

IN THE HIGH COURT OF JUDICATURE AT PATNA
Death Reference No.8 of 2017

Arising Out of PS. Case No.-262 Year-2013 Thana- ROSERA District-

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The State Of Bihar

... .. Petitioner/s

Versus

Hari Kishun Sada

... .. Respondent/s

=====

with

Criminal Appeal (DB) No. 1409 of 2017

Arising Out of PS. Case No.-262 Year-2013 Thana- ROSERA District- Samastipur

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Hari Kishun Sada, son of Yugeshwar Sada, Resident of Village- Sisai Dumra,
P.S.- Hathauri, District- Samastipur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In Death Reference No. 8 of 2017)

For the Petitioner/s : Mr.

For the Respondent/s : Mr.

(In Criminal Appeal (DB) No. 1409 of 2017)

For the Appellant/s : Mr. Krishna Chandra, Adv.

For the Respondent/s : Mr. Ajay Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA)

Date : 02-11-2018

Death Reference No. 8 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 Hari Kishun Sada, who has filed Cr. Appeal



(D.B.). No. 1409 of 2017 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 Hari Kishun Sada, by judgment dated 9th August, 2017 passed by Sri Md. Irshad Ali, 1st Additional-cum-Special Judge, POCSO Act, Samastipur (hereinafter referred to as 'Trial Judge') in Sessions Trial No. 21 of 2014/Registration No. 3233 of 2014, has been convicted under sections 376, 302 of the Indian Penal Code and Section 6 of Protection of Children from Sexual Offences (POCSO) Act and vide order dated 17th August, 2017 he has been sentenced to undergo rigorous imprisonment for life for the offence punishable under section 6 of POCSO Act and fine of Rs. 50,000/- and in default of fine, further to undergo simple imprisonment for six months. The appellant has further been punished with death sentence for the offence under section 302 of the Indian Penal Code. The convict has been directed to be hanged by neck till his death. No separate sentence has been awarded under section 376 of the Indian Penal Code in light of the aforementioned sentence. All the sentences have been directed to run concurrently.

3. The prosecution case, as per the first information



report, in short, is that on 23.11.2013 at 11 AM Sub Inspector of Police Sri Chaturvedi Sudhir Kumar (P.W.7) of Rosera Police Station recorded *fardbeyan* of Binda Kureri (P.W.6) at Primary School near Suriva Pokhar, P.S. Rosera, District- Samastipur. The informant disclosed that yesterday i.e. on 22.11.2013 at about 7-8 in the night, his wife had cooked rice and Hari Kishun Sada (appellant) who is son-in-law of Puran Sada, came to him and asked to send his daughter Khushboo Kumari aged about 6-7 years to bring vegetable from his sasural upon which wife of the informant namely, Shobhani Devi sent her daughter alongwith Hari Kishun Sada. When the daughter of informant did not return by 10-11 O'Clock, the informant and his wife started searching for her but they failed to trace her. Thereafter they went to Puran Sada where they did not get Ram Kishun Sada and then villagers were informed and they also made search. At about 12 in the night, they got him who was covered with mud and there was blood stain on his vest and clothes. On query, he said that Khushboo must have slept somewhere. When the villagers assaulted him, he took them 200 meter away from the school and handed over Khushboo Kumari who was in nude and unconscious condition and blood was oozing out from her private part. Thereafter they brought her to Primary School and



village doctor was called but in the meanwhile Khushboo Kumari died.

4. (a) The fardbeyan of the informant was recorded on 23.11.2013 at 11 AM.

(b) Formal F.I.R. was registered on 23.11.2013 at 14.30 Hrs. vide Rosera P.S. Case No. 262 of 2013 under sections 376, 302 of the Indian Penal Code against the appellant to which section 6 of the POCSO Act was added on 27.11.2013.

(c) The Police, after investigation, finding the case true, submitted charge-sheet on 30.11.2013 against the sole convict-appellant.

(d) Cognizance of the offence was taken on 06.01.2014.

(e) On 07.01.2014 the case was committed to the Court of Sessions.

(f) On 13.02.2015 charge was framed for the offence under sections 376, 302 of the Indian Penal Code and Section 6 of the POCSO Act, however the appellant-convict denied the charge and claimed to be tried.

