

A

KUNAL MAJUMDAR
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 407 of 2008)

B

SEPTEMBER 12, 2012
[DR. B.S. CHAUHAN AND FAKKIR MOHAMED
IBRAHIM KALIFULLA, JJ.]

C *Code of Criminal Procedure, 1973 – s. 366(1) – Death
reference – Manner in which to be dealt with – Held: High
Court is bound to examine the death reference with particular
reference to ss. 367 and 371 Cr.P.C. – High Court cannot
short-circuit the process of reference by merely relying upon
any concession made by the counsel for the convict or that
D of the State – In the instant case, the High Court dealt with
the reference in a very casual and callous manner and did
not exercise its jurisdiction vested in it u/s. 366(1) – Matter
remitted to High Court to decide the reference in the manner
it ought to have been decided.*

E

**The appellant-accused was convicted by trial court
for the offences u/ss.302 and 376/511 and was sentenced
to death with fine for the offence u/s. 302 IPC and was
sentenced to 7 years RI with fine for the offences u/ss.
376/511 IPC. The case was referred u/s. 366 Cr.P.C. for
F confirmation of death sentence.**

**The High Court while dealing with the reference,
alongwith the appeal, confirmed the conviction but
altered the death sentence to life imprisonment u/s. 302
G IPC while maintaining the sentence u/ss. 376/511 IPC.
Hence the present appeal.**

**Disposing of the appeal and remitting the matter to
High Court, the Court**

H

HELD: 1. In a case for consideration for confirmation of death sentence under Section 366 (1) Cr.P.C., the High Court is bound to examine the Reference with particular reference to the provisions contained in Sections 367 to 371 Cr.P.C. In a Reference made u/s. 366 (1) Cr.P.C., there is no question of the High Court short-circuiting the process of Reference by merely relying upon any concession made by the counsel for the convict or counsel for the State. A duty is cast upon the High Court to examine the nature and the manner in which the offence was committed, the *mens rea* if any, of the culprit, the plight of the victim as noted by the trial Court, the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit vis-à-vis the public interest, the conduct of the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependants or the custodians of the victim. There should be very wide range of consideration to be made by the High Court dealing with the Reference in order to ensure that the ultimate outcome of the Reference would instill confidence in the minds of peace loving citizens and also achieve the object of acting as a deterrent for others from indulging in such crimes. [Paras 15 and 17] [715-F; 717-C-F]

2. In the impugned order, the Division Bench of the High Court merely recorded to the effect that the counsel for the appellant pleaded for sympathy to commute the death sentence into one for life for the offence falling u/s. 302 IPC while praying for maintaining the sentence imposed for the offence u/ss. 376/511 IPC and that there was no opposition from the Public Prosecutor. The Division Bench of the High Court did not bother to exercise its jurisdiction vested in it u/s. 366(1) Cr.P.C. r/

A w. Sections 368 to 370 and 392, Cr.P.C. in letter and spirit and thereby, shirked its responsibility while deciding the Reference in the manner it ought to have been otherwise decided under Cr.P.C. [Para 16] [716-E-H; 717-A-B]

B 3. If the matter is considered on merits by this Court, it would only result in dealing with the issue in such a manner which in the normal course should have been considered and examined by the Division Bench of High Court while dealing with the Reference u/s. 366 (1) Cr.P.C. Since the said exercise ought to have been carried out by the Division Bench while dealing with a Reference along with the appeal preferred by the appellant, in fitness of things the, Division Bench is allowed to carry out that exercise as ordained upon it. Therefore, the judgment impugned in this appeal is set aside and the matter is D remitted back to the High Court for deciding the Reference u/s. 366 Cr.P.C. in the manner it ought to have been decided. [Paras 18 and 19] [717-H; 718-A-B, D-E]

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 407 of 2008.

From the Judgment & Order dated 11.7.2007 of the High Court of Judicature for Rajasthan at Jodhpur in DB Cri. Appeal No. 243 of 2007.

F R.K. Das, Suchit Mohanty, Anshuman Patnaik, Anupam Lal Das for the Appellant.

