

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 735 of 2011

=====

Santosh Sah @ Santosh Kumar Sah son of late Saryug Sah resident of village-
Chapriya, P.S. - Bisfi, District – Madhubani.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

with
Criminal Appeal (DB) No. 820 of 2011

=====

Yogendra Pandit son of Uchit Pandit resident of Village - Chapariya , P.S. -
Bisfi, District - Madhubani.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

Appearance :

(In Criminal Appeal (DB) No. 735 of 2011)

For the Appellant : Mr. Devendra Kumar Sinha, Sr.Adv.
Mr. Girish Chandra Jha, Adv.

For the State : Mr. Ajay Mishra (APP)

(In Criminal Appeal (DB) No. 820 of 2011)

For the Appellant : Mr. Nilesh Kumar, Amicus Curiae

For the State : Mr. Ajay Mishra (APP)

=====

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 27-07-2018

1. In aforesaid both appeals, both appellants were convicted and sentenced in one trial i.e. Sessions Trial No. 427 of 2007 and as such, both the appeals were taken-up together and are being disposed of by this common judgment.

2. We have heard Sri Devendra Kumar Sinha, learned senior counsel assisted by Sri Girish Chandra Jha, learned



counsel for the appellant (in Cr.Appeal DB No. 735/11) and Sri Nilesh Kumar, learned counsel as *Amicus Curiae* in Cr. Appeal (DB) No. 820 of 2011. It may be indicated that earlier, Sri Nilesh Kumar had filed *vakalatnama* on behalf of the appellant (Yogendra Pandit) in Cr.Appeal (DB) No. 820/11, however; on the first date when this appeal was taken up for hearing i.e. on 24-07-2018, he informed the Court that his client had already taken back brief, however no fresh *Vakalatnama* on his behalf has been filed nor anyone appeared. Considering the aforesaid fact that the appeal was pertaining to an occurrence, which had taken place long back in the year 2007, and appeal itself was of the year 2011, we thought it proper not to adjourn the appeal and instead, we requested Sri Nilesh Kumar, learned counsel to assist the Court, as *Amicus Curiae* and thereafter, he has placed the matter on behalf of the appellant (Yogendra Pandit) in Cr.Appeal (DB) No. 820/11. Sri Ajay Mishra, learned Addl. Public Prosecutor has appeared on behalf of the State in both the appeals.

3. Both the appellants were tried together in Sessions Trial No. 427 of 2007 (arising out of Bisfi P.S. Case No. 4 of 2007). Both have been convicted by judgment of conviction



dated 08-07-2011 for commission of offence under Sections 302, 201, 376(2)(g) of the Indian Penal Code, 1860 (hereinafter referred to as "I.P.C."). By order dated 15-07-2011, both were sentenced to undergo rigorous imprisonment for life for offence under Section 302 of the I.P.C. and to pay a fine of Rs. 25,000/- (twenty five thousand) each and in default of payment of fine, it was directed to further undergo rigorous imprisonment for six months. For offence under Section 376(2)(g) of the I.P.C., both were sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 5,000/- (five thousand) each and in default of payment of fine, they were directed to further undergo rigorous imprisonment for three months. For offence under Section 201 of the I.P.C., they were directed to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5,000/- (five thousand) each and in default of payment of fine, they were further directed to undergo rigorous imprisonment for three months. The judgment of conviction and sentence was passed by Sri Devendra Prasad Kishri, learned Additional Sessions Judge (Fast Track Court No. 1), Madhubani (hereinafter referred to as 'Trial Judge') in Sessions Trial No. 427 of 2007. After the conviction and sentence, both the



appellants have preferred aforesaid appeals. The appeal filed by Santosh Sah @ Santosh Kumar Sah, vide Cr.Appeal (DB) No. 735/11, was admitted on 03-08-2011 and on the same date, his prayer for bail was rejected and till date, he is in custody. So far as appeal of Yogendra Pandit i.e. Cr.Appeal (DB) No. 820/11 is concerned, it was admitted on 08-09-2011, however; by order dated 13-05-2014 passed by a Division Bench of this Court, this appellant was directed to be released on bail and he is still continuing on bail.

