

IN THE HIGH COURT OF JUDICATURE AT PATNA
Death Reference No. 9 of 2017

Arising Out of PS. Case No.-433 Year-2014 Thana- Hilsa District- Nalanda

The State of Bihar

... .. Petitioner

Versus

Rohan Bind

... .. Respondent

with

Criminal Appeal (DB) No. 20 of 2018

Arising Out of PS. Case No.-433 Year-2014 Thana- Hilsa District- Nalanda

Rohan Bind, Son of Sri Rajgir Mahato @ Rajgir Bind, Resident of village-Beram Tola Beldaria, P.S.- Gaurichak, District- Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In Death Reference No. 9 of 2017)

For the Petitioner/s : Mr.

For the Respondent/s : Mr.

(In Criminal Appeal (DB) No. 20 of 2018)

For the Appellant : Mr. Devendra Kumar Singh, Advocate

Mr. Abhay Kumar, Advocate

For the State : Mr. Ajay Mishra, Addl. Public Prosecutor

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 4 -10-2018

Death Reference No. 9 of 2017 has been referred under
Section 366 of the Code of Criminal Procedure, 1973 (hereinafter
referred to as 'Cr.P.C.') for confirmation of death sentence of



convict Rohan Bind, who has filed Cr. Appeal (DB) No. 20 of 2018 against his conviction and sentence and as such, both the matters were taken up together and are being disposed of by this common judgment.

2. The appellant Rohan Bind by judgment dated 16-11-2017 has been convicted under Sections 302, 376, 201 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') and Sections 4, 6, 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act'). By order dated 29-11-2017, the sole appellant under Section 302 of the I.P.C. has been punished with death sentence. The convict has been directed to be hanged by neck till his death. Further a fine of Rs. 2,000/- (two thousand) has also been imposed under Section 302 of the I.P.C. and in case of default in payment of such fine, the convict-appellant was directed to serve simple imprisonment for two months. By the said order, under Section 201 of the I.P.C., the convict-appellant has been sentenced to undergo imprisonment for seven years and to pay fine of Rs. 2,000/- (two thousand), under Section 4 of POCSO Act, the convict-appellant has further been sentenced to undergo imprisonment for life and pay a fine of Rs. 2,000/- (two thousand) as alternative punishment for Section 376 of the I.P.C., as per provision laid down under Section 42 of the



POCSO Act. By the said order i.e. order dated 29-11-2017, the convict-appellant has further been sentenced for imprisonment for 10 years alongwith fine of Rs. 2,000/- (two thousand) under Section 6 of the POCSO Act and under Section 8 of the POCSO Act, the convict-appellant has been sentenced to undergo imprisonment for five years and pay a fine of Rs. 2,000/- (two thousand). All the sentences were directed to run concurrently and in case of default of payment of fine, the convict-appellant has been directed to further undergo simple imprisonment for two months for each default of fine. Since death sentence has been referred for its confirmation under Section 366 of the Cr.P.C., the death sentence passed under Section 302 of the I.P.C. was directed to remain under-suspension. The appellant was convicted and sentenced in Hilsa P.S. Case No. 433 of 2014/G.R. No. 2008 of 2014 by Sri Shashi Bhushan Prasad Singh, learned 1st Additional Sessions Judge-cum-Special Judge, Nalanda at Biharsharif (hereinafter referred to as 'Trial Judge').

3. The prosecution case in short, as per First Information Report, is that on 29-09-2014 at 00.15 hrs. Sub-Inspector of Police Sri Ranjit Kumar Sinha (P.W.9) of Hilsa Police Station recorded *fardbeyan* of Dukh Haran Bind (P.W.5) near Babhan Barui, Tola Beldaria, P.S. Hilsa, Distt. Nalanda. The *fardbeyan* was recorded