5. During trial, to prove its case from the prosecution side, altogether 8 witnesses were examined, who are as follows :

P.W.1 Ras Bihari Saran,

P.W.2 Shankar Kamti, both have been declared hostile.



P.W.3 Anurag Sharma, who is villager/relative of the informant, is a formal witnesses.

P.W. 4 Dr. Prem Vardhan, is the Doctor who conducted post mortem examination of the dead body.

P.W. 5 Shobhani Devi, wife of the informant.

P.W. 6 Binda Kureri, informant and father of the deceased.

P.W. 7 Chaturvedi Sudhir Kumar, is the Investigation Officer of this case.

P.W. 8 Dr. Vidhanchandra Singh, is the Medical Officer posted at Sub Divisional Hospital, Rosera who examined the appellant.

6. In order to establish the charge, the prosecution has proved the following documents as Exhibits :-

Exhibit-1 & 1/1 Signature of P.W. 3, Anurag Sharma on two seizure lists

Exhibit – 2 Post Mortem Report

Exhibit – 3 Fardbeyan

Exhibit – 4 Endorsement of the F.I.R.

Exhibit – 5 Formal F.I.R.

Exhibit – 6 Carbon copy of the Inquest Report

Exhibit – 7 Seizure list of victim's clothes

Exhibit – 8 Seizure list of accused's clothes

Exhibit – 9 F.S.L. Report in three sheets

Exhibit – 10 Injury Report of the Accused.

7. The statement under section 313 of the Cr.P.C. was recorded on 25.07.2017, in which the appellant has denied the allegations and claimed himself to be innocent.

8. The defence has neither produced any witness



nor filed any document in support of its case.

9. Before reaching to any conclusion, it is felt necessary to examine the evidence of the witnesses.

10. P.W. 1/ Ras Bihari Saran and P.W. 2/ Shankar Kamti have not given any statement with regard to the alleged occurrence. They have been declared hostile by the prosecution.

11. P.W. 3/Anurag Sharma, a formal witness, who has proved his signatures on the seizure list as Exhibits -1 & 1/1.

In cross-examination, he stated that his both signatures were taken on plain paper and nothing was seized in his presence.

12. P.W. 4/ Dr. Prem Bardhan has stated in his evidence that on 23.11.2013 he was posted as Medical Officer at Sadar Hospital, Samastipur and on that day at 4.30 P.M. he had conducted postmortem of the deceased, Khushboo Kumar, aged about 6-7 years and gave the following findings :

1. External – Rigor Mortis was present mild. Eyes closed, blood clot around nose. Teeth mark on right cheek, Bruise over face, chest and back upper part measuring from 1/2” to 1 1/2”. Blueish black mark over upper part of neck measuring about 5” X 1/2” X 2”. More prominent over both sides of neck on left side of neck about 1” wide and on right side two 1/2” wide. Blood clot around vaginal opening. Whole vagina,



vulva lacerated and torn. Anal canal was lacerated and filled with blood clot. Tachia and neck muscles highly congested. Tear and blood clots in vulva and uterus. All viscera congested. Vaginal and rectal swab are preserved for pathological examination. Report awaited. Report shows no spermatozoa in vaginal or rectal swab. Time elapsed since death - within 24 hours. In our opinion, the cause of death is asphyxia caused by throttling after rape.

This witness has proved the *postmortem* report as Exhibit-2.

13. P.W. 8/ Dr. Vidhan Chandra Singh has stated in his evidence that on 24.11.2013 he was posted as Medical Officer at Sub Divisional Hospital, Rosera and on that day he had examined the accused- Hari Kishun Sada and found the following injuries :

- 1. Bruise left hand*
 - 2. Swelling left knee*
 - 3. Swelling right thigh*
 - 4. Swelling and Bruising above left eye*
- Weapon of Injury – Hard and Blunt substance*
Nature of Injury – All injuries are simple in nature
Age of injury – More than twenty hours.
M.I. - Mole on face.

This witness has proved the Injury report as Exhibit -9.