Sonia Mathur, Milind Kumar for the Respondent.

G The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J.

H 1. This appeal at the instance of the sole accused is directed against the judgment of the Division Bench of the High Court of Rajasthan at Jodhpur dated 11.7.2007 in Criminal

KUNAL MAJUMDAR v. STATE OF RAJASTHAN 709
[FAKKIR MOHAMED IBRAHIM KALIFULLA, J.]

Murder Reference under Section 366(1), Cr.P.C. along with Criminal Appeal No.1/2007 as well as Criminal Appeal No.243 of 2007 and Jail Appeal No.313 of 2007 under Section 374(2) Cr.P.C. against the judgment and conviction dated 09.3.2007 passed by learned Additional Sessions Judge (Fast Track) No.1, Jodhpur in Sessions Case No.2 of 2006. The appellant was proceeded against for charges under Sections 376 and 302, IPC.

2. According to the prosecution, on 18.1.2006, a complaint (Exhibit P-6) was preferred by one Laltu Manjhi before the SHO, police station Shastri Nagar, Jodhpur wherein it was alleged that his daughter Bharti (the deceased) was employed as a housemaid in the residence of the appellant and that 25 days prior to the date of complaint, one Sudip De, through whom his daughter came to be employed with the appellant, informed him over phone that his daughter wanted to speak to him, that when he talked to his daughter, he could sense the plight of his daughter in the residence of the appellant, that though his daughter wanted to explain her ordeal at the instance of the appellant, she was prevented from talking to him in detail and that on the morning of 16.1.2006 at about 5 O' clock, he received an information through Sudip De that the appellant informed him over phone that his daughter fell unconscious due to Vertigo and was admitted to hospital. On such information, when the father of the deceased reached Jodhpur, the appellant informed him through Sudip De that his daughter was dead and that he could only see the body of his daughter in the Mortuary of the M.G.Hospital on 18.01.2006 where he noted the injuries all over the body of his daughter. According to him, he received information through the neighbours of the appellant that the appellant was constantly torturing the deceased during the preceding two months during which period she was employed at the house of the appellant apart from his immoral behaviour towards his daughter. It was his further allegation that his daughter was killed by the appellant by strangulation.

A

B

C

D

E

F

G

H

A 3. Based on the above report, the case was registered as Crime No.31 of 2006 and after investigation, the final report came to be filed pursuant to which charges were leveled against the appellant for offences under Sections 302 and 376, IPC.

B 4. Before the trial Court, PWs-1 to 17 were examined in support of the prosecution apart from Exhibits P-1 to P-20. On the 313 questioning, the appellant denied the offences alleged against him. According to him, he did not commit rape on the deceased, that the deceased was a patient of Epilepsy and
 C on the date of incident, she developed the fit of Epilepsy due to which she developed breathlessness, became restless and, thereafter, fell down due to which she sustained injuries, that in order to give artificial respiration, the appellant and his wife took efforts to open her teeth to pour water and subsequently took
 D her to the hospital in a three wheeler taxi where she was declared dead. It was further stated by the appellant that he intimated the parents of the deceased, that the complaint was false and he was innocent.

E 5. One factor which is relevant to be noted at the very outset is that as per the post mortem report, there were as many as 27 injuries almost on all parts of the body of the deceased and, in particular, injury Nos.19, 20 and 21 which were in the private parts of the deceased. The doctor who conducted
 F the post mortem, namely, PW-9, in the post mortem report specifically mentioned to the effect- *'on dissection of neck – ante mortem reddish coloured haematoma present on Lt. side neck underneath the skin & in underlying soft tissues. On further examination, patchy antemortem reddish dark haematoma present below epiglottis on both sides & also in*
 G *soft tissues at upper part of trachea. Hyoid bone, thyroid & corticord cartilages found intact, mucosa of trachea also congested in upper half. Opinion: Cause of death is ante-mortem injuries to neck, which are sufficient to cause death.*

H

6. The further report of the doctor was that there was pressure above the Larynx Trachea of the deceased. In the further report under Exhibits P-14 and P-15, it was noted that many sections in trachea cut and congestion of vessels were found apart from haemorrhage at many places and acute inflammatory infiltrate was present. PW-9 further noted that there was pressure on the layering trachea of the deceased and the injuries were inflicted. PW-9 was the doctor who was a member of the medical board constituted by the Superintendent of Gandhi Hospital Jodhpur who conducted the post-mortem on the body of the deceased.

