A SURENDRA PAL SHIVBALAKPAL

v.

STATE OF GUJARAT

SEPTEMBER 16, 2004

B [K.G. BALAKRISHNAN AND DR. AR. LAKSHMANAN, JJ.]

Penal Code, 1860:

Ss. 363, 376 and 302—A child kidnapped, ravished and done to death—
C *In the night accused seen with a girl on his shoulders—On the following day in the early morning body of girl found indicating sexual assault on her—His conduct immediately prior to the incident and chemical examination of his garments pointing towards accused having committed the crime—Conviction and sentence of death awarded by trial court confirmed by High*
D *Court—Held, both the courts below appreciated the evidence in correct perspective and rightly found the accused guilty—Conviction confirmed, but sentence commuted to life imprisonment.*

Sentence/Sentencing— Accused convicted under ss. 363, 376 and 302 IPC—Death penalty imposed by trial court confirmed by High Court—Held,
E *there is no evidence that accused was involved in any other criminal case previously nor can it be concluded from the material on record that he would be a menace to the society in future—Accused being a migrant labour and living in impecunious circumstances—In the circumstances it cannot be said that this is a rarest of rare case warranting death penalty—Sentence of death*
F *commuted to life imprisonment.*

Code of Criminal Procedure, 1973:

s.235(2)—Hearing the accused on question of sentence—Plea that accused should have been heard in-person and not through the counsel
G *appointed by him—Held, if the accused had engaged a counsel, court can hear the counsel on the question of sentence—Besides, on facts, accused was present in court and he did not make any further statement regarding sentence—He also had liberty to adduce evidence regarding sentence but he did not avail the opportunity—Contention that he was not questioned before*
H *the sentence was imposed is not correct.*

Allauddin Mian & Ors., Sharif Mian & Anr. **v.** *The State of Bihar,* **JT (1989) 2 SC 171, referred to.** A

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 259 of 2004.

From the Judgment and Order dated 19/21.11.2003 of the Gujarat High Court in Crl. C.C. No. 1/2003, Crl. A. No. 770 of 2003. B

Darshan Singh Chawla (A.C.) for the Appellant.

Madhukar Verma, Ms. Sadhana Sandhu and Ms. Hemantika Wahi for the Respondent. C

The following Order of the Court was delivered :

The appellant was found guilty by the Sessions Court for the offences punishable under Sections 363, 376 and 302 IPC. For the offence of murder he was sentenced to death. The appellant preferred an appeal before the High Court and there was also the reference case regarding confirmation of death sentence. The appeal and reference were heard together and the division bench of the High Court of Gujarat confirmed the conviction of the appellant on all the counts and the death penalty imposed on the appellant for the offence under Section 302 IPC was confirmed. Aggrieved by the conviction and sentence this appeal was preferred. D E

The appellant Surendra Pal Shivbalakpal was staying in one of the rooms of a building owned by complainant Kavalpati, a widow having three children. On 11.9.2002 at about 10 p.m., the appellant came to PW-2 Kevalpati and offered Rs. 150 and sought for sexual favours. PW-2 got angry and she asked him to go away, but the appellant declined to leave the place. PW-2 told her brother Rajaram and her son Manoj that the appellant had been harassing. They came and scolded the appellant and he left the place. During the night, PW-2 along with her two minor daughters were sleeping on a cot lying outside the room. At about midnight she felt cold and went inside and at 1.00 o'clock she came back and then she saw that one of her daughters namely Savitri @ Sanju was missing. She immediately called her brother Rajaram and her son Manoj who were sleeping in another portion of the same house. They searched Sanju at nearby places and as they had suspicion on the appellant Surendrapal, they went in search of him in his house but the F G H

A appellant was not found in his room. They made enquiry with PW-7 Ramvaran. He stated that he had seen appellant Surendrapal going away with a girl on his shoulder but he thought that the girl must be the daughter of Fulchand, a relative of the appellant. The people in the locality collected and at about 4 O'clock in the morning they saw the appellant coming from nearby B road. PW-2 and other took him to the police station. It seems that he made certain revelations and PW-2 gave FI statement and on the basis of the FI statement a case was registered and investigation was started.

The dead body of Savitri @ Sanju was recovered from a pond near the G.I.D.C. building. The body was found floating on the water and it was C identified by relatives. An inquest was held on the dead body and on post mortem examination it was found that there were series of injuries on the body of deceased Sanju. The clothes were stained with blood and some mud particles. There was lacerated wound on the private parts of the deceased. Hymen was completely ruptured. Dr. opined that the victim must have died D due to Asphyxia.

On the side of the prosecution PW-1 to PW-19 were examined. The prosecution relied on Section 27 recovery of the dead body pursuant to the confession made by the appellant and also the evidence of PW-7 who had seen the appellant on the previous night moving with a child. The conduct E of the appellant, on the previous night, immediately prior to the occurrence was also taken note of by the Sessions Court in finding him guilty. The Sessions Court as well as the High Court placed reliance on the evidence regarding blood stains found on the clothes worn by the appellant.