4. Short fact of the case is that on 09-01-2007 at 9.00 hrs. (9:00 AM) Sub-Inspector of Police Abdul Torab (P.W.15) recorded *fardbeyan* of Harihar Pandit (P.W.10) of Village Chapariya, P.S. – Bisfi, District – Madhubani. The *fardbeyan* was recorded near Makhnaha Baandh at brick kiln (ईंट भट्ठा) of one late Lalu Sao, which was closed since long. The *fardbeyan* was recorded in front of dead body of cousin sister of informant namely Suratiya Kumari aged about 15-16 years. In the *fardbeyan*, he disclosed that the father of deceased had already died and she was having five brothers. Two brothers were doing some work in Delhi and three younger brothers were residing there itself. The informant disclosed that on 08-01-2007 in



afternoon at about 3:00 PM Suratiya Kumari (deceased) had gone to pluck spinach and to see grain in the field in Makhnaha *bandh*. In the evening, she had handed over plucked spinach to informant's daughter-in-law namely Basmati Devi (P.W.9), who was already present in field. The deceased, while handing over spinach, had asked Basmati Devi (P.W.9) to supply the same to her mother and she disclosed that she will return back after examining the field. Since in night she did not return, the informant with his family members started searching and in late night they returned back, however, they could not get any trace of the victim. On 09-01-2007 in the morning, again informant with his family members started searching Suratiya Kumari and while they reached in brick kiln of late Lalu Sao, which was closed since long in Makhnaha *baandh*, they saw the dead body of Suratiya Kumari. On her body and face, there were number of injuries given by incised/penetrating weapon and she was done to death by such injury. The informant stated that on examining the dead body, it appeared that some unknown persons with bad intention had taken away her to a different place, on objection being raised, they killed her by sharp cutting weapon and with a view to conceal the evidence, the dead body



was kept in brick kiln. The said brick kiln was about 1 km west-north direction of his village and it was lonely place. He further stated that about 200 yards away from the brick kiln, the agriculture field was trampled. The victim had gone there to see the crops. The informant put his signature on *fardbeyan* and on the basis of *fardbeyan* of Harihar Pandit, on 09-01-2007 at 11:30 AM, a formal F.I.R., vide Bisfi P.S. Case No. 4 of 2007, was registered for offence under Sections 302, 201, 34 of the I.P.C. against unknown. After registering F.I.R., police started investigation and during investigation, on 16-01-2007, both the appellants were arrested and thereafter, on 13-04-2007 chargesheet under Section 302, 376(g), 201, 34 of the Indian Penal Code was submitted against both the appellants i.e. Yogendra Pandit (appellant in Cr.App.DB No. 820/11) and Santosh Sah (appellant in Cr.App.DB No. 735/11), however; investigation in respect of other accused namely Sudhir Mandal, Ganesh Mandal and Ramchandra Mandal was kept open. After submission of chargesheet, on 20-04-2007, learned Chief Judicial Magistrate, Madhubani took cognizance of the offence and case was committed to the court of sessions on 04-05-2007. Thereafter, on 14-09-2007, charges were jointly framed against



both appellants for offence under Sections 302, 376(g) and 201 of the I.P.C.

5. To prove its case on behalf of the prosecution, altogether 15 following witnesses were examined:-

P.W.1 Ram Chandra Yadav
P.W.2 Rajendra Pandit
P.W.3 Kiran Devi
P.W.4 Nathuni Sah
P.W.5 Deo Narain Pandit
P.W.6 Shiv Shankar Pandit
P.W.7 Upendra Pandit
P.W.8 Supli Devi
P.W.9 Basmati Devi
P.W.10 Harihar Pandit (informant)
P.W.11 Sri Suresh Kumar Singh (Judl. Magistrate)
P.W.12 Jai Narain Prasad (I.O.)
P.W.13 Dr. Ajay Narain Prasad
P.W.14 Dr. (Smt.) Rama Jha
P.W.15 Abdul Torab

In the case, none of the witnesses was examined as eye-witness, however; most of the witnesses have come forward to state that both the appellants had made confessional statement before the police, in which, they accepted their guilt. So far as appellant Yogendra Pandit (in Cr.App.DB No. 820/11) is concerned, his confession under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') was also got recorded.

6. P.W.1 Ram Chandra Yadav, P.W.3 Kiran Devi, P.W.4 Nathuni Sah, P.W.5 Deo Narain Pandit, P.W.6 Shiv Shankar



Pandit and P.W.9 Basmati Devi are co-villager and most of those witnesses have stated that after they heard that even after sunset the victim had not returned, they alongwith informant and others had gone for searching the victim and search was made till late night. Since the victim was not traced they returned back in the night. Again in the morning, the witnesses went for searching the victim, thereafter the dead body of the victim was found near the brick kiln. Those witnesses have also stated regarding confession made by accused persons before the police.

