

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.87 of 2013

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Ram Dinesh Mahto

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ashok Kumar Mishra, Advocate
Mr. Rishideo Kumar Singh, Advocate,
For the Respondent/s : Mr. S.N. Prasad, APP.

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

and

HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 19 -12-2017

The present appeal has been filed by the appellant challenging the correctness of the judgment of conviction dated 26.11.2012 and the order of sentence dated 01.12.12 passed by Adhoc Additional Sessions Judge –III, Samastipur, in Sessions Trial No. 654/2010, whereby the appellant was held guilty for the offences punishable under Sections 366, 376, 302 and 201 of the Indian Penal Code and was sentenced to suffer R.I. for 05 years with fine having default clause, R.I. for 10 years with fine, having default clause, Imprisonment for life with fine having default clause and R.I. for two years with fine having default clause respectively.

2. The incident occurred in the evening of 28.07.2009. The minor girl (Bholi Kumari), aged about 7 to 8 years, was living at her maternal grandfather's place. She was seen playing outside the house in the evening of 28.07.2009. The appellant, who is a co-villager, was seen present near Bholi Kumari and alluding her to come along with



him on the plea of providing her some fruit. Bholi Kumari followed him. Thereafter, she became traceless. According to the fardbeyan (Ext. 2/1) lodged by PW -6, on 29.07.2009, the informant and other witnesses having found that the victim had gone along with the appellant and not returned, went to the house of the appellant to inquire from him. He was found sitting with his family. He was questioned about the whereabouts of the victim. No plausible answer was offered by him. The search for the girl, however, continued. On the following morning, the cloth of the victim having blood stain mark was spotted in the field close to the house of the appellant. In the meantime, the police received information about the incident. On recording a *sanha* to this effect, PW -10 along with other police personnels rushed to the village, where the statement of PW -6 (maternal uncle of Bholi Kumari) was recorded at 1.30 A.M. While the I.O. was at the village, the presence of the blood stained cloth (ganji) worn by the deceased, was reported. I.O. went to the said place and prepared a seizure memo of the cloth and blood spot found on the ground nearby. PW – 2 and PW -5 became eye-witness of said seizure of the incriminating articles. Further prosecution case projected at the trial is that on the same day the mother of the appellant absconding from her house, was spotted in a field and was apprehended. As the I.O. had not left the village, the custody of the mother of appellant was given to the I.O., who took her along and later remanded to the judicial custody.

3. On 31.01.2009, the dead body of the victim – Bholi Kumari



was exhumed from the agricultural field of the appellant. The police raided the said place and prepared the inquest report, which was identified as the dead body of Bholi Kumari. After drawing up the inquest report (Ext. 5), the dead body of the deceased was sent for autopsy. PW -7 was then posted as the Medical Officer, Sadar Hospital, Samastipur. A Medical Board was constituted to conduct the autopsy. P.W. 7 being member of the Medical Board conducted the autopsy and submitted post mortem report (Ext. 3) and found the following ante mortem injuries.

1. *Vulval Swelling*
2. *Laceration of Vaginal introitus*

On dissection

- *Neck muscle congested.*
- *3rd Cervical Vertebra fractured.*
- *Mucosa of trachea congested.*
- *Chest muscle on anterior aspect congested.*
- *3rd, 4th and 5th ribs on both sides anteriorly fractured.*
- *Lungs congested and emphysematous.*

Vaginal swab taken and sent for pathological examination does not show any spermatozoa.

Time since death : within 96 hours.

Opinion: cause of death is asphyxia due to throttling.

4. At the trial, prosecution examined ten witnesses. On the point of kidnapping of the victim, PW -1, Pappu Kumar Das, PW -4, Buchi Kumari, PW – 6, informant and PW -8, Sumitra Devi (Nani of the victim) have deposed. We have carefully perused their evidences. They have consistently stated that on the relevant date and time when the victim was playing outside the house, the appellant was seen



present with the victim. He had also allured the victim to come along with him on the plea of giving some fruit to her, the victim was seen going along with the appellant.

5. PWs 3, 5 and 9 have also spoken about the aforesaid fact but the counsel for the appellant has rightly pointed that their evidence on this point is hearsay.

6. We have no doubt in our mind that the offence of having kidnapped the victim from the lawful guardianship has been proved by reliable evidence of PWs 1, 4, 6 and 8. As the prosecution case is unfolded, the dead body of the victim was recovered on 31.07.2009 in the agriculture field belonging to the appellant and close to his house. It was found buried there. The recovery of the body on 31.07.2009 from the field of the appellant has been proved by the evidence on record including the Investigating Officer. Adverting to the evidence of the Doctor (PW -7), who has conducted the postmortem, the autopsy surgeon found the 3rd, 4th and 5th ribs on both sides were fractured. The neck muscles were found congested. These injuries were ante mortem. Mucosa of trachea was also found congested. The doctor on examination of the private parts of the deceased, found laceration of vaginal introitus. There was swelling on vulva. The time elapsed since death was within 96 hours. According to doctor, the cause of death of deceased was asphyxia due to throttling. On bare perusal of the findings of the doctor, it is explicit that the death of the deceased was homicidal in nature. She was subjected to rape before being strangled to death. The time of death estimated by the



autopsy surgeon also fits in the prosecution case.