outside the village near अलंग (ridge) of a pond before dead body of minor daughter of the informant. The informant disclosed that on the same date in the evening at 3:30 PM, while he was at his residence, the convict-appellant Rohan Bind (son-in-law of his villager Sukh Bind) son of Rajgir Bind, Village Barama Tola Beldariya came to his in-laws house, where after noticing the lock on the door, he came to his house. The wife of informant Ranju Devi (P.W.8) allowed him to sit in her house and provided tea and नास्ता (refreshment). His daughter (victim-deceased) aged about three years arrived there, then Rohan Bind (convict-appellant) started to talk with her and after some time, he went out of his house carrying the daughter of informant for providing biscuit from the shop. After moving for some some time, he purchased a packet of biscuit from grocery shop of one Surendra Bind (not examined) of the same village and gave to his daughter and thereafter, he moved with his daughter. In the evening, after about 5:30 PM, he started carrying the victim to the eastern side, out of village, towards अलंग (ridge), at that very time, some women of his village, who had gone to attend the natural call, saw the appellant putting a black cap, however; the women of the village thought that the victim was ailing and she was carried for treatment. Since till 7:00 PM in the evening, neither the victim nor the appellant



Rohan Bind returned back to the house, the informant's brother Basant Bind (P.W.7), villager Lakhendra Bind (P.W.4) and some other person started searching them. After inquiry, they went to north-eastern side of the village and about one km. away, when they went through अलंग (ridge), they saw the dead body of daughter of the informant, who was in nude condition and thrown in a ditch, which was meant for passage of water after cutting the अलंग (ridge). The dead body of the victim-daughter was having injury on her neck, mark of teeth biting on her cheek, from private part of the victim blood had oozed out and it was swollen. When the dead body was fished out from the same place, black cap was recovered, which Rohan Bind (appellant) was wearing. On the outer side of अलंग (ridge), the panty of the victim was found thrown. After taking the panty, the same was put on the dead body of the deceased. The deceased was carried in the lap and thereafter, it was put near the pond of one Parshuram Ji. Till that time, number of women and men of the village had arrived there and it was about 8:30 (night). The informant claimed that the appellant Rohan Bind, on the pretext of providing biscuit, lured his minor daughter to go with him and thereafter, she was carried outside the village and in field, she was raped and in inhuman manner, she was killed. The said *fardbeyan* was read over to the informant, in



presence of his brother Basant Bind (P.W.7) and some villagers, and after finding the same correct, the informant put his signature and P.W.7 Basant Bind put his L.T.I. on the *fardbeyan*.

4. On the basis of *fardbeyan*, on 29-09-2014 at 3:30 AM itself, a formal F.I.R., vide Hilsa P.S. Case No. 433 of 2014, was registered for offence under Sections 302, 376, 201 of the I.P.C. and Sections 4, 6, 8 of the POCSO Act. The police after investigation, finding the case true, on 31-10-2014 submitted chargesheet against sole convict-appellant and on 02-02-2015, learned Addl. Sessions Judge 1st -cum-Special Judge, Nalanda took cognizance of the offence and on 10-03-2015, charge was framed for offence under Sections 4, 6, 8 of the POCSO Act and Sections 302, 376, 201 of the I.P.C. However, the appellant-convict denied the charge and claimed to be tried.

5. During the trial, to prove its case from the prosecution side, altogether 11 witnesses were examined, who are:

P.W.1 Bindeshwar Bind (grandfather of the deceased)

P.W.2 Indradeo Kumar @ Indal (independent & co-villager)

P.W.3 Saudagar Bind (co-villager)

P.W.4 Lakhendra Bind @ Lakhendra Kumar (co-villager)

P.W.5 Dukh Haran Bind (informant and father of the deceased)

P.W.6 Moti Bind (independent)

P.W.7 Basant Bind (brother of the informant)

P.W.8 Ranju Devi (mother of the deceased)



P.W.9 Ranjit Kumar Sinha (S.H.O. Hilsa and investigating officer)

P.W.10 Dr. Manoj Kumar (Medical Officer, who conducted *post-mortem* examination of the dead body)

P.W.11 Suresh Paswan (Constable-Munshi of police station)

P.W.1 Bindeshwar Bind has proved his signature on the inquest report, which was marked as Ext.1, P.W.3 Saudagar Bind has proved his signature on seizure list, which was marked as Ext.2, P.W.4 Lakhendra Bind has proved his signature on seizure list, which was marked as Ext.2/1, P.W.5 Dukh Haran Bind has proved his signature on *fardbeyan*, which was marked as Ext.3. P.W.9 Ranjit Kumar Sinha has proved *fardbeyan*, marked as Ext.4, inquest report as Ext.5, seizure list relating to seizure of cap as Ext.6, he has also proved material exhibit i.e. cap, which was marked as Material Ext. I and endorsement on material exhibit, which was marked as Material Ext. I/9. P.W.10 Dr. Manoj Kumar has proved *post-mortem* report, which was marked as Ext.7 and P.W.11 Suresh Paswan has proved the station diary entry, which was marked as Ext.8.