7. P.W.2 Rajendra Pandit was the brother-in-law of deceased. P.W.5 Upendra Pandit cousin brother of the deceased, P.W.8 Supli Devi mother of the deceased and P.W.10 Sri Suresh Kumar Singh, learned Judicial Magistrate had recorded confessional statement of appellant Yogendra Pandit (in Cr.App.DB No. 820/11). This witness has proved the confessional statement recorded under Section 164 of the Cr.P.C. in respect of appellant Yogendra Pandit, which was marked as Ext. 1/9. He also proved his own signature on the said confessional statement, which was marked as Ext.1/10 and



he too proved the signature of appellant Yogendra Pandit on the confessional statement , which was marked as Ext. 1/11.

8. P.W.13 Dr. Ajay Narain Prasad was one of the member of the medical board, who conducted *post-mortem* examination on the dead body of deceased and he proved the *post-mortem* report, which was marked as Ext. 9.

9. P.W.14 Dr. (Smt.) Rama Jha was another member of the medical board in respect of conducting *post-mortem* examination and she proved her signature on the *post-mortem* report, which was marked as Ext. 9/1. She further proved signature of Dr. Ajay Narain Prasad (P.W.13), which was marked as Ext. 9/2.

10. P.W.15 Abdul Torab, Sub-Inspector of Police, who has recorded *fardbeyan*, initially investigated the case and on the same date i.e. on the date of recording formal F.I.R. after examining some of the witness had handed over investigation to Sri Jay Narain Prasad (P.W. 12), the officer incharge of Bisfi Police Station and he is the main investigating officer of the case.

11. After conclusion of the prosecution evidence, statement of both appellants under Section 313 of the Cr.P.C.



was recorded, in which, they claimed to be innocent and both appellants have said that only on blank paper their signature was obtained and they also claimed to lead defence evidence. In the case, during trial, in view of provision contained in Section 315 of the Cr.P.C., on request of both the appellants, they were allowed to be examined as defence witness. Appellant Yogendra Pandit was examined as D.W.1 and appellant Santosh Sah was examined as D.W.2. Besides them, other two persons namely Md. Soeb and Brij Lal Singh were examined as D.W.3 & D.W.4 respectively.

12. Sri Devendra Kumar Sinha, learned senior counsel as well as Sri Nilesh Kumar, learned *Amicus Curiae*, after placing entire evidence, have argued that it was case of no evidence, however; by way of forcible confessional statement, both were held guilty and sentenced. It has been argued that it is true that through confessional statement, it was shown that certain relevant articles were recovered, but fact remains that recovered articles were not having any connection with the crime in question and as such, their confessional statement may not be treated as an exception, in view of Section 27 of the



Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act').

13. Sri Devendra Kumar Sinha, learned senior counsel has further argued that though F.I.R. was lodged against unknown and there was nothing to raise any suspicion against both the appellants, surprisingly without any rhyme and reason firstly Yogendra Pandit (appellant in Cr.App.DB No. 820/11) was apprehended and it was shown that he made confession before the police and in his confession, he confessed, as if, he was having love affair with the deceased and on the date of occurrence in the evening, with the consent, firstly in the field both had enjoyed sex and thereafter, he went to attend natural call, in the meanwhile, appellant Sanosh Sah (in Cr.App.DB No. 735/11) with other three accused persons arrived and captured this appellant (Yogendra Pandit) and on threat, this appellant (Yogendra Pandit) was compelled to tie mouth and hands of the deceased and thereafter, repeatedly all the accused persons committed rape and this appellant (Yogendra Pandit) was also forced to commit rape on the deceased. Almost, similar confession was obtained in respect of Santosh Sah (appellant in Cr.App.DB No. 735/11) to show, as if, there was consistency in



