

IN THE HIGH COURT OF JUDICATURE AT PATNA

Death Reference No.9 of 2013

AGAINST THE JUDGMENT OF CONVICTION, DATED 6TH JULY, 2013 AND THE ORDER OF SENTENCE, DATED 9TH JULY, 2013, PASSED BY SRI MAN MOHAN SHARAN LAL, 3RD ADDITIONAL SESSIONS JUDGE, MADHUBANI, IN SESSIONS TRIAL NO.528 OF 2012/GR NO. 1877 OF 2012, ARISING OUT OF JAINAGAR POLICE STATION CASE NO. 122 OF 2012.

The State of Bihar Petitioner
Versus
1. Kailash Paswan, S/O Late Mahavir Paswan, R/O Village Nahar
Bhagwatipur, P.S. Pandaul, District Madhubani
2. Suresh Mandal, S/O Jai Lal Mandal, Resident Of Village-
Bathney West, P.S.- Pandaul, District- Madhubani
.... .. Respondents

WITH

Criminal Appeal (DB) No. 688 of 2013

Suresh Mandal S/O Jai Lal Mandal Resident Of Village- Bathney
West, P.S.- Pandaul, District- Madhubani Appellant
Versus
The State Of Bihar Respondent
WITH

Criminal Appeal (DB) No. 815 of 2013

Kailash Paswan S/O Late Mahavir Paswan R/O Village Nahar
Bhagwatipur, P.S. Pandaul, District Madhubani Appellant
Versus
The State Of Bihar Respondent

Appearance :

(In D. REF. No.9 of 2013)
For the Petitioner/s : Mr. Ashwini Kumar Sinha, Addl. P.P.
For the Respondent/s : Mr.
(In CR. APP (DB) No.688/ 2013)
For the Appellant/s : Mr. Jaganath Singh, Advocate
For the Respondent/s : Ms. Shashi Bala Verma, Addl. P.P.
(In CR. APP (DB) No.815/2013)
For the Appellant/s : Mr. Rama Kant Sharma, Sr. Advocate
: Mr. Lakshmi Kant Sharma, Advocate
For the Respondent/s : Mr. S. C. Mishra, Addl. P. P.

**CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
AND**

HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 18-03-2015

Under challenge, in these present appeals, are the judgment, dated 06.07.2013, passed, in Sessions Trial No.528 of 2012, arising out of G.R.No.1877 of 2012/Jainagar Police station Case No. 122 of 2012, by learned 3rd Additional Sessions Judge, Madhubani, and the order, dated 09.07.2013, whereby sentences have been imposed on the accused-appellants.

2. By the impugned judgment, learned trial Court has convicted the accused-appellants under Sections 376 and 302 read with Section 34 of the Indian Penal Code. Consequent upon their conviction under Section 376 read with Section 34 of the Indian Penal Code, while both the accused-appellants have been sentenced to imprisonment for life and pay a fine of Rs.10,000/- each and, in default of payment of fine, suffer rigorous imprisonment for a period of three months. Following their conviction under Section 302 read with Section 34 Indian Penal Code they have been sentenced to death.

3. The case of the prosecution, as revealed by the fardebayan of Jai Prakash Kunwar (the informant), recorded by S.I. Pawan Kumar Singh, S.H.O., Jainagar Police Station, on

29.06.2012, at 04.00 hrs., at Primary Health Center, Jainagar,
is as follows:-

(i) On 28.6.2012, the informant (PW 9), along with his family members, arrived at the place of Sushil Singh of village Kuadh Kuadh Khirkhiriya Tola, Police Station Jainagar, District Madhubani, to attend the *marriage ceremony* of his cousin, Vinay Bhushan Kunwar. At about 11.00 PM, the informant, along with his grand-daughter, Anushka Kumari (in short, **A.K.**), aged about 6 years, and grand-son, Sumit Kumar, aged about 7 years, both children of Umakar Kunwar (PW 3), slept on a *Chowki* (wooden cot) in the front room of the house of Saroj Singh, son of Vindeshwar Singh, resident of Kuadh Khirkhiriya Tola. The rest of the members of the bride-groom's party went to the nearby school for taking rest.

