

IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.4 of 2019

Arising Out of PS. Case No.-43 Year-2018 Thana- BARHARA District- Bhojpur

The State of Bihar

... .. Petitioner

Versus

Balwant Singh Son of Bitan Singh @ Biteshwar Singh Resident of Village -
Purana Bind Gawa, P.S.- Barhara, District- Bhojpur

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 1181 of 2019

Arising Out of PS. Case No.-43 Year-2018 Thana- BARHARA District- Bhojpur

1. Anant Pandey, aged about 23 yewars (Male) Son of Tamatar Pandey
Resident of Village- Semra, P.S.- Barhara, District- Bhojpur.
2. Chhotu Singh @ Chhotu Mahto, aged about 30 years (Male) Son of Dwarika
Mahto @ Dwarika Singh Resident of Village- Semra, P.S.- Barhara, District-
Bhojpur.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 1184 of 2019

Arising Out of PS. Case No.-43 Year-2018 Thana- BARHARA District- Bhojpur

Balwant Singh (M), aged about 32 years S/o Bitan Singh @ Biteshwar Singh
Resident of Village- Old Bindgawan, P.S.- Barahara, District- Bhojpur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In DEATH REFERENCE No. 4 of 2019)

For the Petitioner : Mr. XXXXXXXX

For the Respondent : Mr. Amish Kumar, Amicus Curiae

(In CRIMINAL APPEAL (DB) No. 1181 of 2019)

For the Appellant : Mr. Rajesh Kumar, Advocate

Mr. Arun Kumar Pandey, Advocate

For the State : Mr. Satya Narayan Prasad, APP

(In CRIMINAL APPEAL (DB) No. 1184 of 2019)

For the Appellant : Mr. Kanhaiya Prasad Singh, Sr. Advocate

Mr. Ashok Kumar Singh, Advocate

For the State : Mr. Abhimanyu Sharma, APP



**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA**

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 23-07-2021

The appellants in these appeals have challenged the judgment of conviction dated 28.08.2019 and the order of sentence dated 06.09.2019 passed by the learned 1st Additional District & Sessions Judge-cum-Special Judge, POCSO Act, Bhojpur at Ara in POCSO Case No. 26 of 2018 arising out of Barahara P.S. Case No. 43 of 2018. By the aforesaid judgment, the appellants have been convicted for the offences punishable under Sections 366-A/34, 376-D/34, 302/34 of the Indian Penal Code (for short 'IPC') and Section 4 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act'). Consequently, by the aforesaid order, the appellants have been sentenced to death for the offence punishable under Section 302/34 of the IPC, Rigorous Imprisonment for ten years with a fine of Rs.25,000/- for the offence punishable under Section 366-A of the IPC and in default of payment of fine to undergo further imprisonment for six months. The appellants have further been sentenced to undergo Rigorous Imprisonment for life and a fine of Rs.50,000/- for the offence punishable under Section 376-D/34 of the IPC and in default of payment of fine to undergo



further imprisonment for one year. So far as the offence punishable under Section 4 of the POCSO Act is concerned, the Trial Court has not passed any separate sentence. It has directed that all the sentences shall run concurrently.

2. After passing the impugned judgment and order, the Trial Court made a reference under Section 366 of the Code of Criminal Procedure (for short 'Cr.P.C') for confirmation of death sentence awarded to the appellants Balwant Singh and Anant Pandey, which has been registered as Death Reference No.4 of 2019.

3. The appeals preferred by the appellants and the reference made by the Trial Court have been heard together and are being disposed of by a common order.

4. The sessions trial in which the impugned judgment and order were passed relates to the First Information Report (for short 'FIR') that had been registered at 8:30 AM on 05.02.2018 in Barahara Police Station under Section 154 of the Cr.P.C in respect of an incident that had occurred at village Semra, P.S.- Barahara, District- Bhojpur situated at a distance of 8 kilometer east from the Police Station at 8:00 PM on 31.01.2018.

5. The FIR giving rise to the sessions trial was registered on the basis of the written report of one Sheo Raj Rai



(P.W.4) submitted to the Officer-in-Charge of Barahara Police Station on 05.02.2018 at 8:30 AM. In his written report, the informant has stated that on 31.01.2018, at about 8:00 PM, his minor daughter, aged about 16 years, had gone to ease herself towards south of his house. Soon after, she went out of her house, she raised alarm and cried for help as three boys were trying to forcibly abduct her. Hearing his daughter's cry, he along with his nephew went there and saw that Chhotu Kumar Singh son of Rajendra Singh, Balwant Singh son of Bitan Singh, both residents of village- Old Bindgawan and one unknown boy dragged his daughter, forced her to sit on bike and tried to kidnap her. He further stated that the accused Chhotu Kumar Singh was riding the bike and the accused Balwant Singh was the pillion rider. They had sandwiched his daughter in the middle on the bike. The unknown boy rode on another bike. However, he himself and his nephew caught hold of the bike being rode by the kidnappers from behind as a result of which the rider and the pillion riders fell down. He himself also sustained injuries on his hand and legs. Taking advantage of the situation, Chhotu Kumar Singh and Balwant Singh along with his daughter rode on the bike being driven by the unknown miscreants and sped away. Thereafter, he went to the house of the accused Chhotu Kumar Singh and



Balwant Singh and apprised their family members that they had kidnapped his daughter, but they said that they do not know anything about kidnapping of his daughter.