the confession of appellant Santosh Sah and appellant Yogendra Pandit. Sri Sinha, learned senior counsel has further submitted that there is inconsistency in the evidence of witnesses as to at which place confessional statement of the appellants was recorded. He submits that some of the witnesses have stated, as if, confession was recorded near the police station and some of the witnesses have stated, as if, confession was recorded on the raised land near a pond of the village. It has been argued that though, it was claimed by the prosecution witnesses that the appellants had confessed leading to recovery of certain articles, such as; knife and cloths with blood mark, in chemical examination by Forensic Science Laboratory, no blood mark was found on the knife allegedly shown to be recovered from the house of one of the appellants. It has emphatically been argued that even though none had seen the occurrence, a case was made out that both the appellants confessed. In confession, it was disclosed, as if, the victim was gang-raped by the appellants and other three accused and thereafter, she was done to death, however; during *post-mortem* examination, the prosecution case is completely silent on one part i.e. relating to rape. By way of referring to evidence of P.W.13 & 14 with Ext.



9 i.e. Post Mortem Report, it has been argued that on the person of the deceased, incised and penetrating injuries were found, but no sign of rape was found on the person of the deceased. Neither any external injury nor internal injury on the private part of the victim was noticed by the doctor conducting *post-mortem* examination. It is case of the prosecution that occurrence had taken place in the evening of 08-01-07 and *post-mortem* was held only on the next date i.e. on 09-01-07 at 4:20 PM i.e. within 24 hrs. of the alleged occurrence, in pathological examination too, no sign of rape was noticed, rather old rapture of hymen was noticed by the doctor. Sri Sinha, learned senior counsel submits that the *post-mortem* examination report Ext. 9 itself demolishes entire case of the prosecution, since on the dead body no sign of rape was found. It has been argued that once the case had proceeded and established only on the basis of one part of confession, there was no reason to hold appellants guilty ignoring the second part of the confession. He submits that confession depicts that the victim was firstly gang-rapped and thereafter, she was done to death, however; Ext. 9 i.e. *post-mortem* report as well as evidence of P.W.13 & 14 is very much specific that no rape was



committed on the victim and as such, the learned Trial Judge has committed serious error in passing judgment of conviction mainly on the basis of confessional statement.

14. Sri Sinha has further argued that though there was no iota of evidence against either of the appellants, but immediately when they were arrested and so called confessional statement was extracted, the investigating officer had put certain words into mouth of P.W.3 Kiran Devi, as if, in the evening while after taking spinach from the hand of the victim, when she was returning near the village she had noticed appellant Santosh Sah alongwith three others, as if, they were going towards *baandh* side. According to learned senior counsel, those stories were developed subsequently with a view to corroborate the so called confessional statement and fixed both the appellants, as if, they were only culprits in the occurrence.

15. Learned senior counsel has further argued that even confessional statement of appellant (Yogendra Pandit in Cr.App.DB No. 820/11) recorded under Section 164 Cr.P.C. was not required to be relied upon, since his confession under Section 164 Cr.P.C. was recorded while he was in custody and he was produced by the police before the Magistrate. In the



evidence of D.W.1 (Yogendra Pandit appellant in Cr.App.DB No. 820/11), it has come that he was initially beaten by the police and he was threatened to make confession as per dictate of the police and under fear, he made confession before the learned Magistrate. However, after he was sent to the judicial custody, immediately he retracted to his confessional statement and sent a letter through Jail Superintendent, addressed to the court, in which, it was claimed that by adopting forcible act, his confessional statement was got recorded. On aforesaid facts and circumstances, it has been argued that even though, it could not be a case of clean acquittal, the appellants are entitled to be given benefit of doubt.

16. Sri Ajay Mishra, learned Addl. Public Prosecutor has vehemently opposed the appeals on the plea that both the appellants were convicted for commission of heinous offence. He submits that in this case, a minor girl was forcibly raped by about five accused persons including the appellants and after committing rape, she was brutally murdered and her dead body was thrown near a brick kiln. By way of referring to evidence of P.W.3 Kiran Devi, he submits that this witness was also in the field alongwith P.W.9 Basmati Devi and in the evening after



collecting spinach while they were returning, the victim handed over the spinach for handing over to her mother and she said that she will come later. P.W.3 Kiran Devi further disclosed that while they were returning and reached near the village they noticed appellant Santosh Sah (in Cr.App.DB No. 735/11) alongwith other three accused persons moving towards *baandh* side. It was suggested that the evidence of P.W.3 corroborates the confession of the accused persons. According to Sri Mishra, it was not only confession before the police or before the learned Magistrate, but confession was extra-judicial confession, since confession of both the appellants was made in presence of almost all the witnesses. He further submits that first confession of Yogendra Pandit (appellant in Cr.App.DB No. 820/11) had led to recovery of knife, which was used in the offence and also clothes. He submits that as disclosed by the appellant (Yogendra Pandit), the knife was found beneath bed of appellant Yogendra Pandit and as such, seizure list was also prepared. He submits that it is true that confession before the police has got no evidentiary value, but if confession leads to recovery of certain facts, such fact is required to be relied upon, in view of Section 27 of the Evidence Act. According to learned