6. After conclusion of the prosecution evidence, on 03-08-2017, circumstances and evidences, brought on record against the convict-appellant, were explained to him and his statement under Section 313 of the Cr.P.C. was recorded, who



claimed to be innocent and he also claimed that his wife, with a view to solemnizing second marriage, had implicated him. He disclosed the name of his wife as Savitri Devi. The statement under Section 313 of the Cr.P.C. of the convict-appellant was recorded on three dates i.e. on 17th January, 2017, 6th May, 2017 and 3rd August, 2017.

7. Sri Devendra Kumar Singh, learned counsel assisted by Sri Abhay Kumar, learned counsel for the appellant, after placing entire evidence, has argued that it was a case of false implication and appellant had not gone to the village of his in-laws on the date of alleged occurrence. He further submits that in view of evidence of P.W.7, who is none else but own brother of the informant, it is evident that while it was alleged that the appellant visited the house of the informant and carried the minor daughter of the informant, neither informant nor his wife were present in their house and as such, there was no reason to come to the conclusion that the victim was lastly seen with the appellant.

8. Sri Singh, learned counsel for the appellant has argued that the case is based on circumstantial evidence, since none had seen the actual occurrence. In a case of circumstantial evidence, it is the duty on the part of the prosecution to establish connection of chain of all circumstances and in absence of any



such link, the prosecution case was required not to be believed, however the learned Trial Judge has proceeded on assumption, as if, the victim was actually seen with the appellant in the evening and thereafter, within few hours, the dead body of the victim was found about one km. outside the village in a ditch. Sri Devendra Kumar Singh, learned counsel for the appellant has further argued that though it is case of prosecution that many of the witnesses have seen appellant carrying the victim and going to the grocery shop of Surendra Bind of the same village and purchasing the biscuit, but to the reasons best known to the prosecution, the said shop-keeper namely Surendra Bind has not been examined as prosecution witness.

9. On the point of place of occurrence, it has been argued by learned counsel for the appellant that prosecution has miserably failed to establish the actual place of occurrence from where the dead body was recovered. According to learned counsel for the appellant, in such cases, in absence of establishing the place of occurrence, it was not appropriate for learned Trial Judge to pass the judgment of conviction and sentence.

10. Regarding the black cap, which has been got exhibited as Material Ext. I, it has been emphasized by learned counsel for the appellant that none of the witnesses during the trial



has deposed as to whether the person, who was carrying the deceased, was wearing cap or not. In sum and substance, it has been argued that since the case was based primarily on the circumstantial evidence, it was mandatory on the part of the prosecution to establish the chain of all connected circumstance. He submits that in view of the judgment of the Supreme Court reported in **(2005) 12 Supreme Court Cases 438 (Jaswant Gir Vs. State of Punjab)**, in the nature of evidence of the present case, it is established that chain of circumstances is not complete. Learned counsel for the appellant has specifically referred to paragraph - 5 of **Jaswant Gir's case (*supra*)**, which is quoted hereinbelow:-

“5. Apart from the extra-judicial confession which we shall advert to a little later, the main incriminating fact relied upon is that the deceased was last seen by PW 14 in the company of the appellant and the other accused and that he was given a lift in the vehicle belonging to the appellant. In order to establish that the vehicle belonged to or was in de facto possession of the appellant, some evidence has been let in. The “last-seen” evidence is sought to be established by the testimony of PW 14. At the outset, we must observe that there is a serious doubt cast on the version of PW 14 about the deceased going in the vehicle of the appellant. The destination of the deceased was Pehowa whereas the vehicle had come from Pehowa and was proceeding towards Devigarh which is in a different direction. Prima facie there is no apparent reason why the deceased would have chosen to go in the vehicle which was proceeding to some other destination. The High Court resorted to a guess that the deceased would have been lured to consume liquor or his relatives