6. In his written report, the informant further stated that he is handing over the bike bearing registration no. BR03M 1710 left by the accused Chhotu Kumar Singh and Balwant Singh at the place of occurrence. He stated that since the prestige of the family was involved, he did not inform the police earlier, but when all his efforts to trace the victim failed, he is lodging the report with the police.

7. On receipt of the aforesaid written report from the informant, the Officer-in-Charge of Barahara Police Station registered Barahara P.S. Case No.43 of 2018 dated 05.02.2018 under Section 366-A/34 of the IPC against Chhotu Kumar Singh, Balwant Singh and their respective family members and handed over the investigation to one Umesh Kumar Das, Assistant Sub-Inspector of Police.

8. Later on, at the request of the investigating officer, vide order dated 07.04.2018, the learned Chief Judicial Magistrate, Bhojpur permitted addition of Sections 376-D, 302, 376-A of the IPC and 4 of the POCSO Act to the FIR.



9. On completion of investigation, the investigating officer submitted charge-sheet no.25/18 dated 03.05.2018 under Sections 376-D, 366-A, 302, 376-A/34 of the IPC and 4 of the POCSO Act against the accused Balwant Singh and kept the investigation pending against the other accused persons. Subsequently, vide charge-sheet no.100/18 dated 20.09.2018, the investigating officer submitted supplementary charge-sheet against accused Chhotu Mahto and Anant Pandey for the offences under which the FIR was registered and kept the investigation pending against the other accused persons.

10. On perusal of the record, I find that since the FIR was registered under Section 4 of the POCSO Act apart from the offences under the Indian Penal Code, the learned Chief Judicial Magistrate, Ara sent the record to the court of 1st Additional Sessions Judge-cum-Special Judge, which was designated as Special Court under Section 28 of the POCSO Act, vide order dated 10.04.2018 stating therein that his court has no jurisdiction in the matter. I further find from the record that vide order dated 16.11.2018, the learned Additional Sessions Judge-cum-Special Judge, POCSO Act took cognizance of the offences punishable under Sections 376-D, 366-A, 302, 376-A/34 of the IPC and 4 of the POCSO Act.



11. Subsequently, on 08.05.2019, the Trial Court explained the charges to the accused Balwant Singh, Chhotu Singh @ Chhotu Mahto and Anant Pandey under Sections 366-A/34, 376-D, 302 of the IPC and 4 of the POCSO Act to which they pleaded not guilty and claimed to be tried.

12. In order to prove its case, the prosecution examined eight witnesses, namely, Deo Sharan Rai (P.W.1), Kamlesh Rai (P.W.2), Vijendra Rai (P.W.3), Sheo Raj Rai (P.W.4), Dr. Madhu Bala Sinha (P.W.5), Dr. Absar Ahmad (P.W.6), Umesh Kumar Das (P.W.7) and Akhilesh Kumar (P.W.8).

13. **Deo Sharan Rai (P.W.1)** stated in his deposition that on the alleged date of occurrence, upon hearing the noise, he went towards southern side of the embankment where he saw Sheo Raj Rai and Kamlesh Rai fallen on the ground and trying to recover themselves by holding the bike. He corroborated the allegations made by the informant Sheo Raj Rai in the FIR. He stated that he is neighbor of the informant. The height of the embankment is 10-15 ft from the ground level. He further stated that before he could reach the villagers had already assembled there and they were carrying Sheo Raj Rai (P.W.4) and also holding Kamlesh Rai (P.W.2). He has further stated that he had told the police that he himself saw the accused persons abducting the victim.



14. In cross-examination, he admitted that neither the murder had taken place in his presence nor the victim was raped before him. He further stated that he has information that the informant had filed a case against two persons, namely, Balwant Singh and Chhotu Kumar Singh. He stated that the bike was in possession of the Chowkidar from the date of occurrence.

15. **Kamlesh Rai (P.W.2)** stated in his evidence that the deceased was his cousin sister. He stated that he was present along with P.W.4 at the time of occurrence. He also corroborated the allegations made in the FIR in his examination-in-chief. He stated that on hue and cry raised by them, the villagers, namely, Sudama Rai, Tribeni Rai, Khalifa Rai, Vinod Rai, Deo Sharan Rai and Manoj Rai assembled at the place of occurrence. He stated that a search was made for the victim since the time of occurrence itself. He further stated that on 5/6.02.2018 the dead body of the victim was recovered.

16. In cross-examination, he has stated that he along with others had gone to the police station, which is at a distance of 5 kilometer from his house, in the morning between 09 and 10 AM. He further stated that he himself and his uncle narrated the entire incident to the Daroga, who reduced the same in writing on which his uncle Sheo Raj Rai put his signature. He further stated that



since the time of occurrence the search for the victim had begun. He denied the defence suggestion that the accused persons were falsely implicated in the instant case. He further stated that within 4-5 days of the occurrence, information was given to the police orally and a request was to trace the victim. He stated that he does not know as to whether the oral statement was recorded by the police or not. In further cross-examination, he stated that regarding the occurrence of offence, the police had been informed on 01.02.2018, but no proof can be given in this regard. He further stated that on the basis of information given on 01.02.2018, no FIR was lodged.

