

IN THE HIGH COURT OF JUDICATURE AT PATNA

Death Reference No.3 of 2017

Arising Out of PS.Case No. -null Year- null Thana -null District- -

The death reference and the appeal are against the judgment of conviction dated 19.10.2016 and order of sentence dated 24.10.2016 passed in Sessions Trial No.12 of 2015 (arising out of Mojahidpur (Babarganj) P.S. Case No.129 of 2014) passed by Sri Janardhan Tripathy, the learned 1st Additional District and Sessions Judge, Bhagalpur.

=====

The State of Bihar.

Versus

.... Appellant.

Abhisekh Kumar, Son of Late Bhola Prasad Chourasia, resident of Barsaliganj, P.S. Mojahidpur (Babarganj), District Bhagalpur.

.... Respondent.

WITH

=====

Criminal Appeal (DB) No. 1171 of 2016

Arising Out of PS.Case No. -129 Year- 2014 Thana -MAUZAHDIPUR District- BHAGALPUR

=====

Abhishek Kumar, Son of Late Bhola Prasad Chourasia, resident of Barsaliganj, P.S. Mojahidpur (Babarganj), District Bhagalpur.

.... Appellant.

Versus

The State of Bihar.

.... Respondent.

=====

Appearance :

(In D. REF. No.3 of 2017)

For the Appellant : Mr. A.K. Sinha, A.P.P.

For the Respondent : Mr. Praveen Kumar, Adv.

Mr. Krishna Mohan, Adv.

(In CR. APP (DB) No.1171 of 2016)

For the Appellant : Mr. Praveen Kumar, Adv.

Mr. Krishna Mohan, Adv.

For the Respondent : Mr. A.K. Sinha, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH
And

HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)

Date: 28-07-2017

A reference under Section 366 of the Code of Criminal Procedure has been made by the learned 1st Additional



Sessions Judge, Bhagalpur for confirmation of death sentence awarded by him in Sessions Trial No.12 of 2015. In the said Sessions Trial, by judgment dated 19.01.2016, he found the accused guilty of offence under Section 302 and 354 of the Indian Penal Code and by order dated 24.10.2016, sentenced him to death for the offence punishable under Section 302 of the Indian Penal Code and, in default of payment of fine, to serve one year more imprisonment. No separate sentence has been passed for offence punishable under Section 354 of the Indian Penal Code. The condemned convict has preferred the connected appeal.

2. The factual matrix of the case is that Mojahidpur P.S. Case No. 129 of 2014 was instituted under Sections 302 and 354 of the Indian Penal Code on the basis of the fardbeyan of the informant Soni Kumari (P.W.9), mother of the deceased, namely, Resham Kumari, with the allegation in brief that her two daughters, namely, Resham Kumari, Shristi Kumari and son Piyush Kumar daily used to go for tuition to Pappu Master. On the fateful day, i.e. on 15.10.2014, as usual, Shristi and Piyush went at 2 PM to take tuition while Resham Kumari went to take tuition at 2:30 PM. Shristi and Piyush regressed to the house at 3 P.M. but Resham did not. Thereafter, she sent Shristi and Piyush to bring Resham from coaching centre as her neighbour Abhishek



- 3 -

used to tease Reshma Kumari and she was scared of him. After half an hour at about 4 PM, informant heard the sound of screaming and when she stepped out of the house, she witnessed Abhishek Kumar (appellant) indiscriminately assaulting Resham Kumari by means of knife. She rushed in her rescue. In the meanwhile, Abhishek left the scene. She further stated that her daughter was lying smeared in blood. She sent her daughter to the hospital where she was declared brought dead. The informant alleged that Abhishek has slit the neck, abdomen, hand and many other places of the person of her daughter resulting into her death.

3. During course of investigation, I.O. collected and seized two knives, blood stained soil and blood sample of accused and sent them to the F.S.L. for its chemical examination and after conclusion of the investigation submitted chargesheet against the appellant under Sections 302, 354 (A) (i) (iv) of the Indian Penal Code and under Section 11 (i) of the Protection of Children from Sexual Offences Act (POCSO Act).

4. On receiving chargesheet, the learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions. On transfer, the case was received by the Court of 1st Additional District and Sessions Judge, Bhagalpur for trial. The charges were framed against the appellant under



Sections 302, 354, 354 (A) (i) (iv) of the Indian Penal Code and under Section 12 of the POCSO Act to which the appellant pleaded not guilty and claimed to be tried.