(ii) At about quarter past eleven in the same night, three persons came into the room and slept by the side of informant's grand-daughter, **A.K.**, on the wooden cot; two persons on the one side and one person on the other side. One of them was of swarthy colour, short in height, aged



about 20 years, he had worn shirt and pant (i.e., trouser); the other two persons were of fair complexion, aged about 25 years, and both were in white cheque shirt and pant (i.e., trouser). At about 12.30 AM of 28/29.06.2012, informant's son, Umakar Kunwar (PW 3), woke PW 9 up and asked about **A.K.** The informant (PW 9), bemused on not finding **A.K.**, joined the search. In course of search, on finding that the door of the adjacent room was slightly open, Umakar Kunwar (PW 3) went inside and found her daughter, **A.K.**, lying unconscious in the corridor situated between two rooms. They took her to Dr. A. P. Singh, at Jainagar, who referred her to the Government Hospital, where she was declared dead.

- (iii) The informant believed that the three persons, who had slept by the side of his grand-daughter, **A.K.**, on the wooden cot, had committed rape on her in the corridor of the said building and, as a result thereof, she died. The deceased had bled from mouth and nose and bore all the symptoms on her body of having been subjected to rape. The informant claimed that he can

identify the accused persons on seeing them.

(iv) On the basis of *fardbeyan* of Jai Prakash Kunwar (PW 9), Jai Nagar Police Station Case No. 122 of 2012 was instituted, on 29.6.2012, against unknown persons under Sections 376/302/34 of the Indian Penal Code.

4. After investigation, police submitted *charge sheet*, under Sections 376/302/34 of the Indian Penal Code, against accused Kailash Paswan, Suresh Mandal and Madan Sah, under the same penal provisions showing accused Madan Sah, an *absconder*. The learned Chief Judicial Magistrate, Madhubani, took cognizance of the offences aforementioned and committed the case to the Court of Sessions, for trial. Accused Kailash Paswan and Suresh Mandal pleaded not guilty thereto and claimed to be tried.

5. The *death reference* and the *two appeals* aforementioned having arisen out of the impugned judgment of conviction, dated 07.07.2013, and the impugned order of sentence, dated 09.07.2013, *the death reference* and the *two appeals* have been heard together and are being disposed of by this common judgment and order.

6. We have heard Mr. Jaganath Singh, learned Counsel for the appellant, Suresh mandal, and Mr. Rama Kant Sharma, learned Senior Counsel, appearing for the appellant,

Kailash Paswan. We have also heard Mr. Ashwini Kumar Sinha, Ms. Shashi Bala Verma and Mr. S. C. Mishra, learned Additional Public prosecutors, appearing for the State.

7. In support of its case, prosecution examined ten witnesses. PW 1, Ashok Kunwar is cousin of the informant (PW 9); PW 2, Sudhakar Kunwar, is a witness to the *inquest*; PW 3, Umakar Kunwar, is the father of the deceased; PW 4, Krishandeo Singh, is a resident of neighbouring village; PW 5, Chandan Kunwar, is uncle of the deceased; PW 6, Pramod Singh, is a driver of auto rickshaw; PW 7, Durga Nand Kunwar, is another cousin of the informant (PW 9) and elder brother of bride-groom, Vinay Bhusan Kunwar; PW 8 is Dr. B. Prasad, who conducted *post mortem* examination on the said deceased; PW 9, Jai Prakash Kunwar, is grand-father of the said deceased and the informant of the case; PW 10, Pawan Kumar Singh, is the Investigating officer of the case, who had also recorded the *fardbeyan* of the informant.

8. After examination of witnesses, statements of accused were record under Section 313 (1) (b) of the Code of Criminal Procedure. In their statements aforementioned, the appellants denied their involvement in the occurrence. They also denied of having slept by the side of **A.K.** on the cot, on the night of the occurrence, in the same room, wherein she had slept. The appellant, Kailash Paswan, in his statement,

denied of having driven any member of the bride-groom's party, in his vehicle, to village *Khirkhiria Tola*, on 28.06.2012.

9. Both the appellants examined one witness each. The appellant, Kailash Paswan, chose to examine himself as a defence witness as DW 1 and also proved Exhibit A, which was an application, dispatched by him from the jail, alleging that he had been falsely implicated in the case. The application was in the handwriting of one Praveen Kumar Jha. In his deposition, the appellant, Kailash Paswan, denied that he, as a driver, had carried *baraat* (i.e., the members of the bridegroom's party) in his vehicle to village Kuadh Khirkhiriya Tola in the night of 28.06.2012. He also denied having made any confessional statement; rather, he claimed that the police had taken his signature on a blank piece of paper under coercion and duress, which was converted into a *confessional statement*.