17. **Vijendra Rai (P.W.3)** stated in his deposition that the deceased was related as sister to him. Upon hearing the noise, he also went to the embankment where he saw P.W.2 and P.W.4 in an injured condition. On query, the informant narrated him the entire story. He stated that he along with others took the informant Sheo Raj Rai and his nephew Kamlesh Rai to their house and got them treated.

18. In cross-examination, he stated that the embankment is at a distance of 100-150 yards south-west from his house. He has further stated that he does not exactly remember that when he reached near the embankment and whether he was alone or others



had also arrived there. He stated that when he reached at the embankment, the informant and his nephew Kamlesh Rai were found badly injured and they were taken to compounder Sanjeet Kumar, who had treated them.

19. **Sheo Raj Rai (P.W.4)** is the informant of the case. He tried to give a different version. He stated that after hearing hue and cry of his daughter when he reached near the embankment along with his nephew Kamlesh Rai, he saw that on the first bike Balwant Singh, Chhotu Singh, one unknown person and the victim were sitting and on the second bike Anant Pandey, Ajay Rai and Chhotu Mahto were sitting. He stated that when he tried to stop the first bike, he was pushed aside. He further stated that when his nephew caught hold of another bike, he was also pushed aside and the accused persons ran away from the place of occurrence after leaving the second bike. He further stated that his co-villagers carried him to a doctor and got him treated. He further stated that he started searching for his daughter after two hours of her abduction. He further stated that the next day he along with others went to the police station and narrated the story to the Daroga, but the Daroga advised them to search the victim and if she would not be recovered, he would institute the FIR. He further stated that he tried to trace his daughter for four days and when he failed in his



efforts, he submitted a written report on 05.02.2018 to the police pursuant to which the FIR was registered. He identified his signature on the written report, which was marked as Exhibit-1. He stated that on 06.02.2018 at 02:00 A.M. the police apprehended the accused Balwant Singh and on his disclosure the body of the victim was recovered from the mustard field of Jugal Mahto by the police. According to him, the police had found blood stains near the private parts of his daughter. He identified the accused Chhotu Kumar Singh and Anant Pandey in the dock.

20. In cross-examination, he stated that Balwant Singh, Chhotu Kumar Singh and one unknown were riding the bike, which he tried to stop. The second bike which was left at the place of occurrence was with the other miscreants. He further stated that when he caught hold of the accused persons, they pushed him aside and sped away riding the bike. He got injuries on his legs, hand, neck and mouth. His clothes were also torn. In further cross-examination, he admitted that he did not show any wound or the injuries sustained by him to the Daroga when he visited the police station a day after the occurrence had taken place. He also admitted that initially he had given oral statement to the police and, subsequently, he had submitted the written report. He further stated that he had drafted the written statement at his house and a



day after the written report was submitted by him to the police, the body of his daughter was recovered at 02:00 AM. He stated that he had no enmity with Balwant Singh from before. He denied the defence suggestion that his daughter used to frequently visit various shops in the village. He also denied the defence suggestion that his daughter was acquainted with the accused Balwant Singh since before and, because of enmity, the accused Balwant Singh has been falsely implicated. In further cross-examination, he stated that the seized bike was deposited at the police station after four days of the occurrence. He further stated that he kept the bike for four days at his own residence. He further stated that he cannot say which doctor had treated him and his nephew. He admitted that the witnesses of the case are his relatives. He denied the defence suggestion that his co-villagers Anant Pandey and Chhotu have been falsely implicated in this case after due deliberation because of previous enmity.

21. **Dr. Madhu Bala Sinha (P.W.5)** was posted as Medical Officer in Sadar Hospital, Ara on 06.02.2018. She stated in her deposition that on 06.02.2018 at 7:15 AM a medical team headed by the Civil Surgeon was constituted for conducting post-mortem examination on the body of the deceased daughter of the informant. She stated that she took vaginal swab and sent it for



pathological examination. She stated that the post-mortem report was prepared in her presence and she had put her signature over it. She identified her signature on the post-mortem report, which was marked as Exhibit-2.

22. In cross-examination, she stated that the vaginal swab taken by her was sent for pathological examination to Sadar Hospital, Ara. She admitted that the post-mortem report does not mention anything about the vaginal examination of the deceased.

23. **Dr. Absar Ahmad (P.W.6)** was posted as Medical Officer in Sadar Hospital, Ara on 06.02.2018. He also stated that on 06.02.2018 at 07:15 AM a medical team under the leadership of Civil Surgeon was constituted for conducting post-mortem examination of the deceased. He stated that the post-mortem report was prepared by him. According to him, the medical board consisted of three doctors, namely, Dr. T. A. Ansari, Dr. K. S. Chaubey and Dr. Madhubala Sinha. He identified his signature on the post-mortem report, which was marked as Exhibit-3. According to him, the cause of death of the victim was fracture of neck bone leading to asphyxia.

24. In cross-examination, he admitted that he had not stated in the post-mortem report that the fracture of neck bone was ante-mortem. He further admitted that he was not sure about the



cause of death of the deceased. Therefore, he took the viscera from the body of the deceased and sent it for chemical analysis in order to find out any foul play like poisoning etc.