F We heard learned counsel for the appellant and counsel for the respondent.

The counsel for the appellant seriously urged before us that there is no evidence to show that the appellant had committed this offence. The counsel seriously contended that the evidence regarding recovery of the dead body G of deceased Sanju was inadmissible as the place where the dead body was lying was known to the police as well as others present there at that time. It was also pointed out that even in the FI statement reference has been made regarding the place where the dead body was found. There is some force in the contention urged by appellant's counsel. The FI statement is alleged to H have been given at 6 a.m. on 12.9.2002 even in the FI statement, it is stated

that the appellant was brought to the police station and he told as to where the dead body was lying. The recovery is alleged to have been made at 8.30 a.m. on the same day but the inquest is alleged to have been taken place at 7.30 a.m. on the very same day. There is incongruity in the prosecution evidence regarding recovery of the body and the inquest of the dead body. PW-19, the Investigating Officer could not throw much light on this infirmity in the investigation. Therefore, we do not attach importance to the alleged recovery of dead body at the instance of the appellant.

Further, there is strong evidence to show that the appellant committed the offence. According to the prosecution, the appellant was immediately arrested and brought to the police station. His cloths viz. pant, shirt and other garments were recovered and sent for chemical examination. Items F,G,H, and I are shirt, banyan, pant and underwear respectively. All these were cloths worn by the appellant at the time of incident. The chemical analyst report shows that on items F,G and H there were presence of blood stains and Item I was also having blood stains mixed with semen. The appellant could not given any rational explanation for the presence of blood stains on his cloths. He did not offer any explanation when his attention was drawn to these incriminating circumstances.

Another circumstances is the evidence of PW-7 Rambaran. He deposed that in the night of 11.9.2002 he returned from duty after watching TV for some time and after taking dinner he went to bed and at about 1 a.m. he got up to answer the call of nature and came to the bath-room situated outside his house, then he found the appellant moving around and he was having a child on his shoulder. On the next day, PW-2 and others started enquiring about deceased Sanju. He told this fact to his wife who is PW-4. In the FI statement also reference has been made to the statement made by Rambaran. Of course PW-7 had not identified that the girl was deceased Sanju. Nevertheless, it is a serious incriminating circumstance and the appellant being a unmarried man, he could not have been found at that night with a girl and this circumstance clearly shows that the appellant had kidnapped the child during night for the purpose of commission of this crime.

The dead body of deceased Sanju was found in the early morning of 12.9.2002 and the appellant was arrested immediately and previous conduct also though not strictly admissible in evidence would prove that the appellant was prone to do such crime. The Sessions Judge as well as the High Court

A appreciated the evidence in the correct perspective and found the appellant guilty and we do not find reasons to disbelieve this finding.

The counsel for the appellant contended that in this case, the appellant was not heard before the sentence of death penalty was imposed on him. It is urged that under Section 235(2) of CR.P.C. the Sessions Judge should have B heard the accused on the question of sentence. The contention of the appellant counsel is not correct. The appellant also placed reliance on the decision of this Court in *Allauddin Mian & Ors. Sharif Mian & Anr.* v. *The State of Bihar,* JT (1989) 2 SC 171, where this Court emphasised the importance of questioning the accused before the sentence is imposed on him. In the instant C case, the appellant was found guilty under Sections 363, 376 and 302 IPC and the judgment was pronounced on 19.6.2003 and the case was adjourned for hearing of the accused on the question of sentence to the next day and the question of sentence was elaborately considered and that the order of sentence was pronounced on 20.6.2003. It is to be noted that the appellant D and his counsel were present and in paragraph 44 of the judgment of the Sessions Court, it is mentioned that on behalf of the appellant learned advocate Mr. V.T. Acharya submitted that this is a first case in which accused is involved and there was a relationship of a landlord and tenant between the complainant and the accused and the appellant's counsel pleaded that the offence had been alleged against the appellant as there was quarrel regarding E throwing of water from upstairs and the accused being a poor person and as the case does not fall within the category of 'rarest of rare case', the minimum punishment may be awarded.

Thereafter is paragraph 45, the Sessions Court elaborately considered F the various aspects and imposed death penalty.

Therefore it is incorrect to contend that the appellant was not heard. The counsel submitted that as regards sentence, the appellant should have been heard in-person and not through the counsel appointed by him. This contention cannot be accepted. If the accused had engaged a counsel the court G can ask the counsel as to whether he had anything to say about sentence. The appellant was also present in the court and he did not make any further statement regarding sentence to be imposed on him. He also had liberty to adduce evidence regarding the sentence but he did not avail that opportunity and the contention that the appellant was not questioned before the sentence H was imposed is not correct.

The next question that arises for consideration is whether this is a 'rarest of rare case', we do not think that this is a 'rarest of rare case' in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had involved in any other criminal case previously and the appellant was a migrant labour from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to the society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case. We confirm conviction of the appellant on all the counts, but the sentence of death penalty imposed on him for the offence under Section 302 IPC is commuted to life imprisonment.

The appeal is disposed of accordingly.

R.P. Appeal disposed of.