

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.337 of 2014

Arising Out of PS. Case No.-387 Year-2011 Thana- KISHANGANJ District- Kishanganj

Firoz @ Binod Yadav S/o Shankar Yadav @ Abbas Ansari Resident of Village
Ghor Mara, Police Station Taljhari, District Deoghar (Jharkhand).

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Dilip Kumar Singh, Advocate
Amicus Curiae	:	Ms. Archana Palkar Khopde, Advocate
For the Respondent/s	:	Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 08-07-2022

By this appeal, appellant/convicted accused Firoz @ Binod Yadav is challenging the judgment and order dated 01.03.2014 and 04.03.2014 respectively, passed by the learned Additional Sessions Judge, Kishanganj, in Sessions Trial No.1183 of 2011/Trial No.63 of 2011 thereby convicting him of the offences punishable under Sections 376(2)(f), 450 and 302 of the Indian Penal Code and sentencing him accordingly. For the offence punishable under Section 302 of the Indian Penal Code he is sentenced to suffer rigorous imprisonment for life apart from imposition of fine of Rs.10,000/- (Ten thousand). In default of payment of fine he is directed to undergo simple



imprisonment for six months. For the offence punishable under Section 376(2)(f) of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for ten years apart from imposition of fine of Rs.5,000/- (Five thousand) and in default to undergo simple imprisonment for three months. For the offence punishable under Section 450 of the Indian Penal Code, the accused is sentenced to suffer rigorous imprisonment for seven years apart from imposition of fine of Rs.2,000/- (Two thousand) and default sentence of simple imprisonment for one month. For the sake of convenience, the appellant shall be referred to in his original capacity as an accused.

2. Facts in brief leading to the prosecution of the accused, projected from the police report, can be summarized thus:

(A). After death of his wife, first informant PW 1 Bhanu – driver by occupation, was residing at his house situated at Dongibasti, Caltax Square falling under jurisdiction of Police Station Kishanganj along with his children, namely, Anup (PW 5), Santosh (PW 6) and the daughter who is unfortunate victim of the subject crime. At the relevant time she was nine years of age. PW 5 Anup who at the relevant time was aged about 11 years used to work at the tea stall for helping his father in



earning the livelihood.

(B) The incident allegedly took place on 21.09.2011 at the residential house of first informant PW 1 Bhanu. The accused used to work as Conductor/Khalasi with first informant PW 1 Bhanu few months back. At about 4:00 PM of 21.09.2011, the accused came to the house of first informant PW 1 Bhanu. At that time PW 1 Bhanu had gone out for his duty as a driver of the goods vehicle. His children were present in the house. The accused assured PW 5 Anup that on the next day he will arrange some better work for him. He declared his intention to have a night halt at their house. After sometime, PW 5 Anup as usual went to attend his work as a helper on the tea stall. As such, the accused, PW 6 Santosh and the victim female child were all alone in the house of first informant- PW 1 Bhanu. Subsequently, PW 6 Santosh also went out of the house. Taking advantage of this fact, the accused then committed rape on the victim female child and then committed her murder by constricting her neck.

(C). According to the prosecution case, when her brother PW 6 Santosh returned to the house, he saw the accused mounting on the victim minor female child and pressing her neck as well as mouth. At that time, clothes of the accused as



well as of the victim were found open by PW 6 Santosh. The accused slapped PW 6 Santosh when Santosh attempted to make a hue and cry. As such, PW 6 Santosh rushed to disclose the incident to his brother PW 5 Anup. When they both returned to their house, it was found that their sister died in the incident. The incident was then informed to PW 1 Bhanu by PW 5 Anup telephonically. On return, PW 1 Bhanu found his daughter lying dead with blood oozing from the mouth as well as vagina. Accordingly, he lodged the first information report regarding the incident at 10:00 PM of 21.09.2011, which has resulted in registration of crime No.387 of 2011 with Kishanganj Police Station against the accused.

