UTTAM CHAKRABORTY

v.

STATE OF ASSAM

(Criminal Appeal No. 869 of 2006 etc.)

APRIL 6, 2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860:

s. 304 – An eight month pregnant woman died of burn injuries – Post-mortem report revealing severe cut in abdomen and foetus removed – Husband of deceased and his friend convicted of murder – Husband sentenced to death – Life imprisonment to co-accused – Sentences confirmed by High Court – HELD: The girl with whom the accused-husband was stated to have had illicit relationship, though supported the prosecution case in her statement u/s 164 CrPC, but before the court she resiled therefrom – In the light of the fact that a statement recorded u/s 164 Cr.P.C. is not substantive evidence, the court has to go to the other evidence produced in court by the prosecution – Both the trial court and the High Court have noticed that the only other evidence against the accused-husband was the statement of PW-6, a 4-5 year old child of the deceased and the accused –PW-6 did support the prosecution and it is primarily his evidence that has led to the conviction of the accused – The courts below have also found corroboration for the motive in the statement of PW-5, the mother of the deceased, and the very material circumstance that the murder had been committed in the matrimonial house of the couple – However, notwithstanding the fact that PW-6 is a witness whose credibility has not been doubted, it would perhaps be imprudent to award a capital sentence on the statement of a child witness – Therefore, though the conviction

of the accused-husband (appellant in Crl. A. No. 871/2006) needs to be maintained, and his crime was truly horrendous, the death sentence is commuted to life imprisonment –There is absolutely no evidence to connect the co-accused (appellant in Crl. A,. No. 869/2006) with the murder – PW-4 did state that at about 10/10.30 p.m. on the night of the occurrence, he had seen the two accused discussing something with each other and while they were doing so, a girl had come out shouting and told the accused that his wife had died of burn injuries – This evidence cannot connect the co-accused with the murder – PW-5, the mother of the deceased, has not said a word about his involvement in the incident except that he was a neighbour of PW-1 – PW-6 did identify the co-accused in court but he apparently mistook him for PW-4, as is clear from his statement – In this view of the matter, conviction of the co-accused cannot be sustained and he is acquitted – Evidence – Sentence/Sentencing.

Evidence:

Child witness – Testimony of – HELD: In the instant case, notwithstanding the fact that credibility of child witness has not been doubted, it would be imprudent to award capital sentence on his statement – Sentence/Sentencing.

Suresh vs. State of U.P. **1981 (3) SCR 259 = (1981) 2 SCC 569; and** *Raja Ram Yadav & Ors. vs. State of Bihar* **1996 (1) Suppl. SCR 174 = (1996) 9 SCC 287 – relied on.**

Case Law Reference:

1981 (3) SCR 259	**relied on**	**para 5**
1996 (1) Suppl. SCR 174	**relied on**	**para 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal

No. 869 of 2006.

From the Judgment & Order dated 26.04.2006 of the Gauhati High Court in Criminal Appeal No. 212 of 2005.

WITH

Crl. Appeal No. 871 of 2006.

S.B. Sanyal, Azim H. Laskar, Sachin Das, Rana Mukherjee, Abhijit Sengutpa for the Appellant.

J.R. Luwang, Navneert (for Corporate Law Group) for the Respondent.

The following order of the Court was delivered

ORDER

1. This judgment will dispose of Criminal Appeal Nos. 871 and 869 of 2006.

2. The facts are as under:

The appellants, Mission Suklabaidhya and Uttam Chakraborty were friends. Mission Suklabaidhya, who was a retired Army personnel, was married to Gita Das deceased. The couple had a child Marjon PW-6 who was about 4 or 5 years old when the incident happened. The deceased was also pregnant at that time and was carrying a foetus about 8 months old. As the deceased was employed as a school teacher, the couple had engaged one Panchami Suklabaidya PW-1, aged 16 years, as a domestic help, and she resided in the house of the couple. As per the prosecution story, Mission Suklabaidhya and PW-1 developed an illicit relationship and when this was discovered by the deceased, there were frequent quarrels between the couple. As per the prosecution story, on the night intervening the 13th and 14th April 2004 at about 2.00 a.m.

A Radhu Paul PW-4, a resident of Lala Town, accompanied by 4 or 5 persons went to the house of Nioti Das PW-1, the mother of the deceased, situated at Abdullapur, and told her that her daughter had fallen ill and asked her to accompany them to the Police Station. On reaching the Police Station, PW-
B 1 found Mission Suklabaidhya and Panchami Suklabaidhya present there and learnt from them that her daughter had died of burn injuries. She thereupon lodged a FIR at about 2.30 a.m. to the effect that she had learnt from her son-in-law and PW-1 that her daughter had died in a fire caused by kerosene oil but
C she further went on to say that she had been killed by her husband. During the course of the investigation, it transpired that accused Uttam Chakraborty had also present when the deceased had been done to death. The statement of PW-1 was also recorded under Section 164 of the Cr.P.C. in which
D she stated that both the accused had been responsible for the murder as the deceased was objecting to her relationship with Mission Suklabaidhya accused.