14. P.W. 5/ Shobhani Devi, who is mother of the



deceased, has stated in her evidence that the occurrence is of four years back at 6 PM in the evening. While she was cooking food, the accused came saying that he will give vegetable to Khushboo, who is my daughter, and took her with him. When even after lapse of an hour Khushboo did not return back, then she made search for her but could not trace her out. On search the accused was found hiding in *Madai* and on asking him about the whereabouts of the girl, he took them to the place where the dead body of the girl was found in nude condition. Blood was oozing out from the body.

Police arrested the accused and sent the dead body for its *postmortem* examination.

This witness identified the accused.

15. P.W. 6/Binda Kureri, the informant, has stated in his evidence that four years back from today at 6 PM in the evening while they were taking meal accused- Hari Kishun Sada, who is present in the Court, came there saying that he will give vegetable and took away his daughter, Khusboo Kumari, aged about 6 years, with him. On that day he had seen the accused at his home for the first time. He has further stated that he does not know whether the accused is resident of there or not. When his daughter did not return even after lapse of an hour, he



started searching for her. During course of search, the accused was found hiding in Madai, having blood stains on his body. On assault, the accused took them to the place from where the dead body of the deceased was recovered in nude condition and blood was coming out of the body.

This witness has stated about giving of *fardbayan* to the police and putting his thumb impression on the same.

This witness has also stated that we are Ghummakad (Vagabond) type people and at the time of the occurrence we were staying in Ranipatti Village in a Tent.

This witness also identified the accused.

16. P.W. 7/Chaturvedi Sudhir Kumar, who is Investigating Officer of this case, has stated in his evidence that on 23.11.2013 he was posted as Officer-in-Charge, Rosera Police Station. He got information that in village Ranipatti daughter of Binda Kureri has been killed. He reached at the village where he was told by people that after rape she has been killed by the accused.

This witness recorded the statement of the father of the deceased and also took his signature. This witness has stated about the *fardbayan* to be in his writing and signature and



proved it as Exhibit -3. This witness has also proved the endorsement on the *fardbeyan* as Exhibit -4 and formal F.I.R. as Exhibit -5.

This witness has also stated about the Inquest Report to be in his writing and signature and also proved the signatures of witnesses Rabindra Raj and Ras Bihari Sada on it as Exhibit-6.

This witness also stated about sending of the dead body for *postmortem* examination.

The witness has also proved the first place of occurrence where after rape the deceased was done to death as also the second place of occurrence where the dead body was thrown.

After *postmortem*, he seized the blood stained panty of the deceased. He proved the seizure list as Exhibit-7.

He also seized the blood stained underwear of the accused. This witness has stated that the aforesaid seizure was made in presence of P.W. 3, Anurag Sharma and P.W. 1, Rash Bihari Sada. He also proved the seizure list as exhibit-8.

He stated in his cross-examination that from the place of occurrence no blood stained soil was seized, clothes of the deceased has not been sent for its examination, it is not



examined as to whether the blood found on the underwear of the accused was of the deceased. When the accused was sent for examination on the requisition it was not written that he was accused of rape though this witness stated that he knows that on immediate arrest of the accused of rape, accused is also examined as the victim.

17. Sri Krishna Chandra, learned counsel for the appellant submitted that there is no eye witness of the alleged occurrence. The case is of circumstantial evidence and the chain of circumstances is not complete.

Out of the four witnesses of fact, two independent witnesses have turned hostile and remaining two, who are mother and father of the deceased, are interested witnesses and there is contradiction in their evidence.

The only formal witness has specifically stated that no seizure was made in his presence and the police had taken his signature on the plain paper.

The informant in his evidence has clearly stated that on the date of occurrence, he saw the accused for the first time, but how he sent his daughters with a stranger, is apparently unnatural.

The villagers got the information with regard to



rape and murder in the night itself, but they do not inform the police at night and gives information to the police on the next day.

The Investigating Officer has conducted the investigation of the case in a faulty manner. Neither he seized the blood stained soil from the place of occurrence nor he sent the seized clothes for its forensic examination to ascertain as to whether the blood on the clothes is of the victim or of the accused nor he followed the provisions of Section 53A of the Cr. P.C.

The Mukhiya of the village, who put his signature on the *fardbeyan*, and the Chowkidar, who saw the accused with the deceased, both are independent and believable witnesses, have not been examined by the prosecution.