25. **Umesh Kumar Das (P.W.7)** is the first investigating officer of the case. He stated that after the FIR was registered and the investigation was handed over to him, he incorporated the seizure list in the case diary and recorded the subsequent statement of the informant. He stated that in his subsequent statement, the informant stated that he has apprehension that (1) Balwant Singh, (2) Chhote Kumar Singh, son of Rajendra Singh, (3) Chhotu Singh son of Barmeshwar Singh, (4) Anant Kumar Pandey, (5) Om Rai, (6) Ajay Rai, Chhotu Mahto son of Dwarika Mahto and one unknown accused might have ravished his minor daughter and strangulated her to death and concealed the body at some unknown place. He further stated that he recorded the statement of Kamlesh Rai, Deo Sharan Rai and Vijendra Rai during investigation and inspected the place of occurrence. Thereafter, he raided the house of the accused Balwant Singh and Chhotu Kumar Singh son of Rajendra Singh and the accused Chhotu Singh, son of Barmeshwar Singh. He arrested Balwant Singh on 05.02.2018 and, on the same day at 09:50 PM, he recorded his defence statement in police custody after taking him out of the Hajat. He disclosed that on



31.01.2018 he along with his accomplices Anant Kumar Pandey, Ajay Rai and Chhotu Mahto forcibly abducted the victim in the night of 31.01.2018 from Semra embankment and brought her at Semra Marriage Hall and they all raped her and thereafter strangled her to death and threw her body in the mustard field of Jugal Mahto.

26. P.W.7 stated that in order to verify the aforesaid disclosure made by the accused Balwant Singh, he went together with him to the mustard field of Jugal Mahto and recovered the dead body of the victim, which was identified by the local chowkidar and dafadar. Thereafter, the body was sent to Ara Sadar Hospital for post-mortem examination. He stated that after the post-mortem examination, the body was handed over to the informant. He further stated that he recorded the confessional statement of accused Balwant Singh on a separate sheet of paper and incorporated the same in para 58 of the case diary. He stated that he received the supervision report of the Superintendent of Police pursuant to which he filed a written application before the court for adding Section 376-D, 302, 376-A of the IPC and 4 of the POCSO Act to the FIR. He stated that he handed over the charge of investigation to the Officer-in-Charge Kamlesh Paswan on 06.04.2018.



27. In cross-examination, he admitted that prior to the institution of the FIR he had no knowledge about the occurrence. He further stated that he does not know as to who is the author of the written report. He admitted that in the written report Chhotu Mahto and Anant Kumar Pandey are not named as accused. The written report contains the name of the accused Balwant Singh, his family members and Chotu Singh. He admitted that the bike was deposited in the police station at 8:00 AM on 05.02.2018 in presence of Barun Chaudhary and chowkidar whose statements were not recorded during investigation. He stated that during investigation he did not record the statement of any independent witness in the Semra village or Semra Bazar. He admitted that he had recorded the statement of the informant and his relatives only. He admitted that he had neither seen any mark of injury on the body of the informant Sheo Raj Rai and P.W.2 Kamlesh Rai nor did they show him any injury. He stated that Deo Sharan Rai (P.W.1) had stated before him that he had not seen the occurrence himself. He had stated that he had heard about the occurrence from Sheo Raj Rai. He further admitted that Kamlesh Rai (P.W.2) had not stated before him that Sudama Rai, Tribeni Rai, Khalifa Rai, Vinod Rai and Manoj Rai had assembled at the place of occurrence. He stated that he had simply stated that after the



occurrence, only Deo Sharan Rai came at the place of occurrence. He admitted that he recorded the confessional statement of Balwant Singh on 18.02.2018 at 3:00 PM at the police station when he was taken on police remand from the court.

28. **Akhilesh Kumar (P.W.8)** is the second investigating officer of the case. He stated that on 28.04.2018 he was posted at Barahara Police Station as Sub-Inspector of Police. He took over the investigation of the case on 28.04.2018. He submitted supplementary charge-sheet before the court. He identified his signature and writing on the supplementary charge-sheet, which was marked as Exhibit-4.

29. In cross-examination, he denied the defence suggestion that without verifying the truthfulness of the allegation he had submitted the supplementary charge-sheet. He also denied the defence suggestion that the investigation of the case was faulty.

30. After closure of the prosecution case, in order to enable the accused persons to explain the circumstances appearing against them, the Trial Court recorded their respective statements under Section 313 of the Cr.P.C in which they pleaded their innocence. The defence did not lead any oral or documentary evidence during trial.



31. After hearing the arguments advanced on behalf of the parties and appreciating the evidence on record, the Trial Court held the appellants guilty of the offences noted hereinabove vide impugned judgment dated 28.08.2019.

32. Assailing the impugned judgment of conviction and order of sentence, Mr. Kanhaiya Prasad Singh, learned senior advocate appearing for the appellant Balwant Singh in Cr.Appeal (DB) No. 1184 of 2019 submitted that the prosecution has failed to establish its case beyond reasonable doubt. He contended that the FIR was instituted after an inordinate and unexplained delay of six days. He contended that the authenticity of the FIR itself is doubtful. According to him, admittedly, the FIR based on the written report of the informant is a subsequent version as the informant himself has stated that he had gone to the police station along with his nephew on 01.02.2018 and narrated the entire incident to the police. He contended that the witnesses examined on behalf of the prosecution have contradicted each other during trial. He argued that from the evidence of the prosecution witnesses it would be evident that neither the manner of occurrence nor the place of occurrence has been proved. He urged that from the evidence it would be evident that the prosecution was interested in suppressing the facts more than revealing it before the



court. According to him, neither the injury reports of the informant Sheo Raj Rai and Kamlesh Rai (P.W.2) were brought on record nor the doctor who treated them was examined during trial. He further contended that the prosecution has utterly failed to prove the charges under Sections 366-A and 376-D of the IPC.

