Rajkumar vs State Of M.P on 25 February, 2014

Equivalent citations: 2014 AIR SCW 1795, 2014 (5) SCC 353, 2014 CRI. L. J. 1943, AIR 2014 SC (SUPP) 1109, (2014) 1 CURCRIR 540, 2014 (2) SCC (CRI) 570, (2014) 57 OCR 1030, (2014) 2 UC 884, (2014) 2 RECCRIR 45, 2014 CRILR(SC&MP) 303, (2014) 3 SCALE 42, (2014) 2 CRIMES 31, (2014) 1 MAD LJ(CRI) 699, 2014 (2) ABR (CRI) 135, (2014) 1 CRILR(RAJ) 303, (2014) 2 ALLCRILR 529, (2014) 2 DLT(CRL) 413, (2014) 3 KCCR 309, 2014 CRILR(SC MAH GUJ) 303, (2014) 2 ALD(CRL) 312

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Bench: M.Y. Eqbal, B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOs. 1419-1420 of 2013

Rajkumar …Appellant

Versus

State of M.P.
…Respondent

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. These appeals have been preferred against the impugned judgment and order dated 27.6.2013 passed in Criminal Reference No. 01 of 2013 and Criminal Appeal No. 397 of 2013 passed by the High Court of Madhya Pradesh at Jabalpur affirming the conviction of the appellant under Sections 376 and 450 of the Indian Penal Code, 1860 (hereinafter referred to as the `IPC') as well as confirming the death sentence awarded for the offence under Section 302 IPC by the trial court vide judgment and order dated 5.2.2013 passed in Sessions Trial No. 20 of 2013.

2. Facts and circumstances giving rise to these appeals as per the prosecution are that:

A. On 26.12.2012, the appellant, aged 32 years, came to the house of his neighbour Iknis Jojo (PW.1) and stayed with his four children as Iknis Jojo (PW.1) and his wife Albisiya had gone to irrigate agricultural fields in the night. The appellant was on visiting terms with the family and the children used to call him "Mama" i.e. maternal uncle. On the said night, he had taken liquor and meals in the complainant's house and when retiring for the night, the appellant asked the prosecutrix Gounjhi, aged 14 years not to sleep with her three siblings i.e. Sushma, Sanchit and Aric, rather to sleep at some distance from them. Around midnight, he raped prosecutrix Gounjhi. While committing rape, he caused some grievous injuries and consequently she died. The incident was witnessed by Sanchit (PW.2), brother of the prosecutrix, however, out of fear, he could not raise any hue and cry. After committing the crime, the appellant left the place of occurrence. In the morning, Iknis Jojo (PW.1) alongwith his wife Albisiya came from their fields and found the children sleeping. They woke them up and also tried to wake the prosecutrix when they realised that she was dead. Sanchit (PW.2) narrated the incident that had occurred in the night.

B. Iknis Jojo (PW.1) immediately went to the police station and lodged the complaint, on the basis of which Crime No. 294 of 2012 was registered for the offence under Sections 302 and 450 IPC. Shri K.S. Thakur, Inspector of Police, Police Station: Nainpur, District Mandla, Madhya Pradesh started the investigation. He came to the spot, recovered the dead body, prepared the Panchnama, also recovered the blackish brown colour purse and clothes lying near the place of occurrence. Some coins and a small packet of tobacoo were also recovered. Some hair were found lying near the dead body of the prosecutrix and one sky blue coloured shawl was also recovered from the place of occurrence which had blood stains and some other kind of stains at various places. The earth of that place having some fluid material thereon was also recovered. The investigating officer prepared the site plan in presence of the witnesses and dead body of the prosecutrix was sent for postmortem and the appellant was arrested.

C. Dr. Surendra Barkare (PW.6) alongwith lady Dr. (Smt.) Prahba Pipre (PW.7) conducted the postmortem of the prosecutrix and submitted the report. As per the postmortem report, rape had been committed upon the deceased and, thus, Sections 376 and 511 IPC were also added in the case.