Addl. Public Prosecutor, almost all the witnesses are consistent on the point that both the appellants themselves voluntarily confessed showing their involvement in the crime and as such, on the basis of confessional statement of the appellants itself, the judgment of conviction and sentence may not be interfered with.

17. Besides hearing learned counsel for the parties, we have minutely examined the evidence, both oral and documentary. Before proceeding, it would be necessary to firstly examine as to what informant has deposed during trial.

18. The informant was examined in the case as D.W.10. In his evidence, he has proved his signature on the *fardbeyan*, which was marked as Ext. 1/8. He is also witness to the inquest report and his signature was marked as Ext. 1/9. In his evidence, he deposed that deceased Suratiya Kumari was his cousin sister. He stated that on the date and time of occurrence, she had gone to see the field and after plucking spinach she had handed it over to Basmati Devi (P.W.9) for handing over the same to her mother. However, thereafter she did not return and as such, the informant with others started searching. On the same night, she could not be traced, however; on the next date, in the morning



at 5:00 AM he again started searching for the victim and thereafter, the dead body of the victim was found near the brick kiln of late Lalu Sao and he noticed knife injuries on the body of the deceased. Thereafter, the police arrived there and recorded his *fardbeyan*. At the place of occurrence itself, inquest report was also prepared and he put his signature both on *fardbeyan* and inquest report. In paragraph – 7 of his evidence, he stated that one week after the occurrence the police had arrested Yogendra Pandit (app. in Cr.App.DB No.820/11) and Santosh Sah (app. in Cr.App.DB No. 735/11). Appellant Yogendra Pandit had confessed regarding his involvement in the occurrence and on the basis of his confession, knife, blood-stained T-shirt and full pant were recovered. From the house of appellant Santosh Sah, the police recovered two mobiles and one brown colour shirt, for which seizure list was prepared. In paragraph 11 of his cross-examination, he has further stated that in evening when he had gone for searching Suratiya, appellant Santosh Sah was also with them and he also searched her till 12:00 night. In paragraph 13 of his cross-examination, he stated that Santosh Sah was arrested by the police from his betel shop and thereafter, he was carried to police station. From the house



of Santosh Sah (app. in Cr.App.DB No. 735/11), there was seizure of one *lungi* and blood stained shirt. In paragraph 15 of his cross-examination he further stated that Santosh was running betel shop since last 10 years and this is the reason that his cloth wears the mark of *katha*. He further stated that confession was made by accused persons in his presence.

19. P.W.1 Ram Chandra, P.W.2 Rajendra Pandit have also stated almost in similar manner, however; P.W.3 Kiran Devi, though stated like other witnesses, has further stated that on the date of occurrence while she was returning she had seen Santosh (app. in Cr.App.DB No. 735/11) and other accused persons while they were moving towards *baandh* side.

20. P.W.4 Nathuni Sah is the co-villager and he has proved his signature on Ext.1 i.e. seizure list of articles recovered from the possession of appellant Yogendra Pandit. He has also proved his signature on Ext. 1/1 i.e. seizure list in respect of recovery of articles from the room of appellant Santosh Sah.

21. P.W.5 Deo Narain Pandit has proved his signature on the seizure list, which was prepared in respect of seizure of *salwar* of the victim as well as blood soaked soil from the place



where dead body was found. He also proved signature of appellant Yogendra Pandit on his confessional statement before the police, which was marked as Ext. 1/4 and his signature on confessional statement of Santosh Sah, which was marked as Ext. 1/3.

22. P.W.6 Shiv Shankar Pandit has proved his signature on seizure list relating to seizure of cloth of victim and blood soaked soil. He is also witness to the confessional statement of both the appellants and he proved his signature on confessional statement of appellant Santosh Sah (in Cr.App.DB No. 735/11), which was marked as Ext. 1/7 and confessional statement of appellant Yogendra Pandit (in Cr.App.DB No. 820/11), which was marked as Ext. 1/6.