5. During course of trial, prosecution examined altogether 10 witnesses. It also adduced documentary evidence in support of its case. Statement of the accused appellant was recorded under Section 313 of the Cr.P.C. The case of the defence is complete denial of the occurrence. The defence has not adduced any evidence in support of its case.

6. After perusal of the record and hearing the parties the learned Court below has convicted the appellant- Abhishek Kumar for the offence punishable under Section 302 and 354 of the Indian Penal Code and awarded him capital punishment and also slapped him with fine of Rs.10,000.00 for the offence punishable under Section 302 of the Indian Penal Code and, in default of payment of fine, to serve one year more imprisonment. Being aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence, the appellant has filed this present appeal.

7. The only point for consideration in this case is as to whether the prosecution has been able to bring whom the charge levelled against the appellant beyond reasonable doubt or



not?

8. It has been submitted by the learned counsel for the appellant that as per witnesses' account, the knife blow was given on the stomach and leg of the deceased but the doctor has not found any injury on the said part of the person of the deceased, which creates serious doubt about the credential of the eye witnesses. The seizure list witnesses have not been examined by the prosecution. Bloodstained soil, knives and blood samples were also not produced before the Court. The prosecution has miserably failed to prove its case but the learned Court below has convicted the appellant without any cogent, plausible and convincing evidence. The sentence passed against the appellant is also harsh and against the principle of natural justice, hence the impugned judgment and order of conviction and sentence is liable to be set aside and the appellant is liable to be acquitted.

9. On the other hand, learned A.P.P. vehemently opposing the argument of learned counsel for the appellant and advocating the correctness and validity of the impugned judgment and order of conviction and sentence, has submitted that the learned Court while passing the impugned judgment and order has correctly appreciated the law and the facts involved in the present case and the same is correct, legal, valid and liable to be upheld.



10. From perusal of the records, it appears that out of 10 witnesses examined by the prosecution, P.W.1-Ranjit Sah, P.W.2- Shivam Kumar, P.W.3-Chotu Kumar, P.W.4-Krishna Devi, do not appear to be the eye witness of the occurrence, while P.W.5-Amrendra Kumar is a hostile witness. The material witness of the case are P.W.6-Shristi Kumari, sister of the deceased, P.W.7-Piyush Kumar, brother of the deceased and P.W.9-Soni Devi, mother of the deceased. While P.W.8 is Dr. Atul Kumar Mallick, who conducted the autopsy of the dead body of the deceased and P.W.10-Maheshwar Prasad is the Investigation Officer of the case.

11. As P.W.1 to P.W.4 do not happen to be the eye witnesses of the case, we do not think it necessary to discuss their evidence. P.W.6 has stated in her examination-in-chief that on the date of occurrence, while she and Resham were returning on foot from the coaching, the appellant (Abhishek Kumar) was standing near the shop. As soon as she along with Reshma entered in the lane, Abhishek came and held the hand of Reshma from rear side and asked her as to whether she would love him and on refusal to oblige him, assaulted on the abdomen and neck by means of knife. On sustaining injury, Reshma fell down on the ground. She raised alarm and rushed to Pappu Master. Reshma



died on the spot and Abhishek left the scene.

12. P.W.7-Piyush in his examination-in-chief has stated that on the day of occurrence he and Shristi Kumari (P.W.6) had gone to take coaching. After returning and taking meal, they went to pluck guava. After plucking guava while they were regressing home, they met with Reshma. When they started rushing to their house, a boy was standing near the house of Lachho. The boy caught hold the hand of Reshma and asked her as to whether she loves him and, on refusal by her, he assaulted on the limbs, stomach and neck of Reshma.