33. Mr. Singh, learned senior advocate submitted that the prosecution case was closed after examination of P.W.8 on 02.07.2019, the statements of the accused persons under Section 313 of the Cr.P.C were recorded on 05.07.2019 and, thereafter, the Public Prosecutor filed an application on 05.08.2019 for admitting the confessional statement of the accused Balwant Singh recorded by the A.S.I. Umesh Kumar Das on 18.02.2018 at Barahara Police Station into evidence. Though the prayer made on behalf of the prosecution was opposed by the defence, the Trial Court took the confessional statement into evidence with objection and marked the same as Exhibit-5.

34. Mr. Singh, learned senior advocate submitted that the confession made by an accused before the police officer cannot be proved in view of Section 25 of the Indian Evidence Act. He submitted that Section 26 of the Indian Evidence Act also lays down that if an accused makes confession while he is in custody of police, it shall not be proved against him unless it is made in



presence of a Magistrate. He further contended that since confessional statement recorded on 18.02.2018 did not lead to discovery of any fact, the same could not have been taken into evidence by the Trial Court even under Section 27 of the Indian Evidence Act and that too after the evidence on behalf of the prosecution and the defence was closed. He contended that the Trial Court has grossly erred in placing reliance on an inadmissible confessional statement of the accused Balwant Singh.

35. Mr. Rajesh Kumar, learned advocate appearing for the appellant Anant Kumar Pandey and Chhotu Kumar Singh in Cr.Appeal (DB) No. 1181 of 2019 while adopting the submissions made by Mr. Kanhaiya Prasad Singh, learned senior advocate appearing for the appellant Balwant Singh in Cr.Appeal (DB) No. 1184 of 2019 submitted that the Trial Court grossly erred in appreciating the evidence led during trial.

36. He submitted that out of eight witnesses examined during trial, four are official witnesses and the rest four are interested and related witnesses. He submitted that as per the prosecution case though the body of the victim was recovered on 06.02.2018 at 02:00 AM on the disclosure of Balwant Singh, neither the inquest report nor any document containing signature of Balwant Singh has been proved during trial, which raises



serious doubt on the statement of the investigating officer. He contended that no witness was examined to corroborate the statement of the investigating officer regarding recovery of the dead body from the mustard field. He further contended that except P.W.2 and P.W.4, other two witnesses are hearsay witnesses and there are major contradictions in the evidence of the witnesses with regard to the number of accused persons and the bikes being possessed by them. According to him, the story propounded by the prosecution is highly improbable, unbelievable and contrary to the normal act of a prudent person.

37. We have also heard Mr. Amish Kumar, learned advocate, who accepted our request to assist the Bench as *amicus curiae* in Death Reference No.4 of 2019. He took great pains to make detailed submissions elucidating the relevant provisions of the Indian Evidence Act. He submitted that from the chain of events it is apparent that the dead body of the deceased was not recovered pursuant to the confession made by the accused Balwant Singh before the police. He submitted that the investigating officer filed a petition for taking the accused Balwant Singh on police remand on 17.02.2018, which was allowed pursuant to which the confessional statement of the accused Balwant Singh was recorded on 18.02.2018 at 3:00 PM at Barahara Police Station. The said



confessional statement has been taken on record and marked as Exhibit- 5 by the Trial Court with objection. He contended that the body of the deceased was recovered at 2.00 AM on 06.02.2018. Thus, since the recovery of the body of the deceased was prior in time, the confessional statement made by the accused Balwant Singh was not admissible even under Section 27 of the Indian Evidence Act. He also contended that since Exhibit-5 was marked on 07.08.2019 after the prosecution case was closed and the statements of the accused persons were recorded under Section 313 of the Cr.P.C, the veracity of Exhibit-5 was never tested. He contended that the evidence of P.W.2 Kamlesh Rai and P.W.4 Sheo Raj Rai are full of contradictions and does not inspire confidence. He further contended that the other two witnesses (P.W.1 Deo Sharan Rai and P.W.3 Vijendra Rai) are tutored witnesses, who are telling lie and the same can be made out from the contradictions in the evidence of P.W.2 and P.W.4.

38. On the other hand, Mr. Satya Narayan Prasad, learned Additional Public Prosecutor appearing for the State submitted that from the evidence on record, it would be evident that on 31.01.2018 at 8:00 PM the accused Balwant Singh, Chhotu Kumar Singh and an unknown person kidnapped the minor daughter of the informant when she went out near embankment of



her village to ease. He contended that Deo Sharan Rai (P.W.1) and Vijendra Rai (P.W.3) have fully corroborated the prosecution case as narrated by the informant. According to him, Kamlesh Rai (P.W.2) and Sheo Raj Rai (P.W.4) have also withstood the test of cross examination. He further contended that the confessional statement of the accused Balwant Singh was first made on 06.02.2018 after he was arrested pursuant to which the body of the deceased was recovered. He urged that Section 27 of the Indian Evidence Act provides that if any fact is discovered in consequence of any information received from a person accused of an offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved against him. He contended that in the present case since the body of the deceased was recovered by the police at the instance and identification of accused Balwant Singh and he had taken name of his accomplices, Section 27 of the Indian Evidence Act would directly come into play. He submitted that the Trial Court has properly appreciated the facts and law involved in the case and has rightly convicted and sentenced the accused appellants.

