KALPANA MAZUMDAR

v.

STATE OF ORISSA

JULY 30, 2002

[D.P. MOHAPATRA AND Y.K. SABHARWAL, JJ.]

Penal Code, 1860—Sections 364, 302 and 201—Kidnapping and murder—Death sentence—Sessions Judge holding accused persons guilty imposing death penalty—High Court confirming the same—On appeal held, prosecution case rested entirely on testimony of a prosecution witness without any corroboration of his testimony on any of the material aspects, thus it is difficult to confirm conviction of the accused persons—Further if such sole testimony is not relied upon there is no evidence to connect the accused persons except one with the commission of offence—Hence all other accused given benefit of doubt—Conviction of that one accused converted from death penalty to life imprisonment.

Evidence Act, 1872—Section 114—Presumptive evidence—Accused persons kidnapping and committing murder—One of the accused apprehended red handed while disposing of the dead body, making extra judicial confession to the prosecution witnesses, said confession recorded in FIR—Held, these circumstances are presumptive evidence of charge of murder against accused.

According to the prosecution, appellants-accused persons kidnapped and committed brutal murder of a young child with a view to offer human sacrifice to appease deities. They did so on the asking of a tantrik, who told them that as a result of a human sacrifice A1 would get a gold pot, A2 would be blessed with a son A3 was to get cash amount. PW 14 an employee of A1 deposed having seen the entire incident. PW7 claimed to be a eye-witness having seen A3 throwing the body of his deceased nephew and caught him red handed. Further A3 made extra judicial confession before the prosecution witnesses. Sessions Judge held the appellants-accused persons guilty under Sections 364, 302 and 201 read with 34 IPC and sentenced them to death. High Court confirmed the death penalty. Hence the present appeal.

Appellants contended that their conviction is unsustainable as it is

A based on the sole testimony of an accomplice alone without any corroboration and it would be highly unsafe to rely upon the testimony of PW14 and if it is discarded there would be no evidence to connect the appellant-accused with the offences; that the deposition of PW14 on material aspects is not corroborated; and that the circumstance of throwing of dead body of deceased by A3 can only lead to A3's conviction B for offence under Section 201 IPC and not under Section 302 IPC.

Disposing of the appeal, the Court

HELD: 1.1. The deposition of PW14 makes it clear that he was a witness to all the events up to the killing of the boy. He stated that he was C given a torch to watch if anybody was coming near the place of occurrence. This shows that he was deputed to keep watch when the four accused were killing the boy, in the manner deposed by him. He is said to be doing all this on account of fear and also on account of his being an employee of A1. He did not narrate the incident to anyone for 19 days even when he was away to his village. Without going into the question whether PW14 D was an accomplice or not, it is not safe to connect the appellants on the sole testimony of PW-14. Further, it is also to be borne in mind that investigation of the case has been most tardy and unsatisfactory. Despite the fact that PW14 deposed about the tongue of the boy being cut and PW7 deposed that the tongue, hair and nail of the boy were found in the E house of A2, neither those articles were seized nor it was explained as to what has happened to the said articles. Moreover, the medical evidence does not support the cutting of the tongue. [305-F-H; 306-A-B]

1.2. The age of A2 was more than 70. It was not explained whether A2 had a child or not and besides the testimony of PW14 what was the F material to substantiate the motive attributed to him that he wanted a child for which he became party to the sacrifice of the boy on the asking of the tantrik. It is also not explained as to what was the inter-connection between A1 and A2. There is nothing on record to show that either they were friends or relatives; nor how they became common parties to the sacrifice of one human being, one in lurement of a golden pot and other a son. None G of these aspects were enquired into. Further the age of A4 the daughter of A3, was about 17 years at the time of occurrence. If A3 was to get Rs. 25,000 as stated in the FIR there is no reason why the young girl of that age was involved. All these aspects remained in the realm of mysteries thus raising *bona fide* and reasonable doubt about the story of the prosecution. H None bothered to investigate these aspects. The prosecution rested its case

entirely on PW14 without any corroboration of his testimony on any of the material aspects. Thus, it is difficult to affirm the conviction of the appellants on the basis of the testimony of PW14. Further, if the sole testimony of PW14 is not relied upon there would be no evidence to connect the appellants except A3 with the commission of the offence. Under these circumstances, A1, A2 and A4 are entitled to the benefit of doubt. [306-B-F]

