

State Vs Suresh (and vice versa)

Capital Sentence Reference No. 2 of 1998 connected with Criminal Appeal Nos 84 and 102 of 1998

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: Sept. 3, 1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) " Section 313#Penal Code, 1860 (IPC) " Section 302, 376

Citation: (1999) 1 ACR 336

Hon'ble Judges: Maithli Sharan, J; A.N. Gupta, J

Bench: Division Bench

Advocate: G.A, for the Appellant;

Final Decision: Dismissed

Judgement

Maithli Sharan, J.

The instant capital sentence reference and both the appeals, one filed from jail and the Ors. filed through counsel, arise

out of the judgment of conviction and sentence dated 31.1.1998 passed by Sri A.K. Saksena IInd Special Additional Sessions Judge. Hardoi in

S.T. No. 803 of 1995, Under Sections 376 and 302 of the Indian Penal Code, convicting the Appellant Suresh for the offences under the said

provisions of law and sentencing him to undergo life imprisonment u/s 376. I.P.C. and to death u/s 302 of the Indian Penal Code.

2. The prosecution case, in brief, is that the informant Kishan Pal (P.W. 1) was the resident of village Jajoopur district Hardoi, and he was uncle of

the prosecutor, minor girl Bitula, who, at the time of the incident, was aged about 10 years. On the fateful date, i.e. the 17th September, 1995 Km.

Bitula had gone to Jungle for grazing cattle; her brother Ashok (P.W. 3) and one of his friend Mithai Lal had also gone along with her. Accused-

Appellant Suresh had also gone to graze cattle in the Jungle; he met Ashok (P.W. 3) and Ors. in the Jungle. At about 2.00 p.m. Appellant Suresh

asked Ashok (P.W. 3) and Mithai Lal to go to their house for taking food, and on his saying so the latter went away, but when they came back

after taking meal they did not find Km. Bitula present over there, so they asked Appellant Suresh regarding her whereabouts. Appellant Suresh

told them that she might have gone somewhere. According to the prosecution, in the evening when the minor girl Bitula did not return home her,

Uncle Kishan Pal (P.W. 1) went in search of her along with some of the villagers but could not trace her in the night. Since Ashok (P.W. 3) had

gone out, hence he could not contact his uncle Kishan Pal (P.W. 1). Next day again Kishan Pal (P.W. 1) along with some of the villagers went in

search of the girl Km. Bitula, and at about 11.00 a.m. her dead body was found lying in the "Jwar" field of one Munni Lal Mishra, Kishan Pal

(P.W. 1), thereafter, went to police station Atrauli and lodged the written report (Exh. Ka-1) which was registered and reduced to writing in the G.

D. as report No. 20 by Head Moharrir Prem Bahadur Singh whose signatures have been identified by Head Constable Ram Kripal Bajpai (P.W.

6) it is Exh. Ka4.

3. The Sub-Inspector Sri J. L. Nirmal (P.W. 8) reached the village Jajoopur and prepared the "Panchnama" of the dead body Exh. Ka-10 in the

presence of the "Panchas" and sent the dead body of Km. Bitula to the hospital for postmortem examination. From the spot one frock, one

underwear and one Angaucha were seized and sealed by the Sub-Inspector Sri J. L. Nirmal (P.W. 8) in the presence of "Panchas". During

investigation, the spot map was also prepared. On 19.9.1995, Dr. B. P. Singh (P.W. 4) conducted the autopsy on the dead body of Km. Bitula.

His report is Ext. Ka-2. On receiving the post-mortem report, it came to light that the offences Under Sections 376 and 302, I.P.C. had been

committed, and hence on 21.9.1995 it was registered as Crime No. 207/95 Under Sections 376 and 302, I.P.C, and thereafter the Station House

Officer Raghav Ram Mishra (P.W. 7) started investigation of the case. He reached the village and recorded the statements of the witnesses Kishan

Pal Singh (P.W. 1), Ram Swaroop (P.W. 2) and one Lalta Bux Singh. On the basis of the said statements, it was revealed that accused-Appellant

Suresh had confessed his guilt before Lalta Bux Singh and Ram Swaroop (P.W. 2). On the next day, i.e., 22.9.1995 accused-Appellant Suresh

was arrested and sent for his medical examination which was done on 23.9.1995 by Dr. R.C. Verma (P.W. 5); his report is Ext. Ka-3. After

completing the investigation, in the case, the police filed charge-sheet in the Court of the concerned Magistrate wherefrom the case was committed

to the Court of Session.

