

IN THE HIGH COURT OF JUDICATURE AT PATNA

Death Reference No.5 of 2015

[Against the judgment of conviction dated 19th August, 2015, and order of sentence dated 25th August, 2015, passed by the 3rd Additional Sessions Judge, Madhubani, in Sessions Trial No.528 of 2012 arising out of Jainagar P.S. Case No.122 of 2012]

The State of Bihar

.... Petitioner/s

Versus

- 1. Kailash Paswan, son of late Mahavir Paswan, &
- 2. Suresh Mandal, son of Jai Lal Mandal

.... Respondent/s

With

Criminal Appeal (DB) No. 750 of 2015

[Against the judgment of conviction dated 19th August, 2015, and order of sentence dated 25th August, 2015, passed by the 3rd Additional Sessions Judge, Madhubani, in Sessions Trial No.528 of 2012 arising out of Jainagar P.S. Case No.122 of 2012]

- 1. Suresh Mandal @ Subesh Mandal, son of Jai Lal Mandal, resident of village- Bathney West, P.S.- Pandaul, District- Madhubani

.... Appellant/s

Versus

- 1. The State of Bihar

.... Respondent/s

With

Criminal Appeal (DB) No. 142 of 2016

[Against the judgment of conviction dated 19th August, 2015, and order of sentence dated 25th August, 2015, passed by the 3rd Additional Sessions Judge, Madhubani, in Sessions Trial No.528 of 2012 arising out of Jainagar P.S. Case No.122 of 2012]

- 1. Kailash Paswan, son of late Mahavir Paswan, resident of village- Nahar Bhagawatipur, P.S.-Pandaul, District- Madhubani

.... Appellant/s

Versus

- 1. The State of Bihar

.... Respondent/s

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Appearance:

(In D. REF. No. 5 of 2015)

For the Petitioner/s : Mr. G. P. Jaiswal, APP
For the Respondent/s : Mr. Y. C. Verma, Sr. Advocate with
Mr. Manish Kumar No.13, Advocate
Mr. Rohit Kumar, Advocate

(In CR. APP (DB) No. 750 of 2015)

For the Appellant/s : Mr. Y. C. Verma, Sr. Advocate with
Ms. Priyanka Singh, Advocate
For the Informant : Mr. Sanjay Kumar Ghosarvey, Advocate
For the Respondent/s : Mr. Shiwesh Chandra Mishra, Advocate

(In CR. APP (DB) No. 142 of 2016)

For the Appellant/s : Mr. Manish Kumar No.13, Advocate
Mr. Rohit Kumar, Advocate
For the Informant : Mr. Sanjay Kumar Ghosarvey, Advocate
For the Respondent/s : Mr. Ahwani Kumar Sinha, Advocate

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

&

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 10-03-2016

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1. The Death Reference and the two Cr. Appeals arise out of the judgment of conviction dated 19th August, 2015, and order of sentence 25th August, 2015, passed by the 3rd Additional Sessions Judge, Madhubani, in Sessions Trial No.528 of 2012 arising out of Jainagar P.S. Case No.122 of 2012, whereby and whereunder Appellant, Suresh Mandal, and Kailash Mandal have been found guilty under Section(s) 376/34 and 302/34 Indian Penal Code and sentenced to undergo rigorous imprisonment for life under Section(s) 376/34 Indian Penal Code with fine of ₹10,000/- and in default of payment of fine both shall further undergo rigorous

imprisonment for three months, and further to suffer the death sentence for the offence under Section 302/34 Indian Penal Code.

2. It appears that the appeal was heard earlier and was remanded for further evidence since the Court felt that the Charge needed to be amended and incriminating materials be put to the Appellants under Section 313 Cr. P. C. The Trial Court then amended the charge to one under Section 376/34 Indian Penal Code and examined the witnesses thereafter and allowed cross-examination and also examined the Appellants afresh under Section 313 Cr. P. C.

3. The case of the prosecution according to PW 9, Jai Prakash Kunwar, is that on 28.06.2012 he had gone as *Barati* to a certain village along with his other family members and grand children. Sleeping arrangement was made for them in an empty house, therefore, he along with the deceased, Anushka Kumari and grand son, Sumit Kunwar, slept on a *Chauki*. At around quarter past 11, three persons whom he describes with great detail came and slept next to his grand daughter on the same *Chauki*. At around, 12.30 PM, his son Umakar Kunwar (PW 3), father of the deceased came and awoke him up and said that the child missing. Then they started to look for the child and found her in an injured condition inside the courtyard. They took her to the hospital where she was

declared dead. He suspected that the three unknown persons, who had slept with the grandchildren, may have taken the child and after committing rape upon her killed her. This information was given on the next day at 4.00 AM at the hospital itself.