2.1. The contention that the circumstance of throwing dead body of deceased can only lead to A3's conviction for offence under Section 201 IPC and not under Section 302 cannot be accepted. It stands established from medical evidence that the deceased died homicidal death. It was due to asphyxia on account of strangulation. None has questioned this finding. It is unquestionable on the evidence produced on record. Unquestionably, the prosecution has proved the throwing of the body of the deceased by the side of the tank by A3 and at that time he was caught red handed by PW7. The testimony of PWs 1, 2, 3 and 6 is also to the same effect. A3 also made an extra judicial confession before them that he alone had not killed the boy but other appellants were also with him and the said confession was also recorded in the FIR. Though extra judicial confession for making it a basis for conviction by itself is a weak piece of evidence, such evidence deserves strict scrutiny. At the same time, however, strong circumstantial evidence can get strength from extra judicial confession. The fact of third accused being apprehended red handed when he threw the dead body, is an important piece of circumstantial evidence against him. Thus, having regard to the facts of the case a presumption can be drawn against the third accused for having committed the murder of the child. Despite the circumstances duly established against A3 it cannot be said that conviction in respect of A3 under Section 302 is not liable to be maintained. These circumstances are presumptive evidence of charge of murder against A3. Hence his conviction under Section 302 is maintained. [306-H; 307-A, B, C, F, G; 308-A, B]

Mohan Lal and Anr. v. *Ajit Singh and Anr.* AIR (1978) SC 1183, relied on.

2.2. Accused persons other than A3 have been given benefit of doubt having discarded the sole testimony of PW14. The conviction of A3 has been upheld in view of evidence other than that of PW14. Under the circumstances, the death penalty imposed on A3 is converted into

imprisonment for life. [308-C, D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1301 of 2001.

From the Judgment and Order dated 4.7.2001 of the Orissa High Court in D.R. No. 1 of 2000.

WITH

Criminal Appeal Nos. 1302 and 1303 of 2001.

K.S. Bhati, A.C. and Ms. Aishwarya Bhati for the Appellant Nos. 3 and 4.

R.N. Mittal, Arvind Gupta and Rajjeet Roy for the Appellant Nos. 1 and 2.

Radha Shyam Jena and V. Malik for the Respondent.

The Judgment of the Court was delivered by

Y.K. SABHARWAL, J. Subash Chandra Panda (A1), Kunja Ramana (A2), Narayan Mazumdar (A3) and Kalpana Mazumdar (A4), the appellants before us, are facing death penalty. The charge against them is of kidnapping and murder of a child Ranjeet Mohanty @ Rana, aged four years. They were charged for offences under Sections 364, 302 and 201 read with 34 IPC.

The First Information Report was registered at the instance of Chitranajan Mohanty, PW7. He reported that the four appellants and Simanchal Padhi had kidnapped his nephew on 30th April, 1997 and subsequently killed him. According to the FIR on 1st May, 1997 in the early morning while he had gone out to attend the call of nature he observed that a person was bringing something on his shoulders and he came towards the pond. The person was A3. PW7 caught him and an alarm was raised. People gathered there. Some are named in the FIR. They found that A3 was carrying the dead body of the deceased and on being asked he said that he has not murdered the child alone but some other persons were also involved in the murder and he can identify them. He took all the persons to the house of A2 who finding A3 and others threatened to assault everyone and his field servants also came with lathi and tangi. At that time they came back but with the help of villagers they again went to the house of A2 and then found that there is none in the house. In the prayer room of the house they found the nails of the dead child lying with

