Nand Kishore vs The State Of Madhya Pradesh on 18 January, 2019

Equivalent citations: AIR 2019 SUPREME COURT 3310, (2019) 197 ALLINDCAS 129 (SC), AIRONLINE 2019 SC 622, 2019 CRI LJ 4302, (2019) 107 ALLCRIC 666, (2019) 127 CUT LT 768, (2019) 197 ALLINDCAS 129, (2019) 1 ORISSA LR 388, (2019) 1 SCALE 500, (2019) 1 UC 363, (2019) 2 ALD(CRL) 422, (2019) 2 ALLCRILR 235, (2019) 3 CRIMES 35, 2019 (4) KCCR SN 350 (SC), (2019) 73 OCR 774, AIR 2020 SC(CRI) 84

Author: R. Subhash Reddy

Bench: R. Subhash Reddy, L. Nageswara Rao, S.A. Bobde

Crl.A.@ SLP(Crl.)No.7645/13

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 94 OF 2019
[Arising out of S.L.P.(Crl.)No.7645 of 2013]

Nand Kishore ..

Versus

State of Madhya Pradesh ..

J U D G M E N T

R. Subhash Reddy, J.

1. Leave granted.

2. This criminal appeal is filed by the appellant in Criminal Appeal No.798 of 2013 filed before the High court of Madhya Pradesh at Jabalpur, aggrieved by the judgment dated 25.06.2013. By the aforesaid judgment, while dismissing the appeal preferred by the appellant herein convicted for the offence under Sections 302, 363, 366 and 376(2)(i) of the Indian Penal Code (IPC), the High Court answered the reference in affirmative by confirming the SANJAY KUMAR Date: 2019.01.18 death

sentence awarded to the appellant.

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3. Necessary facts, in brief, giving rise to this appeal are that the deceased, a minor girl aged about 8 years, had gone to attend the 'Mela' along with her younger brother namely Chhunu (PW-4) on 03.02.2013. It is the case of the prosecution that the appellant who is aged about 50 years then, took away the deceased from the 'Mela' and committed rape and murdered her. Narendra (PW-2) informed the police stating that his daughter, who had gone to attend the 'Mela', has not returned home. Upon such complaint, case was registered and investigation commenced. In the course of investigation one Amit Mourya (PW-1) informed the Investigating Officer that when he was coming to his shop from residence, he saw a dog running away with a leg of a child in its mouth and on being chased, the dog dropped the leg and ran away. Further, it was the case of the prosecution that in the process of investigation, Investigating Officer found a headless body of the deceased in the bushes near the 'Dushera Maidan', Bhopal. It is alleged that the left leg of the deceased was found at a distance of 100 ft. and both legs were fractured. Further, it is noticed that there were severe injuries on the private Crl.A.@ SLP(Crl.)No.7645/13 parts of the deceased inflicted by the appellant due to which the intestine had come out. During the process of investigation the statement of the appellant was recorded under Ex.P8 and the blood stained cloths and articles he used for the offence were recovered from his house. After completing the investigation, the appellant was chargesheeted for the offence punishable under Sections 363, 366, 376(2)(i) and 302 of the IPC and Sections 5 and 6 of Protection of Children from Sexual Offences Act, 2012.

4. The trial court, after appreciation of the evidence on record, which is mainly circumstantial, came to the conclusion that the appellant has committed rape on the minor girl and murdered her and further, by recording a finding that the crime committed by the appellant is heinous and barbaric, falls within the category of 'rarest of rare' cases, imposed the death sentence. The appellant is also convicted and sentenced for the offence punishable under Sections 363, 366, 376(2)(i) of the IPC. In view of the award of death sentence, the trial court has made a reference to the High Court for confirmation, as contemplated under Section 366 of the Code of Criminal Crl.A.@ SLP(Crl.)No.7645/13 Procedure (Cr.PC). Questioning the conviction recorded and sentence imposed, the accused has filed appeal in Criminal Appeal No.798 of 2013 and the High Court has disposed of, by common judgment, Criminal Reference No.05/2013 and Criminal Appeal No.798/2013. The High Court, by judgment dated 25.06.2013, while dismissing the appeal of the appellant, has affirmed the reference confirming the death sentence awarded to the appellant.

5. We have heard learned senior counsel for the appellant, Sri Sanjay R. Hegde and also learned counsel appearing for the State Ms. Swarupama Chaturvedi.

6. In this appeal, it is contended by learned counsel for the appellant that though there is no acceptable and convincing evidence to prove the guilt of the accused beyond reasonable doubt, the appellant is convicted by the trial court based on the circumstantial evidence which is not enough to record guilt of the accused. It is submitted that from the evidence on record, the prosecution has also failed to prove concept of 'last seen'. It is further submitted that the trial court as well as High

Court has committed error in imposing the death sentence upon the appellant Crl.A.@ SLP(Crl.)No.7645/13 without examining mitigating circumstances. It is submitted that the sentence imposed is illegal and contrary to the legislative mandate under Sections 235(2) and 354(3) of the Cr.PC. It is contended that without examining relevant considerations of legislative policy discernible from Sections 354(3) and 235(2) of the Cr.PC, only by recording a finding that the incident is barbaric, the trial court and the appellate court have recorded that the case of the prosecution falls under 'rarest of rare' cases and imposed death sentence. It is submitted that all the mitigating circumstances which exist were to be considered. The penalty of death imposed is required to be modified.