D. After taking permission from the Judicial Magistrate, the specimen blood of the appellant was obtained to conduct his DNA finger printing which was sent for analysis to State Forensic Science Laboratory, Sagar. All the materials sent for chemical analysis were analysed and the report was submitted and on the basis of which the chargesheet was filed and the appellant was put to trial. Appellant denied his involvement in the offence, thus trial commenced. E. Dr. Surendra Barkare (PW.6) deposed and proved the postmortem report and deposed that the prosecutrix died of asphyxia as a result of strangulation and her death was homicidal in nature. F. Iknis Jojo (PW.1), father of the deceased, deposed while giving the version as mentioned in the FIR and admitted that the appellant used to come to his house occasionally and he was referred to by his children as "Mama" and sometimes he used to stay in the house though his house was only half a kilometer away from his house and he was already married having a child.

G. Sanchit (PW.2), a 10 years old boy, supported the case of the prosecution and deposed that his "Mama" had come to their house. He consumed liquor and was served rice and water by the deceased. Appellant asked the prosecutrix to sleep at some distance from her siblings. The appellant slept with other three children and it was about 11-12 in the night that he heard the shrieks of his sister and saw that the appellant had pressed her neck and he got so much scared that he could not even raise the voice. All this was disclosed by PW.2 to his parents in the morning on their returning from the fields.

H. Dr. (Smt.) Prabha Pipre (PW.7) deposed about the conduct of the postmortem of the body of the deceased alongwith Dr. Surendra Barkare (PW.6). They further deposed that hymen of the deceased was torn and blood was oozing out from her private parts. Some blood was present in the cavity of the private part and some blood was also present in the cavity of her uterus. Her vagina accommodated one finger and it accommodated two fingers with difficulty. On the basis of the above, she had opined that deceased had been subjected to rape before murder.

I. The deceased was 14 years of age and a student in sixth standard which was proved from the school register and the statement of her father Iknis Jojo (PW.1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age. J. So far as the analysis report of the material sent and the DNA report is concerned, it revealed that semen of the appellant was found on the vaginal swab of the deceased. The clothes of the deceased were also found having appellant's semen spots. The hair which were found near the place of occurrence were found to be that of the appellant. K. The trial court after considering the entire evidence on record, recorded the following findings of fact:

i) The evidence of Sanchit Jojo (PW.2), a child witness was worth placing reliance and it duly supported the case of the prosecution;

ii) His deposition corroborates medical evidence;

iii) The hymen of the deceased was found torn;

iv) Semen of the appellant was found on the slide prepared from the vaginal swab of the prosecutrix as proved by the DNA report;

v) The shawl of the deceased was also found having semen stains which were of the appellant;

vi) The hair found near the body of the prosecutrix were found to be of the appellant as per the DNA report;

vii) The appellant did not take any defence in his statement under Section 313 Cr.P.C. except that he had been falsely implicated by the family of the deceased at the instance of the police and that the appellant did not lead any evidence in his defence.

L. Considering all the aforementioned circumstances and evidence of the relationship with the family of the deceased, the trial court treated it to be a case of extreme culpability and a rarest of rare case awarding death sentence under Section 302 IPC with a fine of Rs. 3,000/-. Under Section 376 IPC, the appellant was awarded rigorous life imprisonment and a fine of Rs.3,000/-; in default of making payment on both counts, sentence of one year on each count was also awarded. For the offence punishable under Section 450 IPC, the appellant was awarded 10 years rigorous imprisonment with a fine of Rs.3,000/- and in default, a rigorous imprisonment for one year. However, it was directed that all the sentences would run concurrently.

M. The trial court made a reference to the High Court for affirming the death sentence. The appellant, being aggrieved, also preferred an appeal against his conviction and sentence before the High Court. The appeal and the reference were heard together. N. The High Court recorded the same findings after re- appreciation of evidence and came to the conclusion that prosecutrix was 14 years of age at the time of incident. The appellant was admittedly present in the house but he furnished no explanation whatsoever about the injuries received by the deceased. As the appellant has committed rape upon an innocent and helpless child and then killed her brutally, it has shocked not only the judicial conscience but even the conscience of society as well. The High Court also recorded the finding that the offence had been committed in pre-mediated manner. The death sentence was affirmed and the appeal was dismissed.