the blood as also the hair of the child. A3 told them that in the room the nail, hair and the tongue of the child were cut and Simanchal Padhi offered prayers whereafter they took the child alive in the jeep of A2 to the house of A1 where the child was murdered by holding his leg and hand and throttling his neck. Simanchal Padhi, A1 and A2 told A3 that they will pay Rs. 25,000 to throw the boy. When he was throwing the boy in the pond PW7 caught him red handed. After hearing this they all went to the house of A1. There Simanchal Padhi "the tantrik" said that he had killed the boy and he can give life to him. He offered prayers near the body for three hours and told everybody to wait but he failed to give life to the boy and ran from the house. But he was caught with his associates and handed over to the police.

The four appellants were charged for the offences as aforesaid, the tantrik Simanchal Padhi having already died. It is on record that PW7 was an accused in the case of murder of Simanchal Padhi though we do not know as to what was the result of that case.

The prosecution in order to bring home the charges examined 15 witnesses. Three witnesses were examined on behalf of the defence. PW14, Hari Chand Sahu, was examined by the prosecution as an eye-witness to the occurrence.

According to the prosecution, the deceased was kidnapped and murdered as the accused wanted to offer a human sacrifice to appease the deities on the asking of the tantrik who told them that as a result of the sacrifice A1 will get a gold pot and A2 will be blessed with a son. A3 was to get Rs.25,000, A4 is daughter of A3.

PW14 was an employee of A1. He deposed to have seen everything but did not speak out on the threat that on so doing he would be killed. PW7 claims to be an eye-witness having seen A3 throwing the body of his deceased nephew and caught A3 red handed, A3 is stated to have made extra-judicial confession before PW7 and PWs1, 2, 3 & 6.

On appreciation of evidence in particular the testimony of PWs7 and 14, the learned Additional Sessions Judge held appellants guilty of the offences earlier noticed and considering the case to be rarest of rare imposed on the appellants death penalty. The death penalty has been confirmed by the High Court while disposing of the death reference and the criminal appeal filed by the appellants challenging their conviction and sentence.

A The main evidence that has been relied upon by the High Court as well as by the Sessions Court for holding the appellants guilty is the testimony of PW14 as an eye-witness. PW7 has also been relied upon in respect of matters noticed hereinbefore as an informant leading to FIR being registered. PW14 has given a detailed account of the role of each of the accused. The submission urged before the Additional Sessions Judge and the High Court that PW14 B was an accomplice and was not a witness to the offence was not accepted. PW14 was held to be a mere mute spectator. The same submission has been urged before us.

Learned counsel for the appellants submitted that although they do not dispute the factum of kidnapping and brutal murder of a young child ostensibly C with a view to offer a human sacrifice to appease the deities yet their conviction is unsustainable as it is based on the sole testimony of an accomplice alone without any corroboration. It is contended that it would be highly unsafe to rely upon the testimony of PW14 and convict the appellants. The contention is that if the testimony of PW14 is discarded there would be no evidence to D connect the appellants with the offences. It has also been contended that in none of the material aspects on which PW14 deposed there is any corroboration.

Let us first see as to what PW14 has deposed.

E For appreciating the testimony of PW14, it has also to be kept in view that his statement was recorded by the police after 19 days of the occurrence. He left the place of occurrence and went to his own village. Admittedly he did not narrate the incident to anyone even when he was in his village. He was working in the hotel of A1 for the last five years. PW14 was examined in court on 13th December, 1999. PW14 stated that about three years back F tantrik above named came to him and asked him about the house of A1 which he told him. A1 called him and one rickshaw puller at 10 p.m. and gave a torch light to him and one crow-bar to the rickshaw puller. A1, A3 along with the witness and rickshaw puller went to river side along with puja articles. The river was crossed at 12 midnight. A1 performed puja on his G land. Next day at 10 p.m. A1 and the tantrik along with the witness again went to the land of A1 to perform puja and they returned after performing the said puja. Next day morning one Dhanu Mistri was sent to the place of puja to dig a ditch. On the third day rickshaw puller was sent to dig that place. On Sunday morning tantrik told A1 to collect a black cock. On the same day at night they all went to the ditch with the cock. A1 asked PW14 H to cut the cock in the ditch. PW14 did accordingly. The tantrik placed cross-