7. To support his contention, learned counsel has referred to certain cases decided by this Court in identical circumstances. It is specifically submitted that relevant aspects, like, the socio-economic background of the appellant, lack of criminal antecedents, possiblity of reform, are not considered. It is also brought to the notice of this Court that the local Bar Association, Bhopal had refused to represent the appellant, as such, the appellant was not represented by counsel before the trial Crl.A.@ SLP(Crl.)No.7645/13 court until the date of the framing of the charge. On request made by the appellant on the day of framing of charge, for grant of legal aid, trial court has requested one Mr. Katyayni to appear and the same day charges were framed and the trial was proceeded with.

8. On the other hand, learned counsel appearing for the State has submitted that though the appellant was convicted based on circumstantial evidence, but the evidence adduced is sufficient and consistent. It is submitted that PW-4 had identified the accused as the person with whom the deceased was last seen and PW-4 also identified the accused in the Test Identification Parade. Further, PW-7 has categorically stated in his deposition that he saw the accused in the company of minor girl wearing yellow frock at 9 p.m. on 03.02.2013. It is submitted that the said oral evidence if considered with reference to report of the forensic expert and medical evidence on record, there is absolutely no infirmity in the findings recorded by the trial court convicting the appellant for offences charged. It is stated, having regard to the nature of the crime, that it is heinous and barbaric, it falls within the category of Crl.A.@ SLP(Crl.)No.7645/13 'rarest of rare' cases. It is submitted that having regard to reasons recorded by the trial court, as confirmed by the High Court, there are no grounds to interfere with the conviction recorded and sentence imposed on the appellant.

9. Having heard the learned counsel for the parties, we have perused the judgment of the trial court and High Court and other material placed on record.

10. So far as the conviction is concerned, we are satisfied with the findings recorded by the trial court which are based on the appreciation of oral and documentary evidence on record.

11. Though the case totally rests on circumstantial evidence, it is to be noticed that PW-4 is the brother of the deceased who has accompanied the deceased to 'Mela' on the fateful day, i.e., on 03.02.2013. He has identified the accused in the Test Identification Parade and further he has categorically stated that the appellant took away the deceased from the 'Mela'. Further, PW-1 – Amit Mourya, has deposed that when he was coming from his shop to the residence, he saw a dog running

away with a leg of a child in its mouth and on being chased it dropped the leg. Crl.A.@ SLP(Crl.)No.7645/13 Further investigation revealed detection of headless body of the deceased in the bushes. Further, PW-7 Abid Qureshi, has also stated that he had seen the appellant on 03.02.2013 at 9:00 p.m. with a girl wearing yellow frock. By applying the 'last seen' theory to the facts of the case and further considering the forensic and medical evidence on record, trial court has rightly recorded guilt of the accused for the offences alleged. Even the High Court, referring to the relevant evidence on record, has rightly confirmed the conviction of the appellant for the charges levelled against him.

12. In this appeal, learned counsel for appellant focussed on death penality imposed and submitted that the relevant aspects are not considered before recording a finding that the case falls in the category of 'rarest of rare' cases, so as to impose the death penalty. It is the specific case of the appellant that several relevant aspects which are required to be considered before recording a finding of 'rarest of rare' cases have escaped the attention by the trial court as well as by the High Court. It is specifically argued that special reasons, as required under Crl.A.@ SLP(Crl.)No.7645/13 Section 354(3) of the Cr.PC are not recorded; reasons recorded to impose death sentence, cannot be construed as special reasons within the meaning of Section 354(3) of the Cr.PC. It is further submitted that for the persons convicted of murder, life imprisonment is a rule and death sentence is an exception, as observed by a Constitution Bench of this Court in case of Bachan Singh v. State of Punjab1 and further, it is submitted, that contrary to the ratio laid down in the aforesaid judgment, the focus was on the crime alone though it is the duty of the courts to pay heed to the circumstances of the crime as well as the criminal. Further, the mitigating circumstances which existed and are to be given liberal and expansive interpretation, are omitted from the consideration. It is further submitted that the sentence of death is to be imposed only in cases when the option of life imprisonment is unquestionably foreclosed.

13. A useful reference can be made to the judgment in this regard in the case of Swamy Shradhananda(2) v. State of Karnataka2. In the aforesaid judgment, while confirming the 1 (1980) 2 SCC 684 2 (2008) 13 SCC 767 Crl.A.@ SLP(Crl.)No.7645/13 conviction for offence under Section 302 of IPC, this Court, having regard to the facts and circumstances of the case and considering the evidence on record, has substituted the death sentence by imposing imprisonment for life with a specific direction that he shall not be released from the prison till the rest of his life. In para 92, this Court has observed as under :

> "92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to

two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take Crl.A.@ SLP(Crl.)No.7645/13 recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all." In the case of Neel Kumar v. State of Haryana3 which is a case of rape and murder of a minor, while confirming the conviction, this Court, on the facts and circumstances of the case and having regard to the evidence on record, has modified the death sentence with award of life imprisonment and directed that the accused must serve a minimum of 30 years of jail without remission. Paragraphs 37, 38 and 39 of the said judgment read as under :

"37. A three-Judge Bench of this Court in Swamy Shraddananda (2) v. State of Karnataka (2008) 13 SCC 767, considering the facts of the case, set aside the sentence of death penalty and awarded the life imprisonment but further explained that in order to serve the ends of justice, the appellant therein would not be released from prison till the end of his life.

