Navnit Kumar, learned counsel appearing for the respondent-State. B

4. Mr. Katara, learned senior counsel for the appellant-accused, raised the following contentions:-

(i) Since the evidence of PW-1 is not reliable, the conviction and sentence based upon his sole testimony cannot be sustained. C

(ii) Inasmuch as the High Court has modified the death sentence into imprisonment for life, after expiry of the period of 14 years, the authorities ought to have released the appellant. D

5. Mr. Navnit Kumar, learned counsel for the State, after taking us through the entire material relied on by the prosecution submitted that the evidence of PW-1, who witnessed the occurrence is reliable and is corroborated by PW-2, father of the deceased and the doctor (PW-9), who conducted the *post mortem*. He also submitted that inasmuch as the sentence of death was commuted to imprisonment for life, there cannot be automatic release after the expiry of the period of 14 years as claimed by the appellant-accused. E F

6. We have carefully considered the rival contentions and perused all the relevant materials.

7. Let us deal with the first contention raised by learned senior counsel for the appellant. It is not in dispute that the appellant was charged for the offence punishable under Sections 376 and 302 of the IPC. In other words, according to the prosecution, the appellant along with another person committed rape and, thereafter, murdered the deceased. The H

A entire prosecution case rests on the solitary evidence of the
eye-witness PW-1. According to PW-1, the accused-appellant
engaged him as a labourer in his farm house and all along he
was working under compulsion. Regarding the incident, he
B further deposed that on the date of occurrence, he saw the
appellant-accused and his friend following the deceased and
on seeing the same, he also followed them and saw that the
appellant-accused and his companion behaving indecently with
the girl, committed rape on her and, thereafter, the appellant-
C accused assaulted the girl by throttling her neck. He further
noticed that because of the acts of the appellant-accused, the
girl died on the spot and he also noticed that the appellant-
accused along with the accomplice dragged her to the nearby
place surrounded by shrubs and bushes and left the body there.
D Thereafter, the appellant-accused returned home and PW-1
went to the wheat field in order to show that he was busy in
attending the goats. He also explained that since both them were
having 'Khukri' in their hands, he did not raise alarm out of fear.
E Though PW-1 remained silent, after 2 hours, when PW-2, father
of the victim, raised a commotion at the place of occurrence,
the appellant-accused also came there and saw the dead body
of the girl. The conduct of PW-1, in view of the above, cannot
be doubted because of refusal on his part to open his mouth
in the presence of his master. Even the trial Court found him
F trustworthy that he had nothing to falsely implicate his master
and rightly held him to be a reliable witness. Further, the
evidence of PW-1 clearly shows that he was forced to work in
the house of the appellant-accused. The fact that he was
working in the house of the appellant-accused was admitted
by him in his statement under Section 313 of the Code. There
G is no reason to disbelieve the version of PW-1, who is an
independent eye-witness to the incident.

8. The next witness relied on by the prosecution is Ganesh
Dutta—father of the victim who was examined as PW-2. In his
H evidence, he explained that his daughter went to the field to

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attend the goats but she did not return. He further narrated that when he went in search of her, he found her lying dead with injury on the neck.

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9. The prosecution has also relied on the evidence of two brothers of the deceased viz., Bhaba Kanta Dutta as PW-3 and Mahendra Dutta as PW-4 who also corroborated the statement made by PW-2. Apart from the above evidence, the co-villagers, viz., PWs 7 and 8 were also examined who deposed that they had seen the dead body of the deceased.

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10. The other evidence relied on by the prosecution is of the doctor (PW-9) who conducted the *post mortem*. He noted the following injuries:-

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" A dead body of an average built, female, rigor mortis present.

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1. A cut injury over lower part of the chin, size 3"x1"x1/2".
2. Lower part of the mandibular bone was cut at the side of injury size 2"x1/4"x1/4".
3. Bruise mark over middle part of the front of the right side of the back size 1 1/2"x1".
4. Bruise mark in the middle of the front of the left side of the neck size 2 1/2"x1 1/2".
5. Trachea fractured at the level of the bruise marks.
6. Multiple bruises on left side of the neck overlying each other.

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Heart was healthy containing dark fluid blood, left side empty.

Above injuries (in No. 1) were ante mortem in nature.

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A Injury Nos. 1 and 2 were caused by sharp cutting weapon.
Injury Nos. 3, 4, 5 and 6 caused by blunt weapon. Vaginal smear show no spermatozoa. Smear was taken immediately and the pathologist examined the sample/ smear on 01.04.2000. Uterus non-gravid. (No sign of pregnancy).

B In my opinion, the person died of asphyxia as result of throttling.”

C PW-9, in his evidence has stated that no mark of sexual violence was found on the genital organs of the body.