bar inside the ditch and became unconscious. PW14 entered the ditch on the directions of A1 and stood there out of fear and thereafter he was asked by A1 to come out. Accused A3 also went into the ditch. The tantrik told A3 that golden pot will not be available that day. After about 2 days on 30th April, 1997 he (PW14) heard that one boy was missing. At about 7 p.m. PW14 was called by A1 to his house. There A1 also came in a jeep and A3 brought one child covered with a cloth. A4 caught the boy and directed PW14 to go to the jeep. PW14 along with tantrik and A1 sat in the jeep of A2. They all went and stayed in the house of A2. All of them stayed in one room and PW14 in another room. They told PW14 not to tell about the matter to anybody otherwise he will be killed. At about 10 p.m., PW7 came in search of the boy. He enquired about the Witchcraft from A2 who told him that Witchcraft was not there. Thereafter PW7 returned. Simanchal Padhi thereafter started puja path at about 12 midnight. All sat in the jeep, went to a place where ditch was prepared. They all went to the ditch giving a torch to PW14 to watch if anybody may come.

PW14 has deposed that A4 caught the leg of the boy, A1 pressed his belly, A2 caught the chest of the boy and tantrik was doing mantra path and A3 caught the neck of the child and the child died there. They all returned in a jeep. He further deposed that hearing that the boy was caught out of fear he went to his village.

PW14 deposed to have witnessed all the details of the occurrence. He has given roles played by all the accused and also detailed accounts of the events of four days earlier than the date of kidnapping and killing of the boy. PW14 has further deposed that the tongue of the boy was cut who was alive when taken in the jeep to the ditch but he was not crying.

The deposition of PW14 makes it abundantly clear that he was a witness to all the events up to the killing of the boy. PW14 stated that he was given a torch to watch if anybody comes at the place of occurrence. This shows that PW14 was deputed to watch that when the four accused were killing the boy in the manner deposed by him, no one comes there. In other words, it means that in case he finds someone coming while the accused were killing the boy either he should inform them or ensure that nobody comes. He is said to be doing all this on account of fear and also on account of his being an employee of A1. He did not narrate the incident to anyone for 19 days even when he was away to his village. Without going into the question whether PW14 was an accomplice or not, it is evident, on the facts and circumstances noticed

A above, it is not safe to convict the appellants on the sole testimony of PW14. Further, it is also to be borne in mind that investigation of the case has been most tardy and unsatisfactory. Despite the fact that PW14 deposed about the tongue of the boy being cut and PW7 deposed that the tongue, hair and nail of the boy were found in the house of A2, neither those articles were seized nor it was explained as to what has happened to the said articles. Moreover, the medical evidence does not support the cutting of the tongue. The age of A2 was more than 70. It was not explained whether A2 had a child or not and besides testimony of PW14 what was the material to substantiate the motive attributed to him that he wanted a child for which he became party to the sacrifice of the boy on the asking of the tantrik. It is also not explained as to what was the inter-connection between A1 and A2. There is nothing on record to show that either they were friends or relatives. How they became common parties to the sacrifice of one human-being, one in lurement of a golden pot and other a son. None of these aspects were enquired into. Further the age of A4 was about 17 years at the time of occurrence. If A3 was to get Rs.25,000 as stated in the FIR of PW7 why the young girl of that age was involved. All these aspects remained in the realm of mysteries thus raising *bona fide* and reasonable doubt about the story of the prosecution. None bothered to investigate these aspects. The prosecution rested its case entirely on PW14 without any corroboration of his testimony on any of the material aspects.

We have minutely examined the testimony of PW14 and for the reasons above noted find it difficult to affirm the conviction of the appellants on that basis alone.