38. Similarly, in Ramraj v. State of Chhattisgarh (2010) 1 SCC 573, this Court while setting aside the death sentence made a direction that the appellant therein would serve minimum period of 20 years including remissions earned and would not be released on completion of 14 years' imprisonment.

39. Thus, in the facts and circumstances of the case, we set aside the death sentence and award life imprisonment. The appellant must serve a

3 (2012) 5 SCC 766 Crl.A.@ SLP(Crl.)No.7645/13 minimum of 30 years in jail without remissions, before consideration of his case for premature release." In the case of Selvam v. State4 which is a case involving murder and rape of a child aged about 9 years, without interferring with the finding of conviction, this Court, in the facts and circumstances of the case and considering the evidence on record, imposed a sentence of 30 years in jail without remission. In the case of Tattu Lodhi v. State of Madhya Pradesh5 in a case involving kidnapping of minor girl aged about 7 years and attempt to rape and murder, in the facts of the case and the evidence on record, death sentence was modified to imprisonment for life with a direction not to release the accused from prison till he completes actual period of 25 years of imprisonment. Further, in the case of Raj Kumar v. State of Madhya Pradesh6 in similar circumstances, this Court has modified death sentence and awarded life imprisonment and directed the appellant therein to serve a minimum of 35 years in jail without remission. Further, in the case of Anil v. State of Maharashtra7 where 4 (2014) 12 SCC 274 5 (2016) 9 SCC 675 6 (2014) 5 SCC 353 7 (2014) 4 SCC 69 Crl.A.@ SLP(Crl.)No.7645/13 in a case involving murder of a 10 year old boy who was subjected to carnal intercourse, this Court has held as under :

36. The legislative policy is discernible from Section 235(2) read with Section 354(3) CrPC, that when culpability assumes the proportions of depravity, the Court has to give special reasons within the meaning of Section 354(3) for imposition of death sentence. A legislative policy is that when special reasons do exist, as in the instant case, the Court has to discharge its constitutional obligations and honour the legislative policy by awarding appropriate sentence, that is, the will of the people. We are of the view that incarceration for a further period of thirty years, without remission, in addition to the sentence already undergone, will be an adequate punishment in the facts and circumstances of the case, rather than death sentence. Ordered accordingly."

14. The learned counsel appearing for the State has placed reliance on the judgment of this Court in the case Mukesh & Anr. v. State (NCT of Delhi) & Ors.8 [known as Nirbhaya case] in support of her case and submitted that applying the ratio laid down in the aforesaid judgment, the case falls in the 'rarest of rare' cases attracting death penalty. With reference to above said arguments of learned counsel for the State, it is to be noticed that the case of Mukesh (supra)

8 (2017) 6 SCC 1 Crl.A.@ SLP(Crl.)No.7645/13 is distinguishable on the facts from the case on hand. It is to be noticed that Mukesh (supra) is a case of gang-rape and murder of the victim and an attempt to murder of the male victim. It was the specific case of the prosecution that the crimes were carried out pursuant to a conspiracy and the accused were convicted under Section 120-B of the IPC apart from other offences. Further, as a fact, it was found in the aforesaid case that the accused-Mukesh had been involved in other criminal activity on the same night. Further, it is also to be noticed that in the aforesaid case, there was a dying declaration, eye witness to the incident etc. So far as the present case is concerned, it solely rests on circumstantial evidence. It is the specific case of the appellant that he was denied the proper legal assistance in the matter and he is a manhole worker. The appellant was aged about 50 years. Further, in this case there is no finding recorded by the courts below to the effect that there is no possibility of reformation of the appellant. We are of the view that the reasons assigned by the trial court as confirmed by the High Court, do not constitute special reasons within the meaning of Section Crl.A.@ SLP(Crl.)No.7645/13 354(3) of the Cr.PC to impose death penalty on the accused. Taking into account the evidence on record and the totality of the circumstances of the case, and by applying the test on the touchstone of case law discussed above, we are of the view that the case on hand will not fall within the 'rarest of rare' cases. In that view of the matter, we are of the view that the death sentence imposed by the trial court, as confirmed by the High Court, requires modification. Accordingly, this appeal is allowed in part; while confirming the conviction, recorded by the trial court, as confirmed by the appellate court, we modify the sentence to that of life imprisonment with actual period of 25 years, without any benefit of remission. It is further made clear that sentences imposed for all offences shall run concurrently.

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[S.A. Bobde]

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[L. Nageswara R

New Delhi
January 18, 2019

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[R. Subhash Red