4. The learned Sessions Judge framed charges for the offences Under Sections 376 and 302 of the Indian Penal Code against accused-Appellant

Suresh charges were read over and explained to him. He pleaded not guilty and claimed to be tried. In his statement u/s 313, code of Criminal

procedure accused-Appellant Suresh stated that he had been falsely implicated due to enmity.

5. In this case, the prosecution examined nine witnesses, out of whom three witnesses, namely, Kishan Pal (P.W. 1), Ram Swaroop Singh (P.W.

2) and Ashok (P.W. 3) are witnesses of fact, Dr. B.P. Singh (P.W. 4) and Dr. R.C. Verma (P.W. 5) had respectively conducted the autopsy on

the dead body of Km. Bitula and medically examined accused-Appellant Suresh, and P.W. 6 to P.W. 9 and the Court witness Prem Bahadur are

Police witnesses who took part during the investigation of the case.

6. The factual matrix of the instant case is circumscribed in a very narrow compass. It is a case where an offence of rape coupled with murder is

said to have been committed, and, naturally, as is usual, there is no direct evidence in the case. The whole case hinges on the circumstantial

evidence consisting of "last seen" of the prosecutor Km. Bitula and accused-Appellant Suresh by the farmer's brother Ashok (P.W. 3), medical

evidence consisting of the autopsy done on the dead body of Km. Bitula and the injuries found on the genital organ of accused-Appellant Suresh,

and lastly the extra-judicial confession made by the accused-Appellant Suresh to Ram Swaroop (P.W. 2) and to one Lalta Bux Singh. It is well-

settled legal position that in a case of circumstantial evidence, complicity of the accused with the crime in question can be pinpointed only - if all the

links available on record are so connected that they go to point finger towards the accused only indicating that it is he and he alone who has

committed the crime. In the instant case, as we would discuss henceforth, it is proved beyond doubt that it was the accused-Appellant Suresh only

who had committed rape on Km. Bitula and killed her.

7. At the outset, we are of the opinion that extra-judicial confession though considered being a weak piece of evidence, yet there is neither any rule

of law nor rule of prudence that it cannot be acted upon unless corroborated. If the evidence of the person to whom the extra-judicial confession

has been made by the accused is trustworthy and unbiased, and the confession has been made by the accused voluntarily to the said witness who

is uninominal to him, and the witness is important and credible one, then certainly in such a situation, conviction can be based on the said extra-

judicial confession even without corroboration for in such a situation to go in search of corroboration itself tends to cast a shadow of doubt over

the evidence. Our view is fortified by the view taken by Hon'ble the Apex Court in State of U.P. v. M. K. Anthony 1985 SCC 105 and Baldev

Raj v. State of Haryana. 1991 SCC 659. In view of the above legal position. If it is found that the extra-judicial confession in the instant case

made by accused-Appellant Suresh to prosecution witness Ram Swaroop (P.W. 2) inspires complete confidence, then certainly even without

corroboration, conviction can be based on that evidence alone. But, as observed earlier, besides the said extra-judicial confession of the accused-

Appellant Suresh, there is Ors. circumstantial links also available on record which go to connect the Appellant with the crime in question. Thus, we

propose to discuss the Ors. Circumstantial links first.