might be there at Devigarh. Without probing further into the correctness of the “last-seen” version emanating from PW 14’s evidence, even assuming that the deceased did accompany the accused in their vehicle, this circumstance by itself does not lead to the irresistible conclusion that the appellant and his companion had killed him and thrown the dead body in the culvert. It cannot be presumed that the appellant and his companions were responsible for the murder, though grave suspicion arises against the accused. There is considerable time-gap between the deceased boarding the vehicle of the appellant and the time when PW 11 found the dead body. In the absence of any other links in the chain of circumstantial evidence it is not possible to convict the appellant solely on the basis of the “last-seen” evidence, even if the version of PW 14 in this regard is believed. In view of this, the evidence of PW 9 as regards the alleged confession made to him by the appellant assumes importance.”

11. On aforesaid ground, it has been argued that since the prosecution has not been able to establish the chain of circumstances and establish the case beyond all reasonable doubt, there was no reason to pass judgment of conviction.

12. On the point of capital punishment, learned counsel for the appellant has argued that this Court must do the balancing of mitigating and aggravating circumstances. He submits that it was first offence of the appellant. The appellant was having clean antecedent and he is in his early age and on the date of conviction and sentence, he was only aged about 22 years and there is every possibility of reformation of the appellant.



13. It has been argued that in view of landmark judgment of the Supreme Court reported in **(1980) 2 Supreme Court Cases 684 (Bachan Singh Vs. State of Punjab)**, while considering the mitigating circumstances, the Hon'ble Apex Court has considered the age of the accused. It was observed that if the accused is young and old, he shall not be sentenced to death as well as the probability the accused can be reformed and rehabilitated. Alternatively, it has been argued that if, at all, the judgment of conviction is approved, the death sentence, which has been imposed on the appellant, may be converted to the life imprisonment.

14. Sri Ajay Mishra, learned Addl. Public Prosecutor has argued that it was clear-cut case of barbaric offence committed by the appellant. It has been proved by the prosecution beyond all reasonable doubt. He submits that number of witnesses have come out with a case that the victim-deceased was lastly seen with the appellant and subsequently, within few hours, the dead body of the victim-deceased was found in a ditch. The appellant taken the victim on the pretext of providing biscuit and thereafter, he or the victim never returned. Only the dead body of victim was found, that too after the search by the witnesses. It has been argued that it was a case of barbaric and inhuman nature, in which, the minor



three years old girl was raped and subsequently, she was done to death and her dead body was thrown in a ditch. In such circumstance, since the prosecution has established its case beyond all reasonable doubt, the learned Trial Judge after convicting the appellant has rightly imposed the capital punishment on the appellant and has referred to this Court for its confirmation. He submits that in view of facts and circumstances, particularly the seriousness of the accusation, it is desirable that death sentence may be approved and confirmed by this Court.

15. Besides hearing learned counsel for the parties, we have considered the entire evidence i.e. both oral and documentary evidences. Before proceeding further, it would be necessary to examine as to what the witnesses have said and in that context, firstly it would be necessary to examine the evidence of P.W.5 Dukh Haran Bind, who is informant and father of the victim.

16. P.W.5 in his evidence has stated that the victim was his daughter and on the date of occurrence at 3:30 PM, he was at his residence, Rohan Bind (appellant) came to the house of Sukhu Bind. Rohan Bind (appellant) was son-in-law of Sukhu Bind. At that very time, the house of Sukhu Bind was locked. The house of the informant was near and since there were none in his in-laws' house, the informant's wife called Rohan (appellant), provided him