4. During trial, the prosecution examined ten witnesses. PW 1 (Ashok Kunwar), who is cousin of the Informant, stated that on 28.06.2012, he as *Barati* along with PW 3 (Umakar Kunwar), PW 5 (Chandan Kunwar), PW 9 (Jai Prakash Kunwar) including the deceased and grand son had gone for a marriage ceremony on three vehicles; one of which was Sumo and two were Bolero Cars. At about 10.00 PM, the *Barat* reached the place of ceremony but the boy had not arrived. The three drivers started to drink, whereas, PW 9 with his grand children went to sleep in the house which was arranged for *Barati*. At about quarter past 12, when the ceremony was about to begin, the father of the deceased Umakar Kunwar (PW 3) came and said that the deceased was not to be found at which they started to look for her. In this course, they noticed that the three drivers were nervous. When Chandan Kunwar (PW 5) asked the Appellant, Kailash Paswan, he stated that the deceased was dead. They saw the deceased in an unconscious state near the corridor and then she was brought out. In the meanwhile, all the drivers slipped away. The deceased was taken to the hospital

where she was declared dead. Inquest Report was prepared in his presence on which he signed which is marked as Ext.1.

In cross-examination, he was asked as to whether he knew Suresh Mandal and he stated that he knew him well. However, there is no mention of Appellant, Suresh Mandal, being one of the drivers. He also admitted that he had not taken the name of Suresh Mandal in his statement.

5. PW 2 (Sudhakar Kunwar) stated that he was also one of the *Baratis* which had gone on three cars and the driver of the two Boleros were Appellants, Suresh Mandal and Kailash Paswan, and one Madan Sah was driver of Sumo Victa. He further stated that the child had disappeared and when every one started looking for her, one Deepak Kumar came and told him that Anushka has been killed. He then went and saw Anushka. He also saw the Appellant, Suresh Mandal, leaving in hurry and both he and Kailash Paswan were nervous. He did not bring the car when he was told to do so. He further stated about the deceased having been removed to the hospital where she was declared dead. He signed on the Inquest Report which is Ext.1/1.

To a court query, he explained that he had seen the Appellant, Suresh Mandal, leaving the place where his car was parked. He also conceded that he knew the Appellant, Suresh

Mandal, since long time as also Appellant, Kailash Paswan, since last eight months.

6. PW 3 (Umakar Kunwar), father of the deceased and son of the Informant stated that he along with rest of the family members had gone *Barat* on three cars one of which was being driven by the Appellant, Kailash Paswan. However, he does not name the Appellant, Suresh Mandal as one of them. He also stated that he had seen the three drivers drinking and Appellant, Kailash Paswan, and one Madan Sah having slept next to his daughter.

However, his attention was drawn to the earlier statement that he had not stated this fact, but he denied it. The Investigating Officer confirmed the fact in paragraph 15 that this witness had not stated that Kailash Paswan had slept next to his daughter.

He further stated that his daughter went missing at which a search ensued and then they found her in injured condition in the corridor where some bottles and glasses were found.

He further alleged that Appellant, Kailash Paswan, came in a nervous state and when he told him to get the car ready for taking the deceased to the hospital, he quietly slipped out. However, his attention was drawn to this fact also, but he denied. The Investigating Officer confirmed this fact that he had not stated about

nervous state of Appellant-Kailash Paswan.

In cross-examination, he conceded that the Appellant, Suresh Mandal, was well known to him since he used to live close by as also Kailash Paswan was well known to him since last 6-7 months. He described the place of occurrence where the deceased was sleeping along with her brother and grand-father, as also two drivers and that two *Chaukis* were there and both of them were joint.

7. PW 4 (Krishandeo Singh) stated that he had seen Appellant, Suresh Mandal, holding a child, who was crying. Close by, two other persons were there, one of whom had a cap and it was Appellant, Kailash Paswan, who was the one wearing a cap.