(D). The routine investigation followed. PW 7 Santosh Kumar Nirala, the Investigating Officer, visited the spot of the incident and inspected dead body of the minor female child. He seized her panty. Inquest report came to be prepared and the dead body was then sent for the post mortem examination. The Medical Board of the Sadar Hospital, Kishanganj, comprising of PW 2 Dr. Rafat Hussein, PW 3 Dr. Devendra Kumar and PW 4 Dr. Urmila Kumari conducted autopsy on the dead body on 22.09.2011 and recorded report of post mortem examination.



(E). On completion of investigation, the accused came to be charge sheeted. The learned trial Court framed and explained the charges to him. He pleaded not guilty and claimed trial.

(F). In order to bring home the guilt to the accused, the prosecution has examined in all 7 witnesses. First Informant Bhanu is examined as PW 1. He proved the FIR lodged by him. Dr. Rafat Hussein, the Medical Officer and member of the Medical Board of the Sadar Hospital, Kishanganj, is examined as PW 2. Post mortem report of dead body of the victim female child is at Exhibit-2. Other members of the Medical Board, who conducted post mortem examination on the dead body, were examined as PW 3 and PW 4 and they are Dr. Devendra Kumar and Dr. Urmila Kumari respectively. PW 5 Anup and PW 6 Santosh are brothers of the deceased. PW 7 Santosh Kumar Nirala is the Investigating Officer.

(G). The defence of the accused was that of total denial and false implication. He however did not enter in the defence.

(H). After hearing the parties, the learned trial Court by the impugned judgment and order was pleased to convict the appellant/accused and to sentence him as indicated in the



opening para of the judgment.

3. We heard the learned Counsel appearing for the appellant-accused at sufficient length of time. It is argued on behalf of the appellant that uncle of the victim, who had taken the dead body to the M.G.M. Hospital, is not examined by the prosecution. It is further argued that PW 6 Santosh Kumar is a tutored witness. Though the Investigating Officer has stated that statement of this witness was taken on the same day, this witness Santosh is stating that his statement came to be recorded after two days. This witness has admitted in the cross-examination that his father had informed him as to what should be told to the police. It is further argued that the prosecuting party was on inimical term with the accused giving motive of his false implication to them. The accused was removed from the employment by PW 1 Bhanu. The learned counsel for the appellant further argued that independent witnesses are not examined by the prosecution in this case and therefore the charges cannot be held to be proved.

4. The learned Additional Public Prosecutor opposed the appeal and supported the impugned judgment and order of conviction. We have also heard Ms. Archana Palkar Khopde, the learned Advocate, who acted as Amicus Curiae.

5. We have considered the submissions so advanced



and also perused the record and proceedings including oral as well as documentary evidence relied by the prosecution.

6. Evidence of PW 1 Bhanu, his son PW 5 Anup as well as PW 6 Santosh makes it clear that the victim female child died on 21.09.2011. PW 7 Santosh Kumar Nirala, the Investigating Officer, upon visiting the spot of the incident after receipt of the intimation about the incident, had noted that the dead body of the minor female child was lying at the house of PW 1 Bhanu and the panty of that child was found to be thrown in the corner of the room. This witness had taken inquest notes and dispatched the dead body for autopsy. The inquest report proved by this witness shows that the red frock and the panty of the minor female child was lying near the dead body. There were bruises on the dead body and lip of the dead body was found to be having the cut marks.