chair and thereafter, he was provided with water and नास्ता (refreshment). At about 5:30 PM, Rohan Bind (appellant) lifted his daughter aged about 3 years and kept in his lap and he said that he was going to provide biscuit from nearby shop and thereafter, he never returned. Since it was late evening, his family went for searching her, however; search went in vain. He inquired from a man near the road, then he informed that he had seen Rohan Bind (appellant) carrying his daughter. Thereafter, as informed, he went towards the pond, there also he did not get any information, then on information given by a boy, he went to eastern side and near अलंग (ridge), there was a ditch, where he found that his daughter was raped and killed and her whole body was naked. On the left side of cheek, there was sign of bite of teeth and on neck, there was scratches. Blood had oozed out from the private part of his daughter, then he lifted his daughter. At that place, he found one black color cap, which was of appellant (Rohan Bind). After lifting the dead body of his daughter, it was carried to the pond and police was informed. After the arrival of the police, his *fardbeyan* was recorded and statement of other villagers was also recorded. At that very place, there were Lakhendra (P.W.4), Saudagar (P.W.3), Bindeshwar Bind (P.W.1), Basant Bind (P.W.7) and entire his family and number of other villagers. Daroga Ji prepared some



paper and dead body was carried by the police for *post-mortem*. He proved his signature on the *fardbeyan*, which was marked as Ext.3. In cross-examination, in paragraph-4, this witness stated that the appellant was resident of Patna District. Father-in-law of the appellant namely Sukhu Bind since 4-5 months was not in his house and there was lock on the door of the house of Sukhu Bind. He had gone to Delhi since he was doing job in a company. In paragraph-6 of his cross-examination, he stated that the place, from where the dead body was recovered, was about two-three hundred feet away from the pond. When he saw the dead body of his daughter, it was already dark. On information given by some women of the village, who had gone for attending natural call, he could locate the dead body. Again in paragraph-7 of his cross-examination, he reiterated that his daughter was carried by the appellant (Rohan) at about 5:30 PM and he reiterated that at that very time, he was in his house. The suggestion given by the defence that at the time, while his daughter was taken away, he was not at his residence was denied and in paragraph-9, he denied that he and his wife were not present in the house. He was cross-examined at length, however nothing could be extracted to raise any doubt on the credibility of his evidence.



17. P.W.8 Ranju Devi, mother of the deceased, in her evidence has stated that her victim daughter was aged about 3 years. Rohan Bind (appellant) had gone to her house. He was son-in-law of Sukhu Bind. She stated that when Rohan Bind came to his house, she had provided water since house of his in-laws was locked. She stated that Rohan Bind (appellant) had taken his daughter in his lap and thereafter, he went outside. He had gone to provide biscuit to her daughter. It was evening, he never returned thereafter. The informant searched his daughter. She also stated that villagers had told that the appellant Rohan was seen with her daughter, while he was going towards eastern side. On search, in a ditch, dead body of her daughter was found. At that very time, Lakhendra Bind (P.W.4), Saudagar Bind (P.W.3), Basant Bind (P.W.7), Indal Bind (P.W.2), Dukh Haran Bind (P.W.5) were present. She stated that from the private part, blood had come out and at the same place, a cap was found. The victim was in naked condition and her panty was found separately. In the cheek of the victim, there was mark of bite of teeth. This witness further stated that the victim was lifted and carried to the pond. She reiterated that Rohan Bind (appellant) had raped her daughter and killed her and with a view to conceal the dead body, it was thrown in the ditch. This witness in paragraph-6 has denied the suggestion that



her daughter while playing fell down in the *pine*, due to which, she got injury. She further denied the suggestion that at the time of occurrence, she had gone for working after leaving the victim/daughter in the house. She also denied the suggestion that appellant Rohan Bind had not come to her village.

18. Almost in similar manner, P.W.1 Bindeshwar Bind (grandfather of the deceased) has deposed and he is also witness to the inquest report and he proved his signature on the inquest report, which was marked as Ext.1.

19. P.W.2 Indradeo Kumar @ Indal is an independent witness and co-villager. He, in paragraph-1 of his evidence, has stated that on the date of occurrence at 3:30 PM in the evening, he was in his house and he saw Rohan Bind (appellant), who is son-in-law of Sukhu Bind, had come to his in-laws house and he saw that there was lock on the house and thereafter, neighbour lady had provided him chair and water. In the meanwhile, her daughter (victim), aged about 3 years, arrived there and she, on the pretext of providing biscuit from a shop, was carried by Rohan Bind. She was carried by Rohan Bind to the grocery shop of Surendra Bind (not examined). When it was dark, then the appellant went to south-eastern side of the village. She was raped and killed by appellant. He had also gone in search of the victim and found the



dead body at the place of occurrence. This witness is the co-villager of the informant. This witness was also cross-examined at length, however nothing could be extracted to create any doubt on his evidence.