13. P.W.9 has stated in her examination-in-chief that Piyush Kumar and Shristi Kumari had gone for coaching to the Pappu Master at 2 PM on the date of occurrence. Reshma went to take coaching at 2:30 PM. After returning from coaching, Piyush and Shristi had gone to play. In the meantime, they saw Reshma Kumari coming out from the coaching. Then all the three children were proceeding to the house together. They saw Abhishek Kumar (appellant) standing near the grocery shop. When they turned towards the lane, in the meantime, Abhishek caught hold Reshma Kumari from rear side and asked Piyush and Shristi to leave the place else to face dire consequences. Piyush and Shristi then hid themselves near wall and witnessed the



occurrence. Abhishek slit the neck of Reshma and gave dagger blow on her hand and stomach. She made alarm. She also rushed there and witnessed Abhishek assaulting Reshma. After sustaining injuries she fell on the ground. They rushed her to the hospital where the doctor declared her brought dead. Her fardbeyan was recorded by the I.O. in the hospital.

14. From perusal of aforesaid statement of witnesses and their cross-examination, we find that nothing convincing and cogent has been elicited in their cross-examination, having potential to shatter the prosecution case and rule out the presence of the aforesaid witnesses in the vicinity of the place of occurrence and witnessing the occurrence by them. Out of the aforesaid witnesses, P.Ws.6 and 7 happens to be child witnesses. They are brother and sister of the deceased while P.W.9 is the mother of the deceased. Though they happen to be interested witnesses of the case but only being interested and partisan witness, their testimony is not liable to be discarded out rightly, rather it should be scanned and scrutinized cautiously and minutely. On scanning and scrutinizing the testimony of the aforesaid witnesses cautiously, we do not find any material contradiction in it having potential to disbelieve it. No doubt some contradictions have cropped up in their testimony, but the



same happens to be minor in nature and not material contradiction. Such contradictions are bound to happen in the testimony of natural witnesses as the power of perceiving, retention and reproduction of certain fact varies from man to man and it is also effected by passage of time as the occurrence is of October, 2014 and the evidence of the aforesaid witnesses have been recorded in the month of July, 2015, September, 2015 and January, 2016 respectively, i.e. after long span of time of around ten months and more.

15. P.W.8 – Dr. Atul Kumar Mallick, who has conducted the autopsy of the dead body of the deceased, has found several ante-mortem injuries as incised wound on the neck and limbs of the deceased. The cause of death has been opined by the doctor as hemorrhage and shock. Thus, the aforesaid medical evidence also corroborates the prosecution case. Though as per the witnesses account, a dagger blow was given by the appellant on the stomach of the deceased, but doctor has not found any injury on the stomach of the deceased. Thus, in our considered opinion not finding any injury on the stomach of the deceased by the doctor is not very material and is also not going to shatter the prosecution case as the incised wound on the neck and limbs of the person of the deceased as found by doctor is sufficient to lead



to hemorrhage and shock resulting into the death of the deceased.

16. P.W.10-Maheshwar Prasad, the Investigating Officer of the case, has recorded the further statement of the informant and statement of the witnesses and has also proved the place of occurrence. Though as per prosecution case in his statement he has stated that he had collected bloodstained soil, blood sample of the appellant and bloodstained knife and sent the same to the F.S.L. for its chemical examination but the F.S.L. report has not been produced in the Court. Non production of the F.S.L. report before the Court, in our considered opinion, happens to be the fault of the Investigating Officer and consistent evidence of the prosecution cannot be discarded mere on the ground of faulty investigation of the I.O.

17. Under the aforesaid facts and circumstances of the case and the evidence of the prosecution as made hereinabove, we find and hold that the prosecution has substantiated its case against the appellant by adducing cogent, convincing and consistent evidence and the appellant has been rightly convicted under Sections 302, 354 (A) (i) (iv) of the Indian Penal Code and under Section 11 (i) of the Protection of Children from Sexual Offences Act (POCSO Act). We do not find any illegality or impropriety in the impugned judgment and order of



sentence warranting interference by this Court.

18. So far as the sentence awarded to the appellant is concerned, in our considered opinion, as the appellant has committed murder of a teenage girl when she refused to accept the offer of his love and marry with him, it does not come in the purview of the rarest of the rare cases. Accordingly, the capital punishment of the appellant is commuted to the life imprisonment, which would subserve the ends of justice.

19. With the aforesaid modification in the sentence, this appeal is hereby dismissed.

(Prakash Chandra Jaiswal, J.)

Samarendra Pratap Singh, J.

(Samarendra Pratap Singh, J.)

Trivedi/-

AFR/NAFR	A.F.R.
CAV DATE	22.06.2017
Uploading Date	31.07.2017
Transmission Date	31.07.2017