3. On the completion of the investigation the appellants were brought to trial on a charge of murder. The prosecution
E relied primarily on the evidence of PW-6 Marjon Suklabaidhya, who was projected as an eye witness to what had happened on the fateful day, PW-1 Panchami Suklabaidya aforesaid, PW-2 the Executive Magistrate Manash Das, who held an inquest on the dead body and had noticed a huge cut injury on the
F person of the deceased, Radhu Paul PW-4 who stated that he had seen both the accused involved in an animated discussion in front of his shop and when he had gone close to them they had changed the topic and had started discussing some business matter and that after a □short while a girl had come
G out and raised a hue and cry and told Mission Suklabaidhya that his wife had died of burn injuries, Nioti Rani PW-6, the mother of the deceased, who deposed to the illicit relationship of her son-in-law and PW-1, and PW-7 the doctor, Khairuz Zaman Choudhary, who had carried out the post-mortem
H examination and had found very severe cut injuries on the

stomach which indicated that the foetus had been removed. A

4. The trial court, on a consideration of the evidence, convicted both the accused for the offence punishable under Section 302 of the IPC and while Mission Suklabaidhya was awarded the death penalty, Uttam Chakraborty was ordered to undergo imprisonment for life. The matter was thereafter referred to the High Court for the confirmation of the death sentence in Criminal Death Reference No. 4/2005 whereas Criminal Appeal No.212/2005 was filed by the accused. The High Court, by the impugned judgment, confirmed the death reference and dismissed the Criminal Appeal. While confirming reference, the Division Bench considered the aggravating and mitigating circumstances and held that the aggravating circumstances far outweighed the mitigating ones. Two appeals have been filed in this Court, Criminal Appeal No.871/2006 by Mission Suklabaidhya and Criminal Appeal No. 869/2006 by Uttam Chakraborty. B C D

5. We have heard the learned counsel for the parties and gone through the record very carefully. It is true that the primary evidence would have been that of PW-1 Panchami Suklabaidya, a girl 15 or 16 years of age, and admittedly a domestic help of Mission Suklabaidhya and the deceased. In her statement recorded under Section 164 of the Cr.P.C. she supported the prosecution story but while giving evidence as PW-1 she resiled therefrom and gave a complete go by to what she had said earlier. In the light of the fact that a statement recorded under Section 164 of the Cr.P.C. is not substantive evidence we have to go to the other evidence produced in Court by the prosecution. Both the trial court and the High Court have noticed that the only other evidence against the appellants was the statement of PW-6, a child 4 or 5 years of age. PW-6 did support the prosecution and it is primarily his evidence that has led to the conviction of the appellants. The courts below have also found corroboration for the motive in the statement of PW-5 Nioti Rani Das, the mother of the deceased, and the very E F G H

A material circumstance that the murder had been committed in the matrimonial house of the couple. We are, however, of the opinion that notwithstanding the fact that PW-6 is a witness whose credibility has not been doubted, it would perhaps be imprudent to award a capital sentence on the statement of a B child witness as observed in *Suresh vs. State of U.P.* (1981) 2 SCC 569. While rendering its decision, this is what the Court had to say:

> "Children, in the first place, mix up what they see with what they like to imagine to have seen and besides, C a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life." D

6. This judgment was followed later in *Raja Ram Yadav & Ors. vs. State of Bihar* (1996) 9 SCC 287 wherein similar observations have been made. We are, therefore, of the opinion that though the conviction of Mission Suklabaidhya E needs to be maintained, and his crime was truly horrendous, the death sentence awarded should be commuted to life imprisonment. We make an order in the above terms. Criminal Appeal No. 871 of 2006 is disposed of accordingly.

F 7. We now take up the case of the appellant Uttam Chakraborty. We find absolutely no evidence to connect him with the murder. PW-4 Radhu Paul did state that at about 10/ 10.30 p.m. on the night of the occurrence, he had seen the two accused discussing something with each other and while they G were doing so, a girl (that is PW-1) had come out shouting and had told Mission Suklabaidhya that his wife had died of burn injuries. We are unable to see how this evidence can connect the appellant with the murder. PW-5, the mother of the deceased, has not said a word about his involvement in the incident except that he was a neighbour of PW-1. PW-6 did H

identify the appellant in Court but he apparently mistook him for Radhu Paul PW-4, as is clear from his statement. In this view of the matter, we find that the conviction of Uttam Chakraborty, appellant cannot be sustained. We accordingly allow Criminal Appeal No. 869 of 2006, set aside his conviction and sentence and direct that he be set free forthwith, if not wanted in any other case. A B

R.P. Appeal allowed.