20. P.W.3 Saudagar Bind had also seen the appellant with the deceased and he is witness to the seizure list and he proved his signature on the seizure list, which was marked as Ext.2.

21. P.W.4 Lakhendra Bind @ Lakhendra Kumar is co-villager of the informant and he deposed that he had seen that the appellant has taken the victim in his lap and went outside the house in the same evening i.e. on the date of occurrence. In his presence also, the dead body was recovered. He is also witness to the seizure list and he proved his signature, which was marked as Ext. 2/1.

22. P.W.6 Moti Bind has also deposed in the similar manner that he had seen the victim with the appellant in the evening in between 5:00 and 5:30 and in his presence, dead body was found in the ditch. This witness was also cross-examined at length, but nothing could be extracted to create any doubt on his evidence.



23. P.W.7 Basant Bind in his evidence has stated like other witnesses that he had seen the victim with the appellant, however in paragraph - 7 of his cross-examination, it has come that at the time of occurrence, he with his brother and brother's wife had gone to the field for doing the work of निकोनी (*nikoni*) and when returned back, he did not find his niece and then search started.

24. P.W.11 Suresh Paswan at the relevant time was Munshi in the police station and he had recorded station diary entry i.e. Station Diary Entry No. 851 dated 28-09-2014 and the said entry was exhibited and marked as Ext. 8.

25. P.W.10 Dr. Manoj Kumar on 29-09-2014 was posted as Medical Officer, Sadar Hospital, Bihar Sharif and at 07:10 AM, he conducted *post-mortem* examination on the dead body of the deceased, aged about 3 years, and he found following ante-mortem injuries:-

“On External Examination -

Bruises over left side of cheek, abrasion over right side of neck at three sites of size 1” x ¼”, 1” x ¼” and ¼” x ¼” respectively. External genitalia is swelling. Blood and blood clots present over vagina. Lacerated vaginal wall.

On Dissection –

Head – All cranial bones intact. Brain and its meninges intact and congested. Fracture of hyoid bone, Trachea ring distorted.

Thorax – Thoracic cage normal, Lungs normal. Heart full with blood.



Abdomen: Stomach – filled with 1.5 Oz of digested food material. Liver – congested, Urinary bladder - empty. Spleen & kidney - intact and congested.

Opinion -

Death occurred due to asphyxia caused by throttling.

Time elapsed since death – within 24 (twenty four) hours.”

He stated that the *post-mortem* report was in his writing and signature and it was marked as Ext.7.

26. P.W.9 Ranjit Kumar Sinha on 28-09-2014 was Sub-inspector of Police in Hilsa Police Station. On the same date, he received an information that in Babhan Barui Tola Beldariya, a girl child was raped and she was murdered. Thereafter, after recording *sanha* entry, for its verification and necessary work, he along with officer incharge and other police officials as well as police force rushed to the place of occurrence and after arrival, he recorded *fardbeyan* of Dukh Haran Bind (P.W.5). He proved the *fardbeyan*, which was in his writing and signature and it was marked as Ext.4. On the basis of said *fardbeyan*, he stated that F.I.R., vide Hilsa P.S. Case No. 433 of 2014 dated 29-09-2014, was registered under Sections 302, 376, 201 of the I.P.C. and Section 4, 6, 8 of the POCSO Act. In paragraph-3 of his evidence, he gave detailed description of the place of occurrence and its boundary. He further in paragraph-4 stated that a seizure list was prepared in respect of a cap, which was found at the place of occurrence. The said seizure



list was marked as Ext.6. Thereafter, the dead body was sent for *post-mortem* examination. He further recorded statement of all the witnesses, who have been examined as prosecution witnesses. In paragraph-6 of his cross-examination, he stated that on 28-09-2014 itself, he had received information and reached village Babhan Barui at about 10:30 in the same night and *fardbeyan* was recorded at 00.15 hrs. He further stated that after finding the case true, with the order of Senior Police Official, he had submitted chargesheet. This witness was subsequently examined on recall and in his evidence on recall, he stated that during investigation, witnesses had stated that the accused was seen in the same cap before the occurrence. He further stated that the accused in his confessional statement had also accepted that on the date of occurrence, he was wearing the said cap. He proved the cap, which was marked as Material Ext. I and he also proved his writing on the same, which was marked as Material Ext. I/9.