Hence, these appeals.

3. Ms. A. Sumathi, learned counsel appearing on behalf of the appellant, has submitted that the appellant had falsely been implicated by the family members of the deceased at the instance of the police. There is no eye-witness in the case. Sanchit Jojo (PW.2), brother of the prosecutrix, is a child witness and cannot be relied upon simply for the reason that after seeing the incident and knowing well that his sister had been killed, he did not raise any alarm even after the accused had left the

spot. Even in the morning, he did not tell his parents when they came back from the agricultural fields as what had happened. Therefore, the courts below have committed a grave error while placing reliance upon the deposition of the child witness. It is a clear cut case of circumstantial evidence for which the prosecution could not furnish explanation on various counts and it cannot be held that appellant had committed rape upon prosecutrix and, subsequently, killed her. The facts and circumstances of the case did not warrant death sentence as awarded by the courts below, and hence, the appeals deserve to be allowed.

4. Per contra, Ms. Vanshaja Shukla, learned counsel appearing on behalf of the State, has vehemently opposed the appeals contending that the appellant had a pre-meditated intention to commit the offence and that is why he asked the prosecutrix to sleep separately. The chemical analysis report as well as the DNA report make it crystal clear that no other person except the appellant had committed the offence and the manner in which the offence had been committed and the gravity of the offence warrant nothing less than the death sentence and, thus, the appeals lack merit and are liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

6. We have been taken through the impugned judgments rendered by the High Court as well as the trial court and the evidence on record. In view of the concurrent findings of fact recorded by the courts below, particularly in respect of the DNA report to the extent that the semen of the appellant was found in the vagina swab of the prosecutrix and that she died of asphyxia caused by strangulation, we affirm the findings of fact recorded by the courts below.

7. Sanchit Jojo (PW.2), who is an eye-witness, was a child as he was 10 years of age at the time of incident. The courts below have found him worth reliance as he has understood the questions put to him and he was able to answer the same. The issue regarding the admissibility of evidence of a child witness is no more res intergra.

8. It is a settled legal proposition of law that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, a court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in case of a child witness, the court has to ascertain that the witness might have not been tutored. Thus, the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him. The trial court must ascertain as to whether a child is able to discern between right or wrong and it may be ascertained only by putting the questions to him.

9. This Court in State of Madhya Pradesh v. Ramesh & Anr., (2011) 4 SCC 786, after considering a large number of its judgments came to the conclusion as under:

> "In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition." (See also: Suryanarayana v. State of Karnataka, AIR 2001 SC 482).

10. In view of the above, as the courts below have found the child witness worth reliance, we do not see any cogent reason to take a view contrary to the same.

11. Admittedly, the appellant did not take any defence while making his statement under Section 313 Cr.P.C., rather boldly alleged that the family of the deceased had roped him falsely at the instance of the police. However, appellant could not reveal as for what reasons the police was by any means inimical to him.

12. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide: Ramnaresh & Ors. v. State of Chhattisgarh, AIR 2012 SC 1357; Munish Mubar v. State of Haryana, AIR 2013 SC 912; and Raj Kumar Singh alias Raju @ Batya v. State of Rajasthan, AIR 2013 SC 3150).

In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him.

13. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died.

14. In Prithipal Singh & Ors. v. State of Punjab & Anr., (2012) 1 SCC 10, this Court relying on its earlier judgment in State of W.B. v. Mir Mohammad Omar, AIR 2000 SC 2988, held as under:

> "..... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has

> succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused." (See also: Neel Kumar alias Anil Kumar v. State of Haryana, (2012) 5 SCC 766; and Gian Chand & Ors. v. State of Haryana, AIR 2013 SC 3395).

15. This Court in Prajeet Kumar Singh v. State of Bihar, (2008) 4 SCC 434 had confirmed the death sentence awarded by the High Court observing that accused had been living as a family member of the victim and had been provided with shelter and meals, despite which he committed ghastly and brutal murder of three defenceless children without any provocation.