23. P.W.7 Upendra Pandit was the cousin brother of the deceased and he too has stated in the similar manner as other witnesses have stated regarding search of the victim, recovery of the dead-body and confession of the accused persons.

24. P.W.8 Supli Devi, mother of the deceased, has deposed that since in the evening of the date of occurrence, victim had not returned, she alongwith Upendra Pandit (P.W.7), Harihar Pandit (P.W.10, informant), Shiv Shankar Pandit



(P.W.6), Deo Narain Pandit (P.W.5) had gone for searching the victim and on the next date she found the dead body. She stated in paragraph – 4 of her evidence that *salwar* of the dead-body was open and upper cloth was also pushed upward side.

25. P.W.9 Basmati Devi, in her evidence, has stated almost like Kiran Devi (P.W.3), however; she has not stated as to whether she had seen Santosh (app. in Cr.App.DB No. 735/11) and other accused persons near the village in the evening of the date of occurrence.

26. Sri Suresh Kumar Singh, learned Judicial Magistrate, Madhubani, who recorded confessional statement of appellant Yogendra Pandit, was examined as P.W.11 and he has proved the confessional statement of appellant Yogendra Pandit (Ext.1/9). He also proved his signature on the confessional statement of appellant Yogendra Pandit recorded under Section 164 Cr.P.C., which was marked as Ext. 1/10 and signature of appellant Yogendra Pandit on the confessional statement which was marked as Ext. 1/11. P.W.11 on 17th January, 2007 was posted as Judicial Magistrate 1st Class, Madhubani Civil Court and on the same date, as per direction of learned Chief Judicial Magistrate, Madhubani, he had recorded statement of appellant



Yogendra Pandit under Section 164 Cr.P.C. He stated that the accused was produced from judicial custody. On examination of Ext. 1/9 i.e. confessional statement of appellant Yogendra Pandit recorded under Section 164 Cr.P.C., this fact is evident that before recording his confessional statement, appellant was not given time to think over the matter. It appears that immediately after his production, he recorded his confessional statement. Even certification with regard to fact that there was every possibility to use of confession against him, that was not recorded prior to recording confession under Section 164 Cr.P.C., rather in the bottom of Ext. 1/9 i.e. confessional statement recorded under Section 164 Cr.P.C., such certificate has been granted.

27. *Prima facie*, this confessional statement i.e. Ext. 1/9 appears to be not acceptable due to violation of certain mandatory provision. It is settled that if an accused is produced before the learned Magistrate for recording confessional statement under Section 164 Cr.P.C., before recording his confession, it is required on the part of the learned Magistrate to explain that if accused makes such statement, it may be used against him. He is also required to be satisfied that the



confessional statement is being recorded without any threat and such confession is voluntary. Even in that situation, it is necessary to grant sufficient time to the accused before recording confession to think over the matter and only then, confession is required to be recorded. However, on examination of evidence of P.W.11 as well as examination of confessional statement i.e. Exhibit 1/9, we are satisfied that no such requirements were fulfilled and as such, much reliance is not required to be placed on such confession.

28. Dr. Ajay Narain Prasad, who was posted as Deputy Superintendent, Sadar Hospital, Madhubani on 09-01-07, was examined as P.W.13 and he was one of the member of the Medical Board, who conducted *post-mortem* examination on the dead body of deceased. The other members of the Medical Board were Dr. Pashupati Nath Prasad (not examined) and Dr. (Smt.) Rama Jha (P.W.14). On 09-01-2007 at 4:20 PM, the *post-mortem* examination on the dead body was done in his presence and supervision by Dr. Pashupati Nath Prasad and he had noticed following facts:-

- “1. An incised wound on the right cheek 1” x ½” x Muscle deep.
2. An incised wound on the right side of left of Neck 1” x ½” x Muscle deep.



3. An incised wound on the right Breast 1/7" x 1/3" x Muscle deep.

4. A stab wound on the left side of ant. surface of chest 3/4" x 1/2" x thoracic cavity deep.

5. An incised wound on the left Breast 1" x 1/2" x Muscle deep.

6. An incised wound on the ant. surface of abdomen along midline 3" x 1/2" x Abdominal cavity deep.

7. An incised wound on the right side of Neck 1" x 1/2" x muscle deep cutting the carotid blood vessel.

8. An incised wound on the left side of face extending from the left angle of mouth to posteriority 2 1/2" x 1/2" x mouth cavity.