8. Ashok (P.W. 3) brings to light the evidence of "last seen" of prosecutor Km. Bitula and accused-Appellant Suresh by him. He deposed that he

and one Mithai Lal had gone with her on the fateful day in the morning to graze cattle in the Jungle, and that the Appellant Suresh was also there

who had asked him (P.W. 3) and Mithai Lal at about 2.00 p.m. to go to house for taking meal, and he then went to his house. He has deposed

that when he and Mithai Lal came back after taking meal, he did not find Km. Bitula there and then he asked accused-Appellant Suresh about her

where about; the latter told that she might have gone somewhere. He further deposed that when he returned home in the evening, he had not met

his uncle Kishan Pal Singh (P.W. 1) as he had gone out of the village, and when he came back the next day, he learnt that the dead body of Bitula

was found in a field, and then he had narrated to his uncle Kishan Pal Singh (P.W. 1) as to what had happened there in the Jungle. The evidence of

Ashok (P.W. 3) finds corroboration from the statement of Kishan Pal Singh (P.W. 1) who also deposed that his nephew Ashok (P.W. 3) had told

him that in the Jungle accused-Appellant Suresh had asked him (P.W. 3) and one Mithai Lal at about 2.00 p.m. to go to take meal and at that time

Km. Bitula had remained there in the Jungle, and further that when he (P.W. 3) went back to Jungle, he had not found Bitula there and then he had

asked Suresh her whereabouts then" the latter had told him (P.W.3) that she might have gone somewhere.

9. The above corroborated evidence of "last seen" besides being the "last seen" evidence simpliciter, further goes to indicate the conduct of the

accused-Appellant Suresh to the effect that he wanted to send Ashok (P.W. 3) and Mithai Lal out of the Jungle so that he could easily be

successful in his errand to commit the offence of rape on Km. Bitula. This conduct of the accused-Appellant is also lurking in his extra-judicial

confession made to Ram Swaroop Singh (P.W. 2), three days later, wherein he had told him that at about 2.00 p.m. on that day, a sinister desire

to derive sensual pleasure with Km. Bitula came to his mind, hence he asked P.W. 3 Ashok and Mithai Lal to go to take their meals. We would

discuss this aspect of the matter later on at the appropriate place when we venture to deal with the details of the alleged extra-judicial confession.

10. The medical evidence consisting of autopsy on the dead body of prosecutor Km. Bitula done by Dr. B. P. Singh (P.W. 4) and the medical

examination of the accused-Appellant Suresh done by Dr. R.C. Verma (P.W. 5) form Anr. link in the circumstantial chain. Dr. B.P. Singh (P.W.

4] has deposed that on 19.9.1995 he had conducted the autopsy on the dead body of Km. Bitula aged about 10 years and had found 11 injuries

on her body, out of these 11 injuries most of them were contusions and abrasions, and further the injury No. 1 measuring 15 cm. x 12 cm. was the

important one because the mouth and nostrils appeared to have been forcibly pressed, and that it was sufficient in the ordinary course of nature to

cause death. He opined that vagina and vagina on posterior aspect was lacerated and the finger could pass up to pelvis. He further deposed

that hymen was ruptured and rectum was prolapsed. There is nothing in his cross-examination to discredit his testimony. Thus, on the basis of his

evidence, it is clear that rape was committed on Km. Bitula, and she had died because of the forcible pressing of her mouth and nostrils which

developed asphyxia. According to Dr. B.P. Singh (P.W. 4), cause of her death was asphyxia as a result of blockage of mouth and both nostrils

during sexual offence.

11. As observed above, on the basis of extra-judicial confession made by accused Suresh to Ram Swaroop Singh (P.W. 2) and one Lalta Bux

Singh he was arrested and afterwards got medically examined. Dr. R.C. Verma (P.W. 5) examined him. He has deposed that smegma was absent

on the penis of the accused; prepuce was normal and that frenulum (LING KE NEECHE AAGE HISSE MEN JAHAN KHAL JUDI HOTI HAI