39. I have given my anxious consideration to the rival submissions and have carefully perused the evidence on record.



40. The admitted case of the prosecution is that the minor daughter of the informant was kidnapped on 31.01.2018 at 8:00 PM for which the FIR was lodged on 05.02.2018 at 8:30 AM. The moot point is that both Kamlesh Rai (P.W.2) and Sheo Raj Rai (P.W.4) have claimed to be eye-witnesses of the alleged kidnapping on 31.01.2018, but they did not bother to inform the police for over five days. They went to the Police Station for the first time on 05.02.2018, which is supported by the evidence of the first investigating officer Umesh Kumar Das (P.W.7).

41. The FIR is an important document even though it is not a substantive piece of evidence. A prompt FIR prevents possibility of coloured version being put by the informant.

42. In *Thulia Kali Vs. State of T.N.*, since reported in *AIR 1973 SC 501*, the Supreme Court had observed that the FIR in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The Court further observed that the delay in lodging the FIR often results in embellishment which is a creature of afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is,



therefore, essential that the delay in the lodging of the FIR should be satisfactorily explained.

43. It is true that there is no hard and fast rule that the delay in lodging the FIR would automatically render the prosecution case doubtful. However, the delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not.

44. In *State of Punjab Vs. Ramdev Singh*, since reported in *(2004) 1 SCC 421*, the Supreme Court held: “*Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in the prosecution version on account of such delay, the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the same cannot by itself be a ground for disbelieving and discarding the entire prosecution version....*”



45. Thus, the fact that the FIR has been lodged belatedly has to be considered in the light of other facts and circumstances of the case. It is to be seen whether the delay in lodging the FIR has been sufficiently explained or not. In this regard, first of all, it would appear from the written report submitted by the informant pursuant to which the FIR was instituted that since the prestige of his family was involved, he first took measures to trace the victim himself. When he failed in his effort, he approached the police. During trial, the informant Sheo Raj Rai changed his version and stated in his evidence that though he approached the police a day after the occurrence on 02.02.2018 and gave his oral statement, the Daroga advised him to conduct his own search. He assured that if he would not be able to trace the victim, the FIR would be registered. He stated that he conducted his own search for four days and when he failed in his effort, he approached the police and submitted his written report. The said statement of P.W.4 is not in alignment with the deposition of Umesh Kumar Das (P.W.7), who was entrusted with the investigation of the case. The informant has also not produced any document in support of his contention that he had approached the police a day after the occurrence had taken place. The witnesses examined on behalf of the prosecution have



also not corroborated this part of the story narrated by the informant during trial.

46. In view of the inherent contradictions in the evidence of the informant and the investigating officer, I am of the opinion that the delay caused in institution of the FIR has not been properly explained.

47. However, mere delay in lodging the FIR is not fatal to the case of the prosecution. The fact that the report has been lodged belatedly is a relevant fact, which has to be kept in mind while appreciating the evidence.

48. It is an admitted case of the prosecution that P.W.2, the nephew of the informant and P.W.4, the father of the deceased respectively went to the Police Station to lodge FIR on 05.02.2018.

49. Now, as per evidence of P.W.2, the report was not written by his uncle P.W.4. According to him the police had written the same in his presence. On the other hand, the informant Sheo Raj Rai (P.W.4) has stated in his evidence that he along with P.W.2 went to the Police Station on 05.02.2018 and handed over the written report to the police.

50. Apparently, P.W.2 and P.W.4 are contradicting each other on the point as to whether the police had recorded the



fardebayan of the informant or a pre-prepared written report was handed over to the police.

51. Further, in the FIR, the informant has named Balwant Singh, Chhotu Kumar Singh and one unknown person only, who are said to have kidnapped the deceased. He has stated in the FIR that on the first bike Balwant Singh, Chhotu Kumar Singh and the deceased were sitting and one unknown person was sitting on the second bike. But, during trial, the informant has changed his version regarding the manner of occurrence. He has stated that on the first bike Balwant Singh, Chhotu Kumar Singh, one unknown person and the deceased were sitting and, on the second bike, Anant Pandey, Ajay Rai, Om Rai and Chhotu Mahto were sitting.

52. Similarly, P.W.2, who was present at the time of lodging of FIR, has also changed his version while deposing before the court.

53. As per the confessional statement of the appellant Balwant Singh, which has been marked as Exhibit-5 with objection, the occurrence of kidnapping and rape of the victim followed by her murder had taken place in the marriage hall of Semra. After going through the entire evidence of the two investigating officers, it would be crystal clear that neither the first investigating officer (P.W.7) nor the second investigating officer



(P.W.8) thought it proper to inspect the said marriage hall. There has been no investigation on this point.