Time since death – Within 24 hours (Twenty Four Hours)

Death in our opinion was due to Haemorrhage & Shock as a result of above-noted injuries caused by sharp cutting weapons. We cannot conclude whether Rape was done or not."

The post-mortem examination report was marked as Ext.9.

29. The first investigating officer i.e. P.W.15 Abdul Torab, who was Sub-Inspector of Police, had recorded *fardbeyan* of informant, which was again marked as Ext. 1/10, whereas, it was already marked as Ext.2. He also proved inquest report, which was marked as Ext.11. This witness has stated that he after recording *fardbeyan* of the informant had also recorded statement of some witnesses, but on the same date i.e. on 09-01-2007, he had handed over charge of investigation to P.W.12 Sri Jai Narain Prasad, officer incharge of Bisfi Police Station. He (P.W.15) deposed that on 09-01-2007 at 8:30 in the



morning, he received information that one dead body of unknown person was lying near the *baandh* in old brick kiln in Chapariya village. Thereafter, recording station diary entry no. 141 dated 09-01-07, he, to verify the fact, proceeded to the place of occurrence and at the place of occurrence, he recorded *fardbeyan* of Harihar Pandit. He also inspected the place of occurrence. In the case, he described there were two place of occurrence. One place of occurrence, from where, dead body was recovered and he also noticed some trampled field area. He has described about the description and finding of the dead body in paragraph – 2 of his evidence. He noticed that the dead body was wearing injury caused by sharp-cut weapon. On the certain wearing of the deceased i.e. *salwar*, he noticed some mark like of semen and he noticed that *salwar* of the deceased was pushed downward. He also seized blood-soaked soil from there. About 200 yard away from the first place of occurrence, he had noticed that in the southern side of field of Harihar Pandit, about 6 feet area was trampled. He prepared inquest report, which was marked as Ext. 11. In presence of witnesses, he also prepared the seizure list in respect of seizure of *salwar* and blood soaked soil. Thereafter, on the same date, he recorded



re-statement of the informant (P.W.10) and also statement of some witnesses namely Rajendra Pandit (P.W.2), Shiv Shankar Pandit (P.W.6) etc. and on the same date, he handed over charge of investigation to P.W.12 Jai Narain Prasad.

30. P.W.12 Jai Narain Prasad was at the relevant time officer incharge of the Bisfi Police Station and he proved *fardbeyan*, which was marked as Ext.2, his endorsement on fardbeyan marked as Ext.2/1, formal F.I.R. marked as Ext.3, inquest report marked as Ext.4, seizure list relating to *salwar* of deceased and blood soaked soil as Ext.5, confessional statement of appellant Santosh Sah Ext.6, seizure list of recovered articles from the house of appellant Yogendra Pandit Ext.7, seizure list of articles recovered from the house of appellant Santosh Sah Ext. 7/1 and also C.D.R. in respect of mobile no. 9835250652 and 9430084593, which was marked 'X' for identification. This investigating officer has also proved F.S.L. reports, which were marked as Ext.8, 8/1 and 8/2. It is relevant to notice that this witness had shown to seize a knife purported to be having mark of blood from the house of appellant Yogendra Pandit, which was marked as material Ext.5. In F.S.L. report, no blood mark was found on the said knife. He has also proved material exhibit



i.e. *salwar* with mark of semen material Ext. 1, half pant as material Ext. 2, however regarding these articles, there is no whisper in the evidence of either of the witnesses. Material Ext. 3 relating to jeans full pant, which was shown with soil and blood. Material Ext.4 and 4/1 in respect of recovery of two mobiles from appellant Santosh Sah. Material Ext.3/1 full pant, which was cut at very place, recovered from appellant Yogendra Pandit. Material Ext.6 *Lungi* with blood mark recovered from the possession of appellant Santosh and material Ext.7 regarding recovery of full pant, T-shirt from appellant (Yogendra Pandit). Material Ext.8 one *ganji* with stained mark recovered from appellant Yogendra Pandit and material Ext.9 full shirt with blood mark from appellant Santosh Sah.