7. Upon receipt of the dead body of the minor female child on 22.09.2011, the Medical Board for conducting the autopsy came to be constituted at the Sadar Hospital, Kishanganj, of which PW 2 Dr. Rafat Hussein is one of the member. This witness has stated that during the course of post mortem examination on dead body of the victim, the following injuries were noticed:



- I. Abrasion $\frac{1}{4}$ " x $\frac{1}{4}$ " , $\frac{1}{4}$ " x $\frac{1}{6}$ " at left upper eyelid and left molar region of face.
- II. Abrasion $\frac{1}{4}$ " x $\frac{1}{4}$ " radish in colour at left side of lower lip.
- III. Bruise dark blueish in colour 3" x $\frac{3}{4}$ " at frontal and both side of neck between chin and thyroid cartilage. Two bruise 1 $\frac{1}{2}$ " x $\frac{1}{4}$ " and 1 $\frac{1}{4}$ " x $\frac{1}{4}$ " dark brownish in colour at right side of neck, just below the previous one.
- IV. Three abrasions $\frac{1}{4}$ " x $\frac{1}{6}$ " each at left side of neck beside the bruise radish in colour.
- V. One bruise dark blue in colour $\frac{1}{2}$ " x $\frac{1}{4}$ " on left side of neck beside the previous mentioned bruise.
On dissection of neck shows extra vasation of blood under bruise and subcutaneous muscles of neck. Larynx and trachea congested.
- VI. Face congested, conjunctiva of both the eyes congested.
- VII. There was swelling bluish in colour of both labia majora, hymen teared, radially at posterior part and left lateral part, margin of teared hymen found red.



VIII. Lacerated wound 1½ ” x ¼” x ¼” starting at posterior commission of vagina and running posterior vaginal wall. There is blood clot inside vaginal orifice.

The autopsy surgeon further deposed that death of the victim female child was due to asphyxia and shock as a result of throttling. He further deposed that the dead body was having evidence of commission of rape. The duly proved report of post mortem examination is at Exhibit-2 and this documentary evidence is corroborating the version of PW 2 Dr. Rafat Hussein.

8. Another member of the Medical Board, namely, PW 3 Dr. Devendra Kumar was tendered for cross-examination. PW 4 Dr. Urmila Kumari is the third member of the Medical Board and she had also proved the report of post mortem examination of dead body of the minor female child. With this evidence, the prosecution has established that deceased died homicidal death caused by asphyxia and shock because of throttling.

9. Now let us examine whether the prosecution has proved that the accused trespassed the house of the victim for committing rape as well murder and committed her murder after



ravishing her.

10. PW 6 Santosh, who happens to be younger brother of the victim female child, is a star witness for the prosecution. The incident in question took place in his residential house which used to be shared by his family members including the deceased. This witness PW 6 Santosh at the time of the incident was aged about seven years. He being a child witness, the learned trial Court interacted with him in order to ascertain his competency to testify and to find out whether he is in a position to understand the questions put to him and to give a rational answers to such questions. The learned trial Court after interacting with PW 6 Santosh came to the conclusion that the witness has attained sufficient maturity and is a competent witness. Prior to adverting evidence of this witness as well as that of his brother PW 5 Anup, let us put on record the principles of appreciation of evidence of child witnesses laid down by catena of judgment of the Supreme Court. Recently in the matter of **P. Ramesh Vs. State represented by Inspector of Police** reported in **(2019) 20 SCC 593** following are the observations of the Hon'ble Supreme Court found in para-16 of the judgment:-

“16. In order to determine the competency of a child witness, the Judge



has to form her or his opinion. The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capacity to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.”



11. Similarly, recently in the matter of **Hari Om @ Hero Vs. State of Uttar Pradesh** reported in **(2021) 4 SCC 345** following are the observations of the Supreme Court found in paragraph-22, the relevant portion of which reads thus:

“22. At the outset, we must note the perspective from which the evidence of a child witness is to be considered. The caution expressed by this Court in Suryanarayana that “corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence” is a well-accepted principle. While applying said principle to the facts of that case, this Court in Suryanarayana {(2001) 9 SCC 129} observed: (SCC pp. 133-35, paras 5-9)

“5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending



circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a



measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not a material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

6. This Court in ***Panchhi v. State of***



U.P. held that the evidence of the child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law (vide Prakash v. State of M.P.; Baby Kandayanathil v. State of Kerala; Raja Ram Yadav v. State of Bihar and Dattu Ramrao Sakhare v. State of Maharashtra).