The expert, who has prepared the F.S.L. report, has not been produced for evidence.

From the above, it can be inferred that the prosecution has failed to prove the allegations levelled against the accused beyond all reasonable doubt. Hence, the accused deserves to be acquitted from the accusations levelled or he should have to be given the benefit of doubt.

18. It has been alternatively prayed that the



accused is aged about 30 years and is father of two children and there is every possibility of his reformation, and therefore, the punishment of death sentence imposed upon him may be converted to imprisonment for life.

19. Sri Ajay Mishra, learned Addl P.P. appearing for the State opposed the prayer of the appellant and categorically replied all the points raised by the learned counsel for the appellant.

It has been stated that in cases where an innocent minor girl becomes victim of rape and murder, it is difficult to produce any eye witness.

So far as the circumstantial evidence is concerned, the chain of all the circumstances is complete. Accused takes away the deceased and thereafter neither the deceased nor the accused comes back. On search, accused is found hiding in a house and there is blood spot on his clothes and on pressure being exerted by the villagers he gets the dead body recovered.

The father and mother of the deceased are the best witnesses and they cannot be said to be interested witnesses. They neither have any dispute with the accused nor there is any caste differences. In such circumstances, it cannot



be imagined that the mother and father of an innocent minor girl, who has become victim of rape and murder, will falsely implicate any innocent person leaving aside the actual culprit. So far as contradiction in their evidence is concerned, there is no material contradiction in their evidence and there are only minor difference in their evidence.

It has also to be kept in mind that both the witnesses are illiterate and they do not have any permanent residence, even then they have come for giving evidence after four years of the occurrence. As regards the statement of the formal witness to the effect that he put his signature on plain paper, the same appears to be unbelievable as no literate/prudent person will put his signature on plain paper and the Investigating Officer has clarified that this witness put his signature in his presence.

So far as the sending of his daughter by a father with a stranger is concerned, there is no such statement of the mother to the effect that she also had seen the accused for the first time and it is possible that she might have been knowing the accused from before.

As regards giving information of the occurrence to the police on the next morning despite having information in



the night itself, it is apparent on perusal of the formal first information report that the police station is situated at a distance of 15 kms. from the place of occurrence and in such circumstances it is not possible for an illiterate, poor person to immediately arrange for a conveyance in a cold night and reach to the police station.

So far as the provision of section 53A of Cr. P.C. is concerned, the accused has been found guilty not only under section 376 of the Indian Penal Code but also under section 302 of the Indian Penal Code and section 6 of the POCSO Act and he has not been awarded any punishment under section 376 of the Indian Penal Code.

As regards non-examination of Mukhiya and Chawkidar, it is not necessary to examine all the witnesses of the case. The evidence of P.Ws. 5 and 6 are believable and it has been corroborated by the evidence of P.W. 4, Doctor and the *postmortem* report (Exhibit-4).

In the F.S.L. report also mark of blood and semen have been found on the undergarments of the deceased and accused. This report has been marked as exhibit under section 294 Cr. P.C. and it is not necessary to call the expert for evidence.



It can, therefore, be said that the prosecution has proved all the charges levelled against the accused-appellant beyond all reasonable doubts and this appeal is fit to be dismissed.

20. On the point of alternative prayer of the appellant, Sri Ajay Mishra, learned counsel for the State submitted that he is leaving this matter on the conscience of the Court.

21. Having heard the submissions advanced on behalf of the parties and after minutely considering the materials available on records, this Court has come to the conclusion that the arguments of appellant has no force and agrees with the submissions advanced by Sri Mishra. Accordingly, the appeal is dismissed and the Judgment under appeal is, hereby, confirmed.

22. 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.

23. Learned Trial Judge 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.

24. 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 30 years. He has argued that there is every possibility of reformation of the appellant.

25. 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'.

26. Accordingly, we refrain from confirming the death sentence and as such, Death Reference No. 8 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.

27. The appeal i.e. Cr. Appeal (D.B.) No. 1409 of 2017 stands disposed of.

(Arvind Srivastava,J)

Rakesh Kumar, J I Agree

(Rakesh Kumar, J)

mcv/-

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