27. On examination of the aforesaid evidence, it is established that victim, who was minor and three years old, on the pretext of providing biscuit was carried by the appellant. He was seen by number of the witnesses while moving with the victim. The witnesses have also stated that the appellant, after purchasing a packet of biscuit from a grocery shop of the same village, had



handed over to the victim and then he carried the victim-deceased to south-eastern side of the village. It has been established that since by 7:00 PM, neither the appellant nor the victim returned, the informant and his wife with other witnesses started searching her. While they were searching, number of witnesses informed the informant about movement of the appellant with the victim outside the village side and within few hours, the dead body of the victim was found in a ditch, which was in nude condition, there was injury of teeth bite on the cheek of the deceased, scratches on the neck & private part of minor victim girl was having injuries and blood had oozed out. Such injuries were also found established during her *post-mortem* examination, which was held by P.W.10 Dr. Manoj Kumar on 29-09-2014 at 07:10 AM. The injury corroborates as to how brutally the offence of rape was committed on the victim and she was not only raped but also she was done to death by throttling. Of course, confessional statement of the appellant, which was recorded during investigation, is not admissible but for our satisfaction, we had examined the case diary and noticed the same, in which the appellant had confessed his guilt and he described as to how after committing rape and throwing dead body of the deceased in the ditch, he fled away and returned back to Patna. During investigation, he was arrested on



next date i.e. 30-09-2014 from the house of his relative. His arrest memo was also prepared.

28. On examination of evidence, it is evident that prosecution has established its case beyond all reasonable doubt that just before the recovery of the dead body of the victim, the appellant was lastly seen with the deceased, which has been corroborated by number of witnesses. It is true that during trial, Surendra Bind, who was stated to be shop-keeper from where biscuit was purchased by the appellant, has not been examined, but only on the ground that shopkeeper was not examined, evidence of other witnesses cannot be ignored.

29. In view of aforesaid fact, we are of the opinion that learned Trial Judge has rightly held the appellant guilty for offence under Section 302 of the I.P.C. Besides this, the learned Trial Judge has elaborately discussed the provision contained in Section 29 of the POCSO Act, which deals with presumption for offence under Section 3, 5, 7 and 9 of the POCSO Act. The learned Trial Judge has also rightly placed reliance on a recent judgment of Calcutta High Court in C.R.A. No. 736/16, **Sahid Hossain Biswas Vs. State of West Bengal (2017 SCC OnLine Cal 5023)** and referred to paragraph 22 and 23 of the observation of Hon'ble Calcutta High Court, which are as follows:-



“22. The law, therefore, provides for a reverse burden upon the accused in a prosecution under sections 3, 5, 7 and 9 of the aforesaid Act. The statutory presumption creates an exception to the ordinary rule of presumption of innocence available to an accused in a criminal trial and puts the onus on the accused to rebut such presumption and establish his innocence. Presumption of innocence is a basic human right which is a vital facet of fair trial rights enshrined in various international covenants like the Universal Declaration of Human rights and the International covenant of civil and Political Rights (to which India is a signatory) but is not a fundamental right under Part III of the Constitution. [see Noor Aga V. State of Punjab, (2008) 16 SCC 417]. The concept of presumption of innocence has, in recent times, been reversed in many situations by creating statutory presumptions like under sections 113A, 113B or 114A of the Evidence Act shifting the burden on the accused to prove his innocence. Section 29 of the POCSO is, therefore, a species of such exception to the ordinary rule of presumption of innocence and must be borne in mind while appreciating the evidence of prosecution witnesses in a trial under the POCSO Act. The expressions “shall presume” and “unless contrary is proved” in the aforesaid provision creates a reverse burden on an accused to prove his innocence to earn an order of acquittal and absolves the burden of the prosecution to prove his guilt beyond reasonable doubt. How is the accused to discharge such burden? Sections 3 and 4 of the Evidence Act define the words ‘proved’, ‘shall presume’ and ‘disproved’ as follows:

Section 3:-

“Proved”- A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

“Disproved”- A fact is said to be disproved when, after considering the matters before it, the court either believes that it does



not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Section 4:-

“Shall presume”- Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove ‘the contrary’, that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see Sait Tarajee Khimchand v. YKelamarti Satyam, (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.”