7. To the same effect is the judgment in State of U.P. Ashok Dixit.....{(2000) 3 SCC 70}.”

12. In **State of U.P. v. Krishna Master {(2010) 12 SCC 324}**, the Supreme Court has observed thus in paragraphs 36 and 37:

“36. ... This Court fails to understand as to on what principle and on which experience in real life, the High Court made a sweep-



ing observation that it is inconceivable that a child of Madan Lal's understanding would be able to recapitulate facts in his memory witnessed by him long ago. There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the respondents by firing gunshots. When a child of tender age witnesses gruesome murder of his father, mother, brothers, etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.

37. This Court is of the firm opinion that it would be doing injustice to a child witness possessing a sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in his life and would never forget



those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the specious ground on which the reliable testimony of PW 2 Madan Lal came to be disbelieved can hardly be affirmed by this Court.”

13. It needs to mention here that competency of the child witness depends on his capacity of understanding and intelligence. His understanding of difference between truth and falsehood as well as duty to tell the truth affirms his competency to depose. The decision on the competency of the child witness to testify primarily rests on the decision of the trial Court who has an opportunity to see the child witness, to notice his manner and appearance before the Court as well as his way of answering the questions put to him by the parties. PW 6 Santosh has testified that the incident took place prior to about two years and it was time of about 6:00 PM. He stated that he was in his house itself. His sister was also present in the house. Then by identifying the accused, in most natural way, PW 6 Santosh has stated that the accused then sent him out for purchasing biscuits by giving money. How much time this witness took for bringing the biscuits can be seen from



the material elicited from him during the course of his cross-examination. PW 6 Santosh in his cross-examination stated that there was lot of rush at the shop and the shopkeeper asked him to wait for giving biscuits to him. He waited for about half an hour to get one packet of the biscuits of “Good day” brand. Then as stated by him, he returned to his house and at that time the accused was very much present at his house. Now let us revert to the chief examination of this witness. This witness PW 6 Santosh disclosed what he had seen on his return to his house from the shop after purchasing the packet of biscuits. As per his version, he saw the accused mounting on the person of his sister and his sister was trying to escape from the clutches of the accused. At that time, in the words of this child witness, clothes of his sister as well as that of the accused were open and the accused was pressing the mouth as well as neck of his sister. When he tried to shout, the accused gave a slap to him and, therefore, he rushed to call his brother PW 5 Anup. PW 6 Santosh further stated that on return with his brother PW 5 Anup, they saw his sister lying in dead condition with blood oozing from her private parts. He clarified that the accused used to work with his father as a *Khalasi* and upon return of his father he has disclosed the incident as witnessed by him to his



father.

14. PW 6 Santosh withstood the searching cross-examination by the defence. He clarified in his cross-examination that his mother is no more and his father maintains the family by working as the driver on the goods vehicle. He further disclosed in his cross-examination that after the incident, he gave his statement to the police after two days. As per his version in the cross-examination, he was brought to the Court by the police but on the way to the Court, the police had not disclosed anything to him. He answered very candidly that nobody has told him as to what he should state before the Court. He however has stated that after the incident, his father had told him what is to be stated to the police and at that time he had not concealed anything from the police. He denied the suggestion that he has not seen the incident. Overall scrutiny of the evidence of this witness makes it clear that this child witness is not at all a tutored witness. His evidence is clear and consistent with the prosecution case. He is a natural witness to the incident which took place in his own house. He had given rational answers to the questions put up to him in the chief examination as well as in the cross-examination. In his own words this witness has described the incident seen by him after



his return from purchasing the packet of the biscuits from the money given to him by the accused. Evidence of this child witness makes it clear that very strategically, he was sent out of the house by the accused by giving money for purchase of a packet of the biscuits, in order to ensure that the victim female child remains all alone in the house in the company of the accused. PW 6 Santosh has stated during the course of his evidence that on return to the house he disclosed the incident to his father PW 1 Bhanu.