7. PW-9 in his evidence stated as under:

“Ante mortem reddish coloured haematoma present on left side of neck underneath the skin and in underling soft tissues. On further examination patchy ante mortem reddish dark coloured haematoma present below epiglottis on both sides and also in soft tissues at upper part of trachea. Hyoid bone, Thyroid and Cricoid cartilages found intact. Mucosa of trachea also congested in upper half.

After internal examination of the dead body it was found that there was sub sculp haematoma in area of 2 x 2 centimetres dark reddish in colour on left frontal region and 3 x 2 centimetres dark reddish on left occipital region near underline. Brain, both lungs, lever, spleen and kidney were found congested. Membrane of abdomen was yellowish and abdomen contained about 100 m.l. yellowish fluid. On examination of sexual organ-the hymen showed old healed tears and the vaginal orifice admitted two fingers easily. The uterus was found small in size and healthy and empty.”

8. The trial Court based on the medical evidence stated as under:

A "Here it is worth mentioning that injury No.14 caused to the deceased has come in the portion opposite the chest, in the middle portion and on the right side and in the above said injury No.14, many scratches between 2 x 2 cms to 4 x 2 cm being there has been mentioned.

B Similarly the injuries No.15, 19, 20, 21, 25, 26 respectively caused to the deceased in the portion below the chest of the deceased, above the left nipple, towards four sides of the left nipple, in circular shape, on the right side, on the side portion of the chest, in one third portion, on the neval has appeared in the form of multiple scratches.

C All the above said injuries probably are not possible to be sustained during the course of getting restlessness in the attack of Epilepsy.

D
xxx xxx xxx xxx xxx

E From the evidence of PW-9, Dr. P.C. Vyas, it is proved in clear manner that the cause of death of the deceased was the injury that came on the internal part of her neck and the above injury was sustained as a result of an external pressure. Hence it is clear that the death of the deceased was due to strangulation on account of injury caused on the neck and above said injury was sufficient to cause death. The confirmation of the above statement of PW-9 of Dr. P.C. Vyas in the context of the internal parts of the neck is done from the Histo Pathology report Ex.P-14 also. In the internal Larynx and in the Trachea protion abraided wounds have been found.

F Hence from the singular evidence of PW-9, Dr.P.C. Vyas this fact is proved beyond doubt that the death of deceased Kumari Bharti was not due to suffocation of breath as result of fit of epilepsy. No possibilities have appeared about sustaining above said 27 injuries during

G
H

the course of attack of Epilepsy of the deceased.”

A

(emphasis added)

9. After detailed analysis of the evidence, the trial Court concluded that the appellant was guilty of the charges falling under Sections 302, 376/511 IPC. On the question of sentence, after hearing the appellant as well as the learned Public Prosecutor and after referring to the various decisions of this Court regarding the principles to be applied for imposing the capital punishment, ultimately held as under:

B

C

“This position is proved from the evidence clearly that the accused Kumari Bharti was a minor girl of 14 years and this position is also proved from the evidence that the father of the girl PW-3 Laltu Manjhi had sent her from West Bengal to the residential place located at Vyas Colony in Jodhpur, the above said girl as maid servant, for working at the place of the accused. Laltu Manjhi, father of the deceased has relations with an extremely poor family and he due to his financial circumstances by having trust on the accused that he will maintain his daughter as his own daughter, sent her from West Bengal to such a distance in Rajasthan. Accused Kunal Majumdar at the time of the incident was working in Air Force Station Jodhpur. *The accused being the guardian, had done extremely inhuman act with her and during the course of committing the rape with deceased Bharti, inflicted total 27 injuries on different parts of her body and thereafter by strangulating her throat, committed her murder. The accused on the private physical parts of the deceased i.e. on both of breast, inflicted injuries, along with that close to the breast also of the deceased, inflicted many physical injuries. In this way the accused, with the minor girl who was unable to object herself, committed this type of ill act with her.*”