It is clear that if the sole testimony of PW14 is not relied upon there would be no evidence to connect the appellants except A3 with the commission of the offence. Under these circumstances, A1, A2 and A4 are entitled to the benefit of doubt.

Regarding the third accused Narayan Mazumdar his position is different. We have given our sincere and anxious consideration to case against the third accused. In our view even after discarding the testimony of PW14 there is ample evidence against him. It is neither disputed nor could be disputed, having regard to evidence on record, that this accused was caught red handed while throwing dead body of the deceased by the side of the tank. To that effect there is clinching evidence of PW7 who saw A3 disposing of the body. The FIR was registered on the report of PW7. However the contention of

learned counsel for the third accused was that the circumstance of throwing of dead body of deceased by A3 can only lead to his conviction for offence under Section 201 IPC and not under Section 302.

We are unable to agree with the aforesaid contention of learned counsel. It stands established from medical evidence that the deceased died homicidal death. It was due to asphyxia on account of strangulation. None has questioned this finding. It is unquestionable on the evidence produced on record. It is also unquestionable and has also not been questioned that the prosecution has proved, as stated earlier, throwing by A3 the body of the deceased by the side of the tank on early hours of 1st May, 1997 and at that time he was caught red handed by PW7. The testimony of PW1, PW2, PW3 and PW6 is also to the same effect. The accused also made an extra judicial confession before them that he alone had not killed the boy but other appellants were also with him. We have already given the reasons why the conviction of other accused cannot be maintained. Insofar as this appellant is concerned, there are the following circumstances:

(1) Extra judicial confession made to the prosecution witnesses.

(2) Recording of the said confession also in First Information Report.

(3) Caught red handed while disposing of the dead body. (4) Absence of explanation how the dead body came in his possession either by way of suggestion in the cross examination of prosecution witnesses or in his statement recorded under Section 313 of the Code of Criminal Procedure.

We are conscious of the fact that extra judicial confession for making it a basis for conviction by itself is a week piece of evidence, such evidence deserves strict scrutiny. At the same time, however, strong circumstantial evidence can get strength from extra judicial confession. That circumstance, in the present case, is the fact of third accused being apprehended red handed when he threw the dead body. It is an important piece of circumstantial evidence against him. Having regard to the facts of the case we see no reason for not drawing a presumption against the third accused for having committed the murder of the child. Our view gets sustenance from *Mohan Lal and Anr.* v. *Ajit Singh and Anr.*, AIR (1978) SC 1183 wherein this Court held that the question whether a presumption to be drawn is a matter which depends on evidence and circumstance of each case. The nature of the recovered articles, the manner of their acquisition by the owner, the nature of the evidence about their identification, the manner in which the articles were dealt with by accused,

A the place and the circumstances of their recovery and the length of the intervening period and the ability or otherwise of the accused to explain the recovery are some of those circumstances. Despite the aforenoted circumstance duly established against the third accused, it cannot be said that conviction in respect of the third accused under Section 302 is not liable to be maintained. These circumstances are presumptive evidence of charge of murder against
B the appellant.

In view of the aforesaid insofar as the third accused is concerned, his conviction under Section 302 is maintained.

As earlier noticed, death penalty on the third accused has been confirmed
C by the High Court. We have given to other appellants benefit of doubt having discarded the sole testimony of PW14. The conviction of this appellant has been upheld in view of evidence other than that of PW14. Under the circumstances, in our view, the death penalty imposed on third accused deserves to be converted into imprisonment for life.

D

For the reasons aforesaid, we set aside the impugned judgment and order of the High Court confirming that of Sessions Court and give benefit of doubt to accused No. 1 Subash Chandra Panda, accused No. 2 Kunja Ramana and accused No. 4 Kalpana Mazumdar and allow their appeals. They shall be set at liberty forthwith if not required in any other case.

E

While maintaining conviction of accused No.3, we set aside the death penalty imposed on him and instead impose on him imprisonment for life and to this extent his appeal also stands allowed. The appeals are disposed of in the above terms.

F N.J. Appeals disposed of.