VAH TOOTI HUI THEE) was broken and healed. He has opined that the said injury on frenulum was caused during the sexual intercourse which

might have been committed about a week back. He (P.W. 5) examined accused-Appellant Suresh on 23.9.1995 indicating thereby that the latter

might have committed alleged rape with Km. Bitula. Dr. R.C. Verma (P.W. 5) has further deposed that the accused might have possibly received

injuries on his genital organ on 17.9.1995 between 1.00 p.m. to 3.00 p.m. during the course of committing rape. He further clarified that the said

injury could be received if the rape was committed on a minor girl aged about 10 years. Besides, as we would see later on, this aspect of the

evidence regarding presence of aforesaid injury on the genital organ of the accused Suresh also gets corroboration in the extrajudicial confession

made by the latter to Ram Swaroop Singh (P.W. 2), wherein he himself had told him that during the commission of the rape, he had received said

injury. Thus, the medical evidence available on record is an important link in the chain of the circumstances connecting the accused-Appellant with

the offence in question.

12. The last but not the least, rather a very important edifice of the circumstantial links available on record, is the extra-judicial confession made by

the accused-Appellant Suresh to Ram Swaroop Singh (P.W. 2) and one Lalta Bux Singh three days after the incident in question. It is true that

said Lalta Bux Singh was not examined by the prosecution, and this aspect has been attacked by the learned Counsel for the accused-Appellant as

a weakness of the prosecution case, but we are afraid, it cannot go to belittle the evidence already available in this regard. Ram Swaroop Singh

(P.W. 2) has deposed that after three days from the day of the incident in question, accused-Appellant Suresh alone had come to his house and

told him that he, Km. Bitula, her brother Ashok (P.W. 3) and one Mithai Lai had gone to Jungle to graze cattle. and then at about 2.00 p.m. a

sinister desire to drive sensual pleasure with Km. Bitula came to his mind and hence, to get his vulgar and sensual desire satisfied, he asked Ashok

(P.W. 3) and Mithai Lai to go to their house to take meal. His own words are ; ""MERI KUMARI BITULA PAR NIYAT KHARAB HO GAI

TAB MEN ASHOK AUR MITAH1 LAL KO KHANA KHANE GHAR BHEJ DIYA"". Accused-Appellant had further told him (P.W. 2) that

when Ashok and Mithai Lal had gone from there he forcibly took Km. Bitula in the field of Munni Lal, fell her on the ground and committed rape

on her, and when she tried to raise alarm, he forcibly shut her mouth and nostrils which consequently resulted in her death. Ram Swaroop (P.W. 2)

further deposed that accused-Appellant Suresh had also asked him to pardon him and requested for help as he had good links with the Police.

Ram Swaroop has also deposed that the Appellant had further told him that during the commission of rape, he had received injuries on his genital

organ. He (P.W. 2) deposed that he had told that accused-Appellant that he would not help him and then the latter told that he was going to Lalta

Bux Singh for help. Ram Swaroop (P.W. 2) has deposed that he was Senior Block Pramukh of Block Bharawan and that his brothers were

Advocates and that is why the Appellant had come to him for help.

13. As already observed above, the conduct of the Appellant in sending Ashok (P.W. 3) and Mithai Lal to their house for taking meal was

relevant in the matter, and further, receiving of injury on his genital organ was also very relevant as it occurs in his extra-judicial confession which

goes to connect him with the crime in question. Thirdly, at this very juncture, it is also pertinent to note that this extra-judicial confession made by

the accused-Appellant Suresh to Ram Swaroop (P.W. 2) gets more strengthened by the fact that he had come to request P.W. 2 because the

latter had important links with the Police and he could have been helpful and favourable to him. In the cross-examination of this witness Ram

Swaroop (P.W. 2), nothing could be brought out to show his animosity with the accused-Appellant Suresh, or in any manner to doubt his veracity.