D

E

F

G

(emphasis added)

H

A 10. The trial Court, therefore, imposed the punishment of death sentence apart from a fine of Rs.5,000/- for the offence found proved under Section 302, IPC and sentence of seven years' RI and Rs.25,000/- fine for the offence under Sections 376/511 IPC and in default of payment of fine, to undergo two more years of imprisonment. Since death sentence was imposed, the case was referred for confirmation under Section 366 (1) Cr.P.C. to the High Court and ordered to await for the confirmation of the High Court before its execution.

C 11. We heard Mr. R.K. Das, learned senior counsel for the appellant and learned counsel for the State. We have also perused the written submissions filed on behalf of the appellant. For the reasons stated herein, we do not find any scope to consider the submissions of the learned senior counsel for the appellant on the merits of the case. Having perused the judgment of the trial Court, when we examine the judgment of the High Court, we are shocked to note that the case of Reference of death sentence for confirmation was dealt with by Division Bench of the High Court of Rajasthan at Jodhpur in a casual and callous manner by merely stating that the counsel for the appellant prayed for sympathetic consideration in commuting the death sentence into sentence for life and there being no serious support from the Public Prosecutor of the State and the injuries sustained resulting into death did not suggest use of severe force in order to conclude the same as one of brutal and inhuman, the death sentence can be altered as one for life imprisonment under Section 302, IPC while maintaining the sentence awarded for offences under Sections 376 read with 511 IPC.

G 12. By filing this appeal against the said judgment of the High Court, the learned Counsel for the appellant submitted that the evidence available on record does not call for conviction and consequently the sentences imposed cannot be sustained.

H 13. We also heard learned counsel for the State as to the correctness of the judgment of the Division Bench of the High

Court. The respective counsel were not in a position to make submission as to the correctness or otherwise of the judgment of the Division Bench inasmuch as there was absolutely no consideration of the relative merits and demerits of the conviction and the sentence imposed in the Reference under Section 366 (1), Cr.P.C. in the manner in which it was required to be considered.

14. If the submissions of learned counsel for the appellant were to be considered in detail, that would, on the face of it, conflict with the stand of the appellant himself before the Division Bench of the High Court, where it has been recorded that the counsel who represented on behalf of the appellant stated to have made only one submission to the effect that the Court may sympathetically consider the case of the appellant for commuting the death sentence into the sentence for life and that no seriousness was attached to the sentences passed for offence under Sections 376/511, IPC while praying for life imprisonment for the principal offence. Even assuming such a statement stated to have been made on behalf of the appellant as recorded in the impugned judgment can be taken to be true for its face value, we are at a loss to understand as to how the learned Public Prosecutor could have submitted that the Court may consider the case of the appellant sympathetically as recorded by the Division Bench in the order impugned herein.

15. In a case for consideration for confirmation of death sentence under Section 366 (1) Cr.P.C., the High Court is bound to examine the Reference with particular reference to the provisions contained in Sections 367 to 371 Cr.P.C. Under Section 367, Cr.P.C., when Reference is submitted before the High Court, the High Court, if satisfied that a further enquiry should be made or additional evidence should be taken upon, any point bearing upon the guilt or innocence of the convict person, it can make such enquiry or take such evidence itself or direct it to be made or taken by the Court of Sessions. The ancillary powers as regards the presence of the accused in

A such circumstances have been provided under sub-Clauses (2) and (3) of Section 367, Cr.P.C. Under Section 368, while dealing with the Reference under Section 366, it inter alia provides for confirmation of the sentence or pass any other sentence warranted by law or may annul the conviction itself and

B in its place convict the accused for any other offence of which the Court of Sessions might have convicted the accused or order for a new trial on the same or an amended charge. It may also acquit the accused person. Under Section 370, when such Reference is heard by Bench of Judges and if they are divided

C in their opinion, the case should be decided in the manner provided under Section 392 as per which the case should be laid before another Judge of that Court who should deliver his opinion and the judgment or order should follow that opinion. Here again, under the proviso to Section 392, it is stipulated

D that if one of the Judges constituting the Bench or where the appeal is laid before another Judge, either of them, if so required, direct for rehearing of the appeal for a decision to be rendered by a larger Bench of Judges.