He further stated that the *Barat* reached at about 10.00 PM, whereas, child was seen crying in the lap of Suresh Mandal at around quarter past 11. It is only thereafter that the child was being searched but surprisingly he did not mention this fact to anyone, otherwise, this information would have found mention in the First Information Report. In such circumstances, we are not inclined to place any reliance on this part of evidence of this witness also because he was never examined during investigation.

8. PW 5 (Chandan Kunwar), who is the son of the Informant, stated that on three cars *Barati* had gone to the village which was being driven by Suresh Mandal, Kailash Paswan and



Madan Sah. He further stated that when the child was not being found, he started to look for her and knocked on the window of Sumo Victa from which one person got down and just then Appellant, Kailash Paswan, came and asked as to why he was knocking and when he replied that he was looking for his niece he said that she was already dead. He then fought with him but later saw that his brother Umakar Kunwar (PW 3) was carrying the deceased in his lap in an injured condition.

9. PW 6 (Pramod Singh), cousin of the bride stated about *Barati* having come to the village, some of them sleeping in the house where arrangement had been made and subsequently about the disappearance of the child. He further stated that when everyone was looking for the child, one tall boy came and said that their daughter was dead. He identified the said boy as Kailash Paswan.

In cross-examination, when he was asked as to whether he would be in a position to identify any *Barati* if he was produced before him, he said that he would not be able to do so. Hence, this circumstance against the Appellant, Kailash Paswan, does not seem credible.

10. PW 7 (Durga Nand Kunwar), cousin of the Informant, stated that they had gone as *Barati* on three cars and the



Appellant, Kailash Paswan and one Madan Sah were two drivers. He also does not name the Appellant Suresh Mandal. He further stated that PW 5 (Chandan Kunwar) started quarrelling with Madan Sah and Kailash Paswan and thereafter the deceased was found in an injured condition in the corridor after which she was taken to the hospital and *fard-e-bayan* was recorded and he signed on the same which is Ext.2.

In cross-examination, he stated that being co-villagers Suresh Mandal was well known to him, whereas, Informant was his cousin brother.

11. PW 9 (Jai Prakash Kunwar) is the Informant, who repeats the fact of going to the marriage venue and having slept there along his grandchildren whereafter three persons also slept next to the deceased of which he gives full description. At around 12.30 AM, PW 3 (Umakar Kunwar) came and started to look for the child, who was missing, but they found her in injured condition inside corridor after which she was taken to the hospital where she was declared dead. He proved his signature on the *fard-e-bayan* as Ext. 2/1.

From his cross-examination, it appears that the Appellant, Suresh Mandal, was well known to him and even though he denies the fact that he knows Appellant, Kailash Mandal, but

there is evidence of his son Umakar Kunwar (PW 3) and Sudhakar Kunwar (PW 2) that he was known to them and hence there was every reason for the Informant to also know Kailash Mandal. In cross-examination, he conceded that he had not named the two Appellants at any point in time.

12. PW 10 (Pawan Kumar Singh) is the Investigating Officer, who stated that on information he went to the hospital where he recorded the *fard-e-bayan* and instituted First Information Report which he proved as Ext.2/2 and Ext.5 respectively. He also proved the Inquest Report as Ext.1/2. He stated that he inspected the place of occurrence which was a house arranged for the *Barati* in which there was a corridor from where Salwar, Lahanga and Panty with semen signs was recovered as also some bottles and glasses. He seized the same and prepared the seizure list as Ext.3/2. He further states that from Sumo Victa one white handkerchief with blood stains at two places was recovered along with bottles which he seized and marked as Ext.3/1. He further states that on 30.06.2012 at about 6.00 AM, the Appellant, Kailash Paswan, was arrested from his house and from there blue jeans, underwear and a cap was recovered. The blue jeans had some stains but he conceded he did not give the seizure list to the Appellant. He proved the seizure list as Ext.3/3. He recorded the confessional statement of the Appellant,

Kailash Paswan, which he proved as Ext.6.

However, in cross-examination, he stated that at the time of recording of confessional statement, Appellant, Kailash Paswan, was in custody and, therefore, it is not worth reliance. He stated that he examined rest of the witnesses between 29.06.2012 to 04.07.2012. There is no evidence that the alleged blood stained handkerchief or clothes of Appellant, Kailash Paswan, was sent for chemical testing.

As mentioned earlier, PW 3 had not stated before him that Appellant came and slept next to his daughter or he or any other driver was nervous.