54. It has been argued on behalf of the prosecution that the dead body of the victim girl was recovered by the police at the instance and identification of the appellant Balwant Singh, who also took the name of his accomplices in the crime. In this regard, the evidence of first investigating officer Umesh Kumar Das (P.W.7) is important. In his examination-in-chief, he has stated that the accused Balwant Singh was arrested at 9.50 PM on 05.02.2018 after institution of the FIR and his defence statement was recorded by him for which he was taken out of Hazrat in which he disclosed that he had abducted the deceased on 31.01.2018 in the night with his accomplices Anant Kumar Pandey, Om Rai, Ajai Rai and Chhotu Mahto from Semra embankment and kept her at Semra Marriage Hall where they gang-raped her and, thereafter, strangled her to death and threw her body in the mustard field of Jugal Mahto. In cross-examination, he admitted that he did not record the confessional statement of the accused Balwant Singh in the night of 05.02.2018 after his arrest. He further admitted that he recorded the confessional statement of accused Balwant Singh on 18.02.2018 at 3:00 PM in the police station after he was taken on police remand.



55. There is no explanation as to why the confessional statement made by Balwant Singh was not recorded in the night of 05.02.2018 or prior to the recovery of the body of the deceased. There is also no explanation as to why the confessional statement of the accused Balwant Singh was recorded on 18.02.2018 in the police station if the police had the confessional statement available with them from before.

56. It is manifest from the evidence that the recovery of the dead body took place on 05.02.2018 and the confessional statement of the accused Balwant Singh was reduced in writing on 18.02.2018.

57. Sections 25 and 26 of the Indian Evidence Act read as under:

“25. Confession to police-officer not to be proved. — No confession made to a police-officer, shall be proved as against a person accused of any offence.”

“26. Confession by accused while in custody of police not to be proved against him. — No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.”



58. As per the aforesaid provision when an accused makes a confession to a police officer or an accused makes confession while he is in custody, such a confession cannot be proved in evidence against him unless it is made in the immediate presence of a Magistrate. This is with a purpose to do away with the torture of the accused and use of force against him by the police.

59. In ***Bullu Das Vs. State of Bihar***, since reported in ***(1998) 8 SCC 130***, while dealing with the confessional statements made by the accused persons before a police officer, the Supreme Court held as under:

“7. The confessional statement, Ex. 5, stated to have been made by the appellant was before the police officer in charge of the Godda Town Police Station where the offence was registered in respect of the murder of Kusum Devi. The FIR was registered at the police station on 8-8-1995 at about 12.30 p.m. On 9-8-1995, it was after the appellant was arrested and brought before Rakesh Kumar that he recorded the confessional statement of the appellant. Surprisingly, no objection was taken by the defence for admitting it in evidence. The trial court also did not consider whether such a confessional statement is admissible in evidence or not. The High Court has also not considered this aspect. The



confessional statement was clearly inadmissible as it was made by an accused before a police officer after the investigation had started.”

60. Notwithstanding the aforesaid provisions of the Indian Evidence Act coupled with the ratio laid down by the Supreme Court in **Bullu Das** (Supra) and the objections raised by the defence during trial, the Trial Court erroneously relied upon the confession made by the accused Balwant Singh for arriving at a conclusion of guilt against the appellants.

61. Apart from the immediate presence of a Magistrate prescribed under Section 26 of the Indian Evidence Act, Section 27 provides another situation when confession made to the police would be admissible in evidence.

62. According to Section 27 of the Indian Evidence Act, when a statement made by the accused leads to discovery of a fact in relation to the offence then it may be proved.

63. Section 27 of the Indian Evidence Act reads as under:

“27- How much of information received from accused may be proved-provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved”.



64. In ***Pulukuri Kottaya Vs. Emperor***, since reported in ***AIR 1947 PC 67***, the Privy Council explained the ambit and scope of Section 27 of the Indian Evidence Act as under:

“It is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed A’ these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

65. In ***Anter Singh v. State of Rajasthan***, since reported in **(2004) 10 SCC 657**, the Supreme Court observed as under:



“14. The expression “provided that” together with the phrase “whether it amounts to a confession or not” shows that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only “so much of the information” as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word “distinctly” means “directly”, “indubitably”, “strictly”, “unmistakably”. The word has been advisedly used to limit and define the scope of the provable information. The phrase “distinctly” relates “to the fact thereby discovered” and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against



confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.”

66. In ***Geejaganda Somaiah v. State of Karnataka***, since reported in ***(2007) 9 SCC 315***, the Supreme Court observed as under:

“22. As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act.”



67. In the instant case, since no fact was actually discovered in consequence of the information given by the accused Balwant Singh while he was in police custody after being taken on police remand from the court, partial lifting of ban against the confession and the statement made to the police as provided under Section 27 of the Indian Evidence Act was not at all available.

68. Coming back to the evidence of Kamlesh Rai (P.W.2) and Sheo Raj Rai (P.W.4), I find that they have stated that they sustained injury while trying to stop the bike of the miscreants, neither any injury report has been filed by them nor the compounder nor the doctor, who examined them was made a prosecution witness.

69. So far as Deosharan Rai (P.W.1) is concerned, he has stated in his evidence that he himself saw Balwant Singh and Chhotu Kumar Singh taking away the victim. He stated that he had given his statement before the police in this regard, but the investigating officer Umesh Kumar Das (P.W.7) has categorically stated in his deposition that P.W.1 had stated before him that he learnt about the occurrence from Sheo Raj Rai (P.W.4) and he did not see the incident of kidnapping himself.