16. When such a special and onerous responsibility has

E been imposed on the High Court while dealing with a Reference under Section 366 (1), Cr.P.C., we are shocked to note that in the order impugned herein, the Division Bench merely recorded to the effect that the counsel for the appellant pleaded for sympathy to commute the death sentence into one

F for life for the offence falling under Section 302, IPC while praying for maintaining the sentence imposed for the offence under Sections 376/511, IPC and that there was no opposition from the learned Public Prosecutor. The Division Bench on that sole ground and by merely stating that there was no use of force

G of severe nature on the victim at the hands of the appellant and that the commission of offence of murder cannot be held to be brutal or inhuman and consequently the death sentence was liable to be altered as one for life for the offence under Section 302, IPC. The Division Bench of the High Court did not bother

H to exercise its jurisdiction vested in it under Section 366(1)

KUNAL MAJUMDAR v. STATE OF RAJASTHAN 717
[FAKKIR MOHAMED IBRAHIM KALIFULLA, J.]

Cr.P.C. read with Sections 368 to 370 and 392, Cr.P.C. in letter and spirit and thereby, in our opinion, shirked its responsibility while deciding the Reference in the manner it ought to have been otherwise decided under the Code of Criminal Procedure. We feel that less said is better while commenting upon the cursory manner in which the judgment came to be pronounced by the Division Bench while dealing with the Reference under Section 366 (1) while passing the impugned judgment.

17. We are, however, duty bound to state and record that in a Reference made under Section 366 (1) Cr.P.C., there is no question of the High Court short-circuiting the process of Reference by merely relying upon any concession made by the counsel for the convict or that of counsel for the State. A duty is cast upon the High Court to examine the nature and the manner in which the offence was committed, the mens rea if any, of the culprit, the plight of the victim as noted by the trial Court, the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit vis-à-vis the public interest, the conduct of the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependants or the custodians of the victim. There should be very wide range of consideration to be made by the High Court dealing with the Reference in order to ensure that the ultimate outcome of the Reference would instill confidence in the minds of peace loving citizens and also achieve the object of acting as a deterrent for others from indulging in such crimes.

18. It is unfortunate that the Division Bench of the High Court of Rajasthan was oblivious of the above vital factors while disposing of the Reference in such a cursory manner. It will have to be stated that if the submissions of the counsel for the appellant before us are to be considered on merits, they would

- A only result in dealing with the issue in such a manner which in the normal course should have been considered and examined by the Division Bench while dealing with the Reference under Section 366 (1). Since the said exercise ought to have been carried out by the Division Bench while dealing with a
- B Reference along with the appeal preferred by the appellant, in fitness of things the Division Bench is allowed to carry out that exercise as ordained upon it. To emphasize upon the duty cast upon the Division Bench in such cases of Reference, we reiterate that resorting to any such shortcut course would reflect
- C very badly upon the concerned Court.

19. We are convinced that it is the bounden duty of the Division Bench to carry out such exercise in the manner set out above and we feel it appropriate, therefore, to set aside the judgment impugned in this appeal for that reason and remit the
- D matter back to the High Court for deciding the Reference under Section 366 Cr.P.C. in the manner it ought to have been decided. Inasmuch as the conviction and sentence imposed on the appellant was by the judgment dated 09.03.2007 of the trial
- E Court and the offence alleged was dated 16.01.2006, while remitting the matter back to the High Court, we direct the High
- F Court to dispose of the Reference along with the Appeals expeditiously and in any case within three months from the date of receipt of the records sent back to the High Court. The appeal stands disposed of with the above directions to the High Court.

K.K.T.

Appeal disposed of.