30. The prosecution has already establish its case that the victim was aged about only 3 years and as such, the learned Trial Judge has rightly held the appellant guilty for commission of offence under Sections 4, 6 and 8 of the POCSO Act. The learned Trial Judge has rightly convicted the appellant under Section 376 of the I.P.C., ofcourse sentence under Section 376 of the I.P.C. has been alternatively imposed on the Section 4 of the POCSO Act, in view of the provision contained in Section 42 of the POCSO Act.



31. In view of aforesaid facts and circumstances, the judgment of conviction of the appellant for offence under Sections 302, 376, 201 of the I.P.C. and Sections 4, 6, 8 of the POCSO Act by the learned 1st Addl. Sessions Judge-cum-Special Judge, Nalanda is hereby approved.

32. Now, it is to be examined as to whether the capital sentence is required to be confirmed or not. Before proceeding on this issue, it would be necessary to firstly examine as to whether the death sentence of the appellant, in the facts and circumstances of the present case, is only remedy or death sentence can be converted to imprisonment for life? Time without number, it has been reiterated that death sentence is to be imposed in the rarest of the rare cases. For such sentence, balancing of mitigating circumstance and aggravating circumstance is appropriately required to be done. The learned Trial Judge before imposing death sentence has elaborately discussed on this issue.

33. It has been noticed that ‘capital punishment’ was subject matter of great social and judicial discussion and catechism and as such, the Supreme Court in a case reported in **(2012) 4 Supreme Court Cases 257 (Ramnaresh and others Vs State of Chattisgarh)** in paragraph - 57 has rightly considered that “*...whatever point of view it is examined, one indisputable*



statement of law follows that it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital punishment has been prescribed. It shall always depend upon the facts and circumstance of the given case". It would be better for us to just quote paragraph 76 to 80 of the said judgment i.e. **Ramnaresh's case (supra)**, which are as follows:-

"76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh (supra) and thereafter, in Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments—one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was



committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.



(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstart besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the “rarest of rare” case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.



78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the court may consider in its endeavour to do complete justice between the parties.

79. The court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of “*just deserts*” that serves as the foundation of every criminal sentence that is justifiable. In other words, the “doctrine of proportionality” has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.”

34. Learned Trial Judge of course has elaborately dealt with the mitigating and aggravating circumstances and has come to the conclusion that it was a case for capital punishment, but fact remains that such sentence is to be imposed in rarest of the rare cases and in each case, its fact is essential ingredient for deciding



such sentence. It is true that in the present case, there were aggravating circumstances, but the early age of the appellant is also required to be noticed. Besides his early age, it has also been noticed that the appellant was the first offender and nothing has been brought on record that appellant was accused in any case earlier.

35. Learned counsel for the appellant at the time of argument has emphasized that this was the first offence and appellant on the date of conviction was aged about only 22 years. He had argued that there is every possibility of reformation of the appellant.

36. In such circumstances, we are of the opinion that if the 'capital punishment' is altered to the imprisonment of the appellant for life, this will meet the requirement. In such circumstances, in view of early age of the appellant and considering the fact that on record, there is nothing that the appellant was having criminal antecedent, it would be necessary that while approving the judgment of conviction and other sentences, the 'death sentence' may be converted to 'imprisonment for life'.

37. Accordingly, we refrain from confirming the death sentence and as such, Death Reference No. 9 of 2017 fails and



death sentence instead is directed to be converted to imprisonment for life of the appellant till his last breath. Accordingly, the judgment of conviction and sentence is approved with modification of death sentence under Section 302 of the I.P.C to imprisonment for life till last breath of the appellant.

38. The appeal i.e. Cr. Appeal (DB) No. 20 of 2018 stands disposed of.

(Rakesh Kumar, J.)

Arvind Srivastava,J. I agree.

(Arvind Srivastava, J.)

Anay

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