Simply pleading that Ram Swaroop was inimical with the accused-Appellant would not help unless some substantial material was brought either in

the cross-examination of the witness in question or by way of adducing oral or documentary evidence. In the instant case nothing of this sort is

available on record. Thus, the aforesaid extra-judicial confession made by the accused -Appellant Suresh to Ram Swaroop (P.W. 2) cannot be

doubted and brushed aside, and it inspires full confidence. Ram Swaroop Singh (P.W. 2) not only stated about the aforesaid extra-judicial

confession for the first time in the Court but he had also told all about it to Kishan Pal Singh (P.W. 1) and the latter also deposed on oath in this

regard. It was on the basis of this extra-judicial confession only that the investigation in this regard was done and the accused-Appellant Suresh

was later arrested. Thus, this piece of circumstantial link pin pointedly goes to connect the Appellant with the crime in question.

14. We have already observed in detail that even without corroboration, the extra-judicial confession can be acted upon and the accused can be

connected with the crime in question as there is neither any rule of law nor any rule of prudence that it cannot be acted upon unless corroborated.

However, while discussing the various circumstantial links of the instant case, we have seen that besides the evidence of extra-judicial confession,

Ors. important relevant factors are also available and they altogether make a complete chain to connect the accused with the crime in question. We

hold so. Consequently, the order of conviction passed by the learned Sessions Judge against the accused-Appellant Suresh for the offences Under

Sections 376 and 302. I.P.C. is upheld.

15. So far as the sentence of life imprisonment passed by the Learned Sessions Judge against the Appellant in regard to the offence u/s 376,

I.P.C. is concerned, we have nothing to add, obviously because in a case of rape coupled with murder, the maximum punishment of imprisonment

for life is but desirable. We held so.

16. As regards the sentence of death passed by the learned Sessions Judge against the Appellant for the offence u/s 302, I.P.C., we find" ourselves

unable to agree with him. The legal position is well-settled and precipitated that the death penalty should be awarded in the "rarest of the rare

case". Hon"ble the Supreme Court has given the guidelines in this respect in the cases of Bachan Singh Vs. State of Punjab, and Machhi Singh and

Others Vs. State of Punjab, . The learned Sessions Judge has nowhere discussed as to how the instant case is the "rarest of the rare one" calling

for the death penalty. Life imprisonment is the rule and the death sentence is an exception. In awarding death penalty, which is exceptionally

awarded, the Judge has to be very cautious, and the aggravating and mitigating circumstances of the case available on record have to be cautiously

weighed and the balance has to be struck in this regard. We are of the view that since the death penalty is awarded in the "rarest of rare cases"

hence mitigating circumstances available in the case have to be accorded full weightage.

17. With the aforesaid legal backdrop, we find that the instant, case does not call for the extreme penalty provided for the offence of murder. In

the earlier part of this judgment, we have discussed the evidence of Dr. B.P. Singh (P.W. 4) who had conducted the autopsy on the dead body of

the prosecutor Km. Bitula. Dr. B. P. Singh (P.W. 4) has deposed that injury No. 1 on the mouth and nostrils of the deceased Km. Bitula was

sufficient in the ordinary course of nature to cause death. Thus, it is clear that the accused Suresh did commit murder of Km. Bitula. He had

developed sensual desire to commit rape on her and to achieve that end him although tried to create a favorable situation for him, and he did

succeed and committed rape on Km. Bitula. In the extrajudicial confession also, it is clear that the accused-Appellant had shut the mouth and the

nostrils of Km. Bitula when the latter tried to raise alarm. So, to achieve his errand accused Suresh had forcibly pressed the mouth and nostrils of

Km. Bitula which resulted in asphyxia and her consequential death.

18. In these circumstances, we are of the opinion that no doubt Km. Bitula died of asphyxia during the commission of rape on her by accused-

Appellant Suresh, but it could not be said that it was a murder of brutal, grotesque, diabolical, revolting or dastardly nature, and consequently it

does not call for the extreme penalty of death. Therefore, the sentence of death awarded by the learned Sessions Judge for the offence u/s 302,

I.P.C. proved to have been committed by the accused-Appellant Suresh is hereby set aside, and it is altered to imprisonment for life.

19. Consequently, the capital reference No. 2 of 1998 is hereby rejected, and both the Criminal Appeal Nos. 84 of 1998 and 102 of 1998 are

partly allowed in the manner indicated above.