70. Similarly, Vijendra Rai (P.W.3) has tried to be a witness to the occurrence, but P.W.7 has admitted in cross-examination that he had stated before him that he had gone at the embankment after hearing commotion.

71. As seen above, the Trial Court has convicted the appellants for the offences punishable under Sections 366-A, 376-D and 302 of the IPC. On scrutiny of the evidence of P.W.2 and P.W.4, I find that they have deposed that they heard that the victim girl was screaming for help meaning thereby she was not induced as per the prosecution case. Therefore, charge under Section 366-A of the IPC does not stand.

72. In so far as the charge under Section 376-D is concerned, the case of the prosecution is that the appellants gang raped the deceased. Admittedly, there is no witness to the offence of gang rape. Dr. Madhu Bala Sinha (P.W.5) and Dr. Absar Ahmad (P.W.6), who were members of the medical team conducting the post-mortem examination on the body of the deceased have not stated anything in their evidence to corroborate the fact that prior to death the victim was subjected to rape.

73. Dr. Madhu Bala Sinha (P.W.5) has stated in her evidence that she had taken vaginal swab and sent it for pathological examination. The report of the vaginal swab, which



was necessary to ascertain as to whether the deceased was subjected to rape or not has not been brought on record. In absence of any witness to the incident of rape and in the absence of any corroborative medical evidence, by no stretch of imagination it can be said that the prosecution has been able to prove the charge under Section 376-D of the IPC beyond shadow of reasonable doubt.

74. In so far as Section 302 of the IPC is concerned, as per the evidence of the first investigating officer, Umesh Kumar Das (P.W.7), the inquest report was prepared before sending the body of the deceased for autopsy. The same has not been brought on record. As per the evidence of P.W.7, the appellant Balwant Singh was arrested from his house on 05.02.2018 and, on the same day at 9:50 PM, his defence statement was taken on the basis of which the body of the deceased was recovered from the mustard field of Jugal Mahto. The said statement of the appellant Balwant Singh was not recorded by the police. It was due to this reason that eleven days after the autopsy on the body of the deceased on 17.02.2018, an application for police remand of the appellant Balwant Singh was filed in the court and, after taking him on police remand, his confessional statement (Exhibit-5) was recorded on 18.02.2018.



75. If the appellant Balwant Singh had given his statement, which led to recovery of the body of the deceased, that statement should not have been suppressed by the prosecution. Furthermore, there would have been no need to record the statement of the appellant again on 18.02.2018. The inquest report also ought to have been brought on record. Since the investigating officer stated that the body was identified by the local Chowkidar and Dafadar, they ought to have been examined to corroborate the fact that the appellant Balwant Singh was accompanying the police at the time of recovery of the body of the deceased.

76. The withholdment of the inquest report, non-examination of the Chowkidar and Dafadar and the withholdment of the alleged confessional statement of the appellant Balwant Singh apparently shows that after recovery of the dead body of the victim, the police recorded the confession of the appellant Balwant Singh on 18.02.2018. Hence, it is not a case of confession leading to recovery and possibly that is the reason that the police never bothered to inspect the marriage hall at Semra, which was the place where the occurrence of murder and gang rape allegedly took place.

77. In view of the inordinate and unexplained delay in lodging the FIR, the casual manner in which the investigation was



carried out, the investigating officer did not inspect the place of occurrence where the victim was allegedly gang raped and killed, the inadmissibility of confessional statement of the appellant Balwant Singh, the glaring inconsistencies in the evidence of witnesses examined during trial and the contradictions taken from the investigating officer, I am of the opinion that the prosecution has not been able to prove the charge under Section 302 of the IPC against the appellants beyond shadow of reasonable doubt.

78. Thus, on consideration of the entire evidence, I find that the prosecution has miserably failed to prove its case beyond reasonable doubt against the appellants.

79. For the aforesaid reasons, these appeals are allowed. The impugned judgment of conviction dated 28.08.2019 and the consequent order of sentence dated 06.09.2019 passed by the learned 1st Additional District & Sessions Judge-cum-Special Judge, POCSO Act, Bhojpur at Ara in POCSO Case No. 26 of 2018 arising out of Barahara P.S. Case No. 43 of 2018 are set aside.

80. The appellants, namely, Balwant Singh, Anant Pandey and Chhotu Singh @ Chhotu Mahto are acquitted of the charges levelled against them. They shall be released from the jail forthwith unless they are required in any other case.



81. Since, I have allowed the appeals and set aside the impugned judgment of conviction and the consequent order of sentence passed by the Trial Court, the reference made by the Trial Court for confirmation of death sentence vide Death Reference No. 4 of 2019 is, hereby, rejected.

82. Before parting with the death reference and these appeals, I would record my appreciation for the able assistance rendered by the learned *amicus curiae*.

83. The Patna High Court, Legal Services Committee is, hereby, directed to pay Rs. 7500/- to Mr. Amish Kumar, learned *amicus curiae* in Death Reference Case No. 4 of 2019 as a consolidated fee or the services rendered by him.

(Ashwani Kumar Singh, J)

Arvind Srivastava,J.: I agree.

(Arvind Srivastava, J)

Pradeep/-

AFR/NAFR	AFR
CAV DATE	25.06.2021
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