31. However, on examination of his entire evidence, it is clear that cloths, particularly *salwar* of the victim, which was shown to be recovered and seized, were neither sent for their chemical examination to the F.S.L. nor any report from F.S.L. in respect of said cloth was brought on record during the trial. Ofcourse, in F.S.L. report i.e. pertaining to recovery of knife, though it was case of prosecution that on edge of the knife at the time of recovery there was some blood mark, same was not



noticed during chemical examination in the report of the Forensic Science Laboratory. However, F.S.L. report i.e. Ext. 8/1 and 8/2 suggest that those articles were having blood mark. However, prosecution was not having any occasion to connect the blood mark found on the seized articles with blood mark of the victim and in absence of any such cogent material, it would be difficult to come to a definite conclusion that cloths, which were shown to be recovered from both the appellants, were having blood stain of the deceased itself and as such, recovery of those articles may not be considered as recovery of fact relating to commission of the crime in the present case. If recovery part is ignored, there is no reason to place any reliance on confessional statement of either of the appellants, which were made before the police under Section 161 Cr.P.C., since it is barred in view of Section 25 and 26 of the Evidence Act.

32. On minute examination of entire evidence, it is difficult to conclude that the confessional statement of both the appellants was sufficient to come to a conclusion of their involvement in the present case. The reason is very simple. It is case of the prosecution that both the appellants had confessed that in the occurrence, firstly they committed gang-rape with the



victim and thereafter, the victim was done to death. Accordingly, the confessional statement is in two part. First commission of rape and secondly, commission of murder. The medical evidence i.e. *post-mortem* report, which was prepared by a medical team consisting of three doctors, in respect of rape creates serious doubt on the prosecution case, since no sign of rape was noticed on the deadbody of victim. However, one part of confession relating to murder was substantiated since on the dead-body, multiple incised injury was noticed. Now question is as to whether in a confession, which is halfly true and halfly untrue, whether on such confession, conviction of the appellants can be approved or not. We are of the opinion that certainly if the prosecution case is based purely on confessional statement, such confession may not be relied upon for approving the conviction and sentence of the appellants.

33. It is evident that the occurrence was not seen by any of the witnesses. It is also not a case of the prosecution that on the date of occurrence itself, any of the witness has come forward to say that appellant Santosh (in Cr.App.DB No. 735/11) with other accused persons were seen with deceased. Only one witness i.e. P.W.3 Kiran Devi has come forward to say



that she had seen in the evening of the occurrence that Santosh with other accused persons were proceeding towards *baandh*. However, on examination of the record, it is evident that this witness (P.W.3) had made statement under Section 161 Cr.P.C. relating to this fact only after both the appellants were arrested and their confessional statement was extracted by the police and as such, it is difficult to rely that at least one of the appellant i.e. Santosh (appellant in Cr.App.DB No. 735/11) was seen near the place of occurrence. The whole case of the prosecution is based on the theory of the confessional statement. Since confessional statement though introduced, as if, confession had led recovery is itself not believable as well as confessional statement of one of the accused i.e. Yogendra Pandit (appellant in Cr.App.DB No. 820/11) recorded under Section 164 Cr.P.C. itself appears to be in conflict with the statutory provision, certainly there is no other evidence to connect the appellants in the present case.

34. In view of aforesaid facts and circumstances, we are of the opinion that prosecution has not been able to establish its case beyond all reasonable doubt. Accordingly, by way of extending benefit of doubt, the Judgment of conviction and sentence dated 08-07-2011 and 15-07-2011 respectively passed



in Sessions Trial No. 427 of 2007 (arising out of Bisfi P.S. Case No. 04 of 2007) by Sri Devendra Prasad Keshri, learned Additional Sessions Judge (Fast Track Court No. 1), Madhubani is hereby set aside and both the appeals i.e. Cr.Appeal (DB) No. 735 of 2011 and Cr.Appeal (DB) No. 820 of 2011 are allowed.

35. The appellant Santosh Sah @ Santosh Kumar Sah (in Cr. Appeal (DB) No. 735 of 2011) is in custody and as such, after the appeal is allowed, it is, hereby, directed to release him forthwith, if not required in any other case.

36. So far as appellant Yogendra Pandit (in Cr. Appeal (DB) No. 820 of 2011) is concerned, he is on bail and as such, in view of the fact that appeal has been allowed, he is discharged from the liability of his bail-bond.

(Rakesh Kumar, J.)

(Arvind Srivastava, J.)

anay

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	03.08.2018
Transmission Date	03.08.2018