10. The appellant, Suresh Mandal, in support of his case, examined one Jawahar Chaupal (DW 2). Jawahar Chaupal has deposed that he, too, had come to village Kuadh Khirkhiriya Tola, in the marriage ceremony, in the vehicle of Suresh Mandal, at about 10.30 PM in the night. Two more vehicles also arrived in the village, Kuadh Khirkhiria Tola, carrying the members of the bride-groom's party, about the same time. When the members of the bride-groom's party got down, he, along with Suresh Mandal and others, sat in the field

in front of the school and talked with each other for about 45 minutes. Around that time, they learnt that the daughter of Umakar Kunwar (PW 3) was missing. Thereafter, all of them started to look for her. Later on, he learnt that some of the members of the bride-groom's party damaged vehicles and, then, Suresh Mandal fled away with his vehicle.

11. The learned trial Court, upon hearing both sides, held the appellants guilty of commission of offences under Sections 376 and 302 read with Section 34 of the Indian Penal Code and sentenced them to suffer imprisonment for life, for commission of offence under Sections 376 read with Section 34 of the Indian Penal Code, coupled with fine of Rs. 10,000/- each and, in default of payment of fine, undergo imprisonment for a further period of 3 months. For their conviction, under Section 302 read with Section 34 of the Indian Penal Code, the learned trial Court awarded *death sentence* to the appellants.

12. The appellants have challenged, in these appeals, their conviction as well as the sentences passed against them. Death Reference No. 9 of 2013 is for confirmation of *death sentence* under Section 366 Code of Criminal Procedure.

13. The appellants argue that admittedly, there is no eye-witness to the occurrence and the case is based on circumstantial evidence, which are of weak nature and do not

form complete chain to establish that the appellants had committed rape and murdered **A.K.** It is also contended, on behalf of the appellant, Kailash Paswan, that his confessional statement cannot be relied upon inasmuch as police took his signature forcibly on a blank paper and converted the same into his confessional statement.

14. The appellants further contend that they have been implicated on mere suspicion as well as on account of local politics. According to them, had they been the persons, who had slept on the cot along side **A.K.**, committed rape on her and murdered her, there was no reason why the informant would not have named them in the FIR as one of them, Suresh Mandal, was of the informant's village and the other person, Kailash Paswan, is alleged to have driven the vehicle, wherein the informant had come to village Kuath Khirkhiria Tola to attend the marriage ceremony.

15. On the other hand, Mr. Ashwini Kumar Singh, learned Additional Public Prosecutor, submits that the appellants are drivers of the vehicles by which the members of the bride-groom's party had come, in the night of 28.06.2012, to the place of Sushil Singh of village Kuath Kuath Khirkhiriya Tola. The two drivers (appellants), along with the third driver, Madan Sah (*absconding*), at around 11.30 PM, came into the room, at the house of Saroj Singh, where informant (PW 9),



along with his grand-children, was taking rest on a cot. It is the further case of the prosecution that there is sufficient evidence to establish that the appellants committed rape on **A.K.** and murdered her. According to the prosecution, the fact that the accused were not found on the cot, along with **A.K.**, within an hour or so, clearly establishes that they were the perpetrators and this conclusion gets strengthened as the accused surreptitiously slipped away from the place of occurrence, when they learnt that in course of search **A.K.** had been traced out.

16. The two important questions, which fall for determination, in the present appeals, are: **(a)** whether the deceased was, as already indicated above, subjected to rape and murdered; and **(b)** whether these appellants, along with the absconder accused, namely, Madan Sah, had, in furtherance of their *common intention* committed rape on her and murdered her.

17. In the case at hand, the charges, as already indicated above, were framed under Sections 376 and 302 read with Section 34 of the Indian Penal Code against two of the appellants, namely, Suresh Mandal and Kailash Paswan, and the third accused, namely, Madan Sah, is still an *absconder*.

18. What is, now, noticeable is that though the charges are sought to be proved with the aid of Section 34 of the Indian Penal Code, the fact remains that while framing

charges against two of the appellants, namely, Suresh Mandal and Kailash Paswan, it was not mentioned that they had subjected Anuska Kumari to rape and/or intentionally killed her along with the *absconder*-accused Madan Sah in furtherance of their common intention.