7. If the kidnapping of the victim is proved and it is found from the evidence on record that she was done to death after being subjected to rape around the time after she was kidnapped the law enjoins a duty on the accused to explain the circumstances, which were in the special knowledge of the accused.

8. Counsel for the appellant has vehemently argued that in a case where severe punishment is provided, court is required to apply strictest scrutiny. The suspicion howsoever is grave, will not take the place of proof. Further contention of learned counsel for the appellant is that PW - 8 and 9 have stated about going to the house of appellant at about 7 or 7.30 P.M. and found appellant present along his parents. The deceased was seen in company of appellant at or around 6. P.M. on the same evening, which was such a little span of time during which the incident could not have occurred. This aspect of the matter has not been considered by learned Trial Court.

9. Counsel for the State conversely has submitted referring to the case of **State of M.P. v. Lattora**, reported in (2003) 11 SCC 761, **Sucha Singh v. State of Punjab** reported in (2001) 4 SCC 375 and **State of Bihar v. Chandan Singh** reported in (2011) 1 PLJR 48 that the onus shifts on the accused to explain the circumstances under which the deceased received those injuries and suffered a homicidal death. Section 106 of the Evidence Act, reads as under :-

“106. Burden of proving fact especially within knowledge.—

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations



(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him.

10. On the deceased last seen with the appellant, prosecution has led evidence of PWs 1, 4, 6 and 8. They have stated that on the relevant date the victim was playing outside the house when the appellant was seen enticing her away from that place. One of the aforesaid witnesses had seen the victim going along with the appellant. PW -4 out of PWs 1, 6 and 8, is the witness, who is unconnected with the family of the victim. The defence has not been able to discredit their evidence on this point. The evidence appears to be consistent. There is no reason for us to disbelieve their evidence. The prosecution has thus established that the victim was last seen going with the appellant, whereafter, only her dead body was recovered from a ditch.

11. In the case of Lattora (supra), the Hon'ble Apex Court having found that the prosecution has been able to prove the offence of abduction and the deceased was found murdered soon thereafter, has observed in paragraph -4:-

“4. Learned counsel for the appellant State contended that the High Court, while rendering the impugned judgment, did not follow the correct legal position. This Court in State of W.B. v. Mir Mohd Omar 2008 8 SCC382 held that if the deceased was proved to have been abducted by the accused and was found murdered soon thereafter it is for the abductors to satisfy the court as to how else the abducted victim was dealt with by them. In the absence of any such explanation. It is open to the court to draw the presumption



that the abductor is the murderer also. The said view of this Court was reconsidered subsequently in *Sucha Singh v. State of Punjab*. 2001 4 SCC 375 and the legal position has been reiterated by this Court.”

12. Recently a Division Bench of this Court, referred the said Judgment of Lattora (Supra) in the case of *Chandan Kumar v. State of Bihar* (supra) and laid down the same legal principle.

13. If the deceased was seen during the sunset time in the company of the appellant, whereafter, she became traceless and the dead body was recovered few days, thereafter, and prior thereto blood stained *ganji* of the victim was recovered from the field of the appellant on the very next date of her elopement, the circumstances are well proved, which shifts the burden on the appellant to explain the circumstance that led to her homicidal death.

14. We have purposefully perused the statement of accused recorded under Section 313 of the Code of Criminal Procedure (for short “the Code”). The circumstances indicated above were directly put to him soliciting his reply. Instead of giving out any explanation, the appellant only recorded his denial. Recording of statement under Section 313 of the Code is not a mere formality. It has a purpose. The answers given by the accused in such statement is considered by the Court in the light of the evidence on record to come to a just finding. We find no explanation was spelt out by the appellant, which led to the deceased receiving those fatal injuries on her person. The prosecution cannot be fastened with the burden of proving something which it cannot prove as the victim was last seen in the company of



the appellant.

15. As noted above, there is cogent and reliable evidence on record to prove that the victim was kidnapped on the relevant evening by the appellant.

16. Having bestowed our anxious consideration of the entire evidence available on record in the light of the contentions of the appellant, this Court has no reason to find any legal infirmity in the finding(s) of guilt recorded by learned Trial Court against the appellant.

17. Consequently, the appeal fails. The conviction and sentence recorded by learned Trial Court in Sessions Trial No. 654 of 2010 is upheld.

18. Accordingly, the appeal is dismissed.

(Kishore Kumar Mandal, J)

(Vinod Kumar Sinha, J)

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