13. PW 8 (Dr. Bimlesh Prakash) conducted Post Mortem Examination on the dead body of the deceased and found following injuries:

- I. Eyes half closed, mouth closed, rigor mortis present, first half closed and found following ante mortem injury.
 - (a) Lacerated wound 1"x ¼" x muscle deep over upper lip near left lateral angle of the mouth with bruise 1"x1" over left cheek.
 - (b) Blackening over the left and right ear.
 - (c) Whole face congested.
 - (d) Injury on private part: hymen ruptured, tear of anterior, posterior and lateral vaginal wall, margin of tear, injuries lacerated and reddish in colour, vaginal orifice admitted one finger loosely and filled with clotted bloods, blood stains present on her perineal area and both

thigh.

- II. On dissection: Heart right chamber-full of blood, left chamber-empty. All internal viscera congested namely, lungs, liver, spleen, kidneys, stomach containing semi digested food material, intestine containing faecal matters and gases, urinary bladder-empty.

14. The defence also examined two witnesses. DW 1 (Kailash Paswan) deposed for himself saying that his confessional statement was recorded after due assault, whereas, DW 2 (Jhhawan Chaupal) stated that when cars were being damaged at the place where *Barati* had gathered on discovery of the dead body of the child, it was then Appellant, Suresh Mandal, had left the place.

15. It appears there is no denial on the factum of occurrence which undoubtedly is heinous being rape and murder of a child and the only argument which has been made by the counsel for the Appellants is on their complicity.

16. On going through the entire evidence, we find that there is no direct evidence against the Appellants and the case is based on the following circumstantial evidence:

- (i) Both the Appellants had gone as drivers to the marriage venue.

However, there is contradictory evidence as to whether, Appellant, Suresh Mandal, was in fact, driver of one of the Bolero

Cars. PW 1 (Ashok Kunwar), who is the cousin of the Informant, PW 3 (Umakar Kunwar), father of the deceased and son of the Informant, do not name the Appellant, Suresh Mandal, being one of the drivers.

(ii) The Appellant, Kailash Paswan, had slept next to the deceased along with another unknown person soon before her death.

However, we find that in the First Information Report, PW 9 (Jai Prakash Kunwar) has stated that three unknown persons whose physical description he give with great care came and slept next to his granddaughter before she went missing. Subsequently, the story has been developed by his son PW 3 (Umakar Kunwar) in Court for the first time by saying that two of the drivers including the Appellant, Kailash, Paswan, and another one had slept by the side of his daughter. This does not seem credible also since PW 9, Jai Prakash Kunwar, who was one of the '*Baratis*' would have had the opportunity of knowing the drivers at least by face but he does not say that it was the drivers who had slept next to the granddaughter. He merely says that three unknown persons whom he describes had slept. Hence, this appears a concoction and has to be rejected.

We also find from the evidence of PW 2 and 3, son of

the Informant, that they knew Appellant, Kailash Paswan, also from before. It is naturally probable that even the father of PW 3 i.e. the Informant would have known him from before. In such circumstance, none of the Appellants being named in the First Information Report having been sleeping where the deceased was sleeping is a major circumstance in favour of the Appellants.

(iii) The drivers were allegedly drinking in the campus of wedding venue.

This circumstance that the drivers were drinking in the campus before the occurrence cannot lead us conclusively to their participation in the crime.

(iv) The drivers looked nervous and left hurriedly after the discovery of the dead body.

This circumstance does not seem reliable since had it been so, this fact would have been mentioned in the First Information Report itself since it happened even while the search for the child was going on.

Moreover, whether a person is looking nervous or not is a personal perception which cannot be relied upon with absolute certitude.

(v) That Appellant, Kailash Paswan, had declared the deceased dead when a search was being made for her.

This does not point to the complicity of the Appellant by any stretch of imagination.

17. In view of such, the impugned judgment of conviction dated 19th August, 2015, and order of sentence 25th August, 2015, passed by the 3rd Additional Sessions Judge, Madhubani, in Sessions Trial No.528 of 2012 arising out of Jainagar P.S. Case No.122 of 2012, is hereby set aside. The Appellants, namely, Suresh Mandal and Kailash Paswan are acquitted of their respective charges. They are directed to be released forthwith, if not required in any other case.

18. In the result, **Death Reference is answered in negative** and both the **Cr. Appeals are allowed**.

(Anjana Prakash, J)

AFR
J.Alam/-

(Rajendra Kumar Mishra, J)

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