19. While considering the present appeals, it also needs to be noted that Section 34 provides for constructive liability meaning thereby that a person may be made liable not only for his own act or omission, but also for the act or omission of another person. In such circumstances, an accused ought to be informed, in the context of a case of present nature, that he is alleged to have committed the offence, charged with, not only himself, but in furtherance of common intention of those, whose names may have surfaced as the offender(s) or those, whose names may not have been known.

20. In the case at hand, the two accused-appellants were not at all informed that they would be liable not only for their own acts or omissions, but also for the acts and omissions of their co-accused, namely, Madan Sah, inasmuch as all the three of them had allegedly committed the offences of murder and rape in furtherance of their common intention.

21. Because of the fact that the appropriate charges are not framed at the trial, it logically follows that serious prejudice would be caused to the appellants if they are sought



to be made vicariously liable not merely for their own acts and omissions, but also for the acts and omissions of the *absconder*-accused aforementioned, particularly when the case at hand based substantially on circumstantial evidence. If any of them was made to suffer for not only his own act or omission, but for the act or omission of the co-accused, who is absconding, such conviction would not be sustainable in law.

22. Situated thus, it becomes abundantly clear that in absence of the appropriate charges having been framed, serious prejudice would be caused to the appellants if the appeals are decided on merit on the basis of the evidence available.

23. Moreover, we notice that the learned trial Court has not put to the appellants various incriminating pieces of evidence, which became the basis of conviction of the appellants. If the accused-appellants are not properly examined under Section 313 of the Code of Criminal Procedure, none of the incriminating pieces of evidence can be relied upon by this Court, for, placing of reliance on an incriminating piece of evidence, which had not been put to the appellants, would cause serious prejudice to the accused-appellants. At the same time, if the accused-appellants are given the benefit, because of the vital omission or lapse on the part of the learned Trial Court, it would cause serious prejudice to the prosecution

inasmuch as prosecution cannot be made to suffer, because of the lapse or lapses, on the part of the learned trial Court, in conducting the trial.

24. The remedy, therefore, lies, in our considered view, in remanding the case to the learned trial Court for framing of charges against them in accordance with law, as already indicated above, and also for proper examination of the accused-appellants under Section 313 of the Code of Criminal Procedure and, then, to come to its own judicious conclusion(s) depending on what surfaces from the record.

25. We may refer, at this stage, to the case of ***Sharad Birdhi Chand Sarda v. State of Maharashtra, (AIR 1984 SC 1662)***, wherein their Lordships have succinctly laid down the law, on the above subject of examination of an accused by the Court under Section 313 of the Code of Criminal Procedure, in the following words:

"As these circumstances were not put to the Appellants in their statement under Section 313 of the Code of Criminal Procedure they must be completely excluded from consideration because the Appellants did not have any chance to explain them. This has been consistently held by this Court as far back as 1953, wherein the case of Hata Singh Bhagat v. State of Madhya Bharat MANU/SC/0073/1951 : AIR 1953 SC 468 this Court held that any circumstances in respect of which an accused was not examined under Section 342 of the

Code of Criminal Procedure cannot be used against him. Ever since this decision there is a catena of authorities of this Court uniformly taking the view that unless the circumstances appearing against an accused is put to him in his examination under Section 342 of Section 313 of the Criminal Procedure Code, the same cannot be used against him....It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court in this view of the matter the circumstances, which were not put to the Appellant in his examination under Section 313 of the Code of Criminal Procedure have to be completely excluded from consideration."

(Emphasis is supplied)

26. With regard to the above, even in the case of ***State of Maharashtra v. Sukdeo Singh and Anr.*** (MANU/SC/0416/1992 : AIR 1992 SC 2100), their Lordships have observed as follows:

"The trial judge is not expected, before he examined the accused under Section 313 of the Code, to sift the evidence regarding any incriminating material to determine whether or not to examine the accused as that material. To do so, would be to prejudice the evidence without hearing the prosecution under Section 314 of the Code. Therefore, no matter how weak or scanty prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon."