16. In a similarly situated case in Kamta Tiwari v. State of M.P., AIR 1996 SC 2800, this Court found that the accused was close to the family of the deceased. The deceased and her siblings used to call the accused uncle and her closeness with the appellant encouraged her to trust him and when the accused had committed the rape and gruesome murder causing numerous injuries on her body, this Court found it to be a fit case for awarding death sentence. The Court observed as under:

> "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." (See also: Dhananjoy Chatterjee @ Dhana v. State of W.B., (1994) 2 SCC
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> 220)

17. However, in Bantu @ Naresh Giri v. State of M.P., AIR 2002 SC 70, while dealing with the case of rape and murder of a six years old girl, this Court found that the case was not one of the 'rarest of rare case'. The Court noticed that, accused was less than 22 years at the time of commission of the offence, there were no injuries on the body of the deceased and the death probably occurred as a result of gagging of the nostril by the accused. Thus, the Court while noticing that the crime was heinous, commuted the sentence of death to one of life imprisonment.

18. In Mohinder Singh v. State of Punjab, AIR 2013 SC 3622, this Court dealt with the case of death sentence observing:

> "In this context, we are only reminded of the Tamil proverb "[pic]" which means in English "when the fence eats the crops". When the father himself happens to be the

> assailant in the commission of such beastly crime, one can visualise the pathetic situation in which the girl would have been placed and that too when such a shameless act was committed in the presence of her own mother. When the daughter and the mother were able to get their grievances redressed by getting the appellant convicted for the said offence of rape one would have in the normal course expected the appellant to have displayed a conduct of remorse. Unfortunately, the subsequent conduct of the appellant when he was on parole disclosed that he approached the victims in a far more vengeful manner by assaulting the hapless victims which resulted in filing of an FIR once in the year 2005 and subsequently when he was on parole in the year 2006. The monstrous mindset of the appellant appears to have not subsided by mere assault on the victims who ultimately displayed his extreme inhuman behaviour by eliminating his daughter and wife in such a gruesome manner in which he committed the murder by inflicting the injuries on the vital parts of the body of the deceased and that too with all vengeance at his command in order to ensure that they met with instantaneous death. The nature of injuries as described in the post-mortem report speaks for itself as to the vengeance with which the appellant attacked the hapless victims. He was not even prepared to spare his younger daughter viz. PW 2 who, however, escaped the wrath of the appellant by bolting herself inside a room after she witnessed the grotesque manner in which the appellant took away the life of his wife and daughter." However, the Court concluded that applying various principles culled out from earlier judgments of this Court, the case did not fall within the category of "rarest of rare case", though it called for a stringent punishment.

19. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised.

Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

20. A three-Judge Bench of this Court in Swami Shraddananda @ Murali Manohar Mishra v. State of Karnataka, AIR 2008 SC 3040, wherein considering the facts of the case, the Court set aside the sentence of death penalty and awarded 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.

21. Thus, taking into consideration the aforesaid judgments, we are of the view that in spite of the fact that the appellant had committed a heinous crime and raped an innocent, helpless and defenceless minor girl who was in his custody, he is liable to be punished severely but it is not a case which falls within a category of rarest of rare cases. Hence, we set aside the death sentence and award life imprisonment. The appellant must serve a minimum of 35 years in jail without remission, before consideration of his case for pre-mature release. However, it would be subject to clemency power of the Executive.

The appeals stand disposed of.

Before we part, we would like to note with appreciation that in the instant case investigation and all judicial proceedings upto this Court stood concluded in less than 8 months from the date of incidence. Thus, it is an exemplar of expeditious justice in country of chronic delay by smooth functioning of investigating agency, courts and the members of legal fraternity. We expect such prompt disposal of cases specifically in cases of such grave nature.

..... J.

(Dr. B.S. CHAUHAN) ..... J.

(M.Y. EQBAL) NEW DELHI FEBRUARY 25, 2014