D 11. Learned senior counsel for the appellant, by drawing our attention to the remarks of PW-9 that there was no mark of injury on the genital organs of the body of the deceased contended that conviction under Section 376 of IPC is unsustainable. In the light of overwhelming materials placed by the prosecution, we are unable to accept the said contention. As rightly observed by the trial Court and the High Court, there is no reason to disbelieve the version of PW-1 and the corroborative evidence of PW-2, father of the deceased. In the same way, the injuries noted by PW-9 also support the prosecution story though he has noted that there was no sign of injury on the genital organs of the deceased.

F 12. Taking note of oral and documentary evidence led in by the prosecution, particularly, the evidence of PWs 1, 2 and 9 as well as the statement of co-villagers, we agree with the conclusion arrived at by the trial Court and affirmed by the High Court regarding the death of Rupamoni Dutta and reject the claim made by learned senior counsel for the appellant-accused.

H 13. Coming to the second contention, it is not in dispute that considering the heinous crime of committing rape and murder and throwing the dead body in a place surrounded by

bushes and shrubs, the trial Court has awarded the sentence of death, however, the High Court, taking note of the fact that the accused is a young man of 33 years of age and also finding that the case does not come under the purview of the "rarest of rare" category, declined to confirm the sentence of death and altered the same to the imprisonment for life while upholding the conviction under both the counts.

14. Mr. Katara, learned senior counsel for the appellant-accused, by taking us through various sections of the Penal Code viz., Sections 121, 121A, 122, 128, 131, 194, 224 and 238 and the sentences which the Court of Magistrates, Sessions Judges and High Courts may pass and also some of the sections which mention life imprisonment as maximum punishment or imprisonment of either description for a term which may extend to 10 years or lesser than 10 years contended that when statute provides imprisonment for life for an offence and in alternative imprisonment for a term which may extend to 10 years, in that case, incarceration of 14 years should be held sufficient and the appellant is entitled to be released on that ground. After hearing his arguments patiently and noting the same, we are of the view that the case on hand relates to commuting the sentence of death into imprisonment for life and all the contentions raised by learned senior counsel relating to the sentence are unacceptable or irrelevant.

15. This Court, in a series of decisions has held that life imprisonment means imprisonment for whole of life subject to the remission power granted under Articles 72 and 161 of the Constitution of India. [Vide *Life Convict @ Khoka Prasanta Sen vs. B.K. Srivastava & Ors.* (2013) 3 SCC 425, *Mohinder Singh vs. State of Punjab*, (2013) 3 SCC 294, *Sangeet and Anr. vs. State of Haryana* (2013) 2 SCC 452, *Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat* (2011) 2 SCC 764, *Chhote Lal vs. State of Madhya Pradesh* (2011) 8 SCR 239, *Mulla and Another vs. State of Uttar Pradesh* (2010) 3 SCC 508, *Maru Ram vs. Union of India & Ors.* (1981) 1 SCC

A 107, *State of Madhya Pradesh vs. Ratan Singh & Others* (1976) 3 SCC 470 and *Gopal Vinayak Godse vs. State of Maharashtra* AIR 1961 SC 600].

B 16. In view of the clear decisions over decades, the argument of learned senior counsel for the appellant-accused is unsustainable, at the same time, we are not restricting the power of executive as provided in the Constitution of India. For adequate reasons, it is for the said authorities to exercise their power in an appropriate case.

C 17. It is also relevant to point out that when death sentence is commuted to imprisonment for life by the Appellate Court, the concerned Government is permitted to exercise its executive power of remission cautiously, taking note of the gravity of the offence. [Vide *Swami Shraddananda (2) @ Murlidhar Manohar Mishra vs. State of Karnataka* (2008) 13 SCC 767 and *Sahib Hussain @ Sahib Jan vs. State of Rajasthan* 2013 (6) Scale 219.

E 18. In view of the categorical and consistent decisions of this Court on the point, we are unable to accept the argument of learned senior counsel for the appellant-accused.

F 19. Learned senior counsel for the appellant also placed reliance on a decision of this Court in Writ Petition (Crl.) No. 34 of 2009 dated 07.09.2009 wherein the order passed by the Governor of the State of Uttar Pradesh for release on remission of the petitioners therein was set aside by a Division Bench of the High Court of Allahabad and the same was challenged before this Court by way of a writ petition. It was also pointed in the above said writ petition that a number of convicts who had undergone actual sentence of 14 years were directed to be released forthwith by this Court in SLP (Crl.) No. 553 of 2006 dated 09.05.2006. This Court, following the same, issued a similar order in the said writ petition for the release of the petitioners therein. As stated earlier, the case on hand relates to commuting the sentence of death into imprisonment for life

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and we have already preserved the right of the executive for ~~ordering remission~~ taking note of the gravity of the offence. Hence, the said decision is not helpful to the facts of this case and the contention of learned senior counsel is liable to be rejected.

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20. In the light of the above discussion, we do not find any valid ground for interference, on the other hand, we are in entire agreement with the conclusion arrived at by the High Court, consequently, the appeal is dismissed.

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Appeal dismissed.

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