(Emphasis is added)



27. It is, now, settled beyond dispute by a catena of judicial pronouncements that every circumstance, on which a trial Court relies upon to hold an accused guilty, must be put to the accused person and his answer sought thereto. The very purpose of Section 313 Code of Criminal Procedure will stand defeated if a trial Court, without asking for explanation of an accused on the circumstances, which appear to it to be incriminating, bases its conviction on such circumstances. It is in this view of the matter that the examination of an accused person, under Section 313 Code of Criminal Procedure, is considered a solemn act of a trial Court and it cannot, and must not, be treated as an empty formality.

28. In the case at hand, the incriminating circumstances, spoken to by each prosecution witness, on which the learned trial Court has relied upon, ought to have been put to the accused-appellants, when they were being examined under Section 313 (1) (b) of the Code of Criminal Procedure and the same having not been done, learned trial Court ought not to have based its findings on such incriminating pieces of evidence. In fact, it appears to us that the learned trial Court had not put to the accused-appellants, in the present case, even the sum-total of the prosecution's case, which, in our considered view, does not satisfy the

requirements of law.

29. Situated thus, one has no option, but to conclude that if the accused-appellants are not examined under Section 313(1)(b) of the Code of Criminal Procedure as warranted by law, it will deny to the accused-appellants a valuable right vested in them by law to properly and effectively project their defence. At the same time, prosecution, to our mind, cannot be made to suffer solely for the lapse on the part of the learned trial Court in properly examining the accused-appellants under Section 313(1)(b) of the Code of Criminal Procedure apart from the indiscernible defects in the framing of charges, which we have already noted above. We are, therefore, clearly of the view, if we may reiterate, that this case needs to be remanded to the learned trial Court.

30. Ordinarily, we would have re-appreciated the entire evidence on record to arrive at a legally correct finding; but in the case at hand, since we have found that before the evidence on record is re-appreciated in these appeals, charges are needed to be framed in accordance with law, in the light of the materials available, and further examination of the accused-appellants, under Section 313 (1) (b) of the Code of Criminal Procedure, in accordance with the requirements of law contained in that behalf, is imperative and that the case, for the twin purposes, needs to be remanded back to the learned



Court below, we do not wish to enter into the merit of the various grounds on which the judgment has been impugned in these appeals and we do not even remotely wish to make any observation about the reliability of the relevant evidence on record so that the learned trial Court does not get fettered by any of the observations of this Court on any piece of evidence on record and it may feel free to come to its own independent findings.

31. In the circumstances indicated above, the conviction of the appellants by the judgment and order, dated 06.07.2013, passed, in Sessions Trial No.528 of 2012, arising out of G.R.No.1877 of 2012/Jainagar Police station Case No. 122 of 2012, and the order, dated 09.07.2013, whereby sentences have been imposed, on the accused-appellants, by learned 3rd Additional Sessions Judge, Madhubani, which are under appeal, are hereby set aside, the death reference is answered accordingly, and the case is remanded to the learned trial Court for framing appropriate charges and, then, call or recall the witness or witnesses for such examination or cross-examination as may be warranted in the facts of the case and the law relevant thereto and also examine the accused-appellants under Section 313 of the Code of Criminal Procedure, in accordance with law, in the light of the incriminating pieces of evidence, which may emerge from

record.

32. Coming to the question as to whether the appellants shall, on account of the fact that their conviction has been set aside, be set at liberty, we cannot ignore the fact that there are serious incriminating materials on record against the appellants and though these incriminating materials may or may not be sufficient to convict the accused-appellants, the accused-appellants cannot be allowed to go on bail pending conclusion of the trial.

33. In the circumstances indicated above, it would be appropriate to keep, in custody, the accused-appellants, whose conviction and the consequential sentence have been set aside until the time their trial is concluded and judgment is pronounced. The release of the accused-appellants shall, therefore, be governed by the outcome of the trial, which shall be held, on remand, in terms of the directions given above and until the time the trial is concluded, the accused-appellants shall be detained in custody unless, otherwise, directed by this Court.

34. We further direct that the learned trial Court shall deal with the case expeditiously and dispose of the same, in accordance with law, within a period of four months from the date of receipt of the Lower Court Records along with a copy of this judgment and order.

35. The Registry shall send back the Lower Court
Records along with a copy of this judgment and order.

(Samarendra Pratap Singh, J.)

I. A. Ansari, J. : I agree.

(I. A. Ansari, J.)

Pawan/AFR

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