15. Let us examine whether evidence of this child witness PW 6 Santosh is corroborated by other evidence on record. His father PW 1 has duly corroborated the version of PW 6 Santosh by stating that at about 10:00 PM, he returned to the house on getting information of the incident telephonically through his son PW 5 Anup. PW 1 Bhanu further testified that his younger son PW 6 Santosh then disclosed him that on his return to the house he (PW 6 Santosh) saw that the accused mounted on the person of his sister and was pressing her neck. PW 1 Bhanu further stated that PW 6 Santosh disclosed him that at that time there were no clothes on the person of the victim and the pant of the accused was also down.

16. The incident in question took place after 6:00 PM



and PW 1 Bhanu returned to his house where the incident took place, at 10 PM. Immediately thereafter, his son PW 6 Santosh had disclosed the incident to him. PW 1 Bhanu as such has proved former statement of his son PW 6 Santosh made immediately after the incident. The time gap between the happening of the incident and the disclosure thereof to his father by PW 6 Santosh was so small as to exclude any possibility of polluting his mind by any external interference or force. Thus, previous statement of PW 6 Santosh proved by his father PW 1 Bhanu is certainly admissible under Section 157 of the Evidence Act and is fully corroborating the version of PW 6 Santosh regarding the incident.

17. PW 5 Anup has stated that the accused came to his house at about 4:00 PM of 21.09.2011. The accused was known to him because the accused was working with his father. As per version of PW 5 Anup, the accused assured him that he will provide employment at some good shop to him. The accused further informed that he will stay in their house at the night. PW 5 Anup further stated that then he gave an amount of Rs.40/- to his sister and told her that she should cook something for the accused. PW 5 Anup then left the house for going to his workplace. He disclosed that then his younger brother Santosh,



his sister and the accused alone remained in the house. As per version of PW 5 Anup, then at about 6:00 PM PW 6 Santosh came to his tea stall and told him that the accused had removed the clothes of their sister and is pressing her neck. That is how this witness returned to the house. This version of PW 5 Anup that PW 6 Santosh told him by rushing to his workplace that the accused is pressing the neck of their sister by removing her clothes is not at all challenged in the cross-examination. This duly proved former statement of PW 6 Santosh made by him to his brother PW 5 Anup soon after the incident fully corroborates the version of PW 6 Santosh and shows that the accused had denuded the victim, committed rape on her and was pressing her mouth and neck when PW 6 Santosh returned to his house.

18. Medical evidence reproduced by us in foregoing paragraph coming from the mouth of PW 2 Dr. Rafat Hussein is also fully corroborating the version of PW 6 Santosh. The deceased died because of asphyxia and shock caused to her because of throttling. There were marks of violence on her private parts as seen from the medical evidence. Laceration of her vagina, tear of hymen, swelling of both labia majora as well as labia minora, the laceration reaching up to the posterior vaginal wall of the victim, finding of blood clots inside the



vaginal orifice apart from bruises on all over the body of the victim female child, abrasion at her lip unerringly indicates that the victim female child was subjected to rape in a brutal manner prior to her death by throttling. Trustworthy evidence coming on record from the mouth of PW 6 Santosh which is gaining corroboration from voluminous other evidence adduced by the prosecution and discussed by us in the foregoing para shows that the accused had committed rape on the victim female child and thereafter caused her death by throttling her. The victim was done to death by constricting her neck by the accused. This act of constricting neck of the minor female child after raping her establishes the intention of the accused to commit her murder. Thus, the prosecution has established beyond all reasonable doubt that the accused committed house trespass by entering in the house of the victim with an intention to commit her rape as well as murder and accordingly committed rape on her by violating the trust repose by her and subsequently committed her murder.

19. Minor discrepancies in the version of PW 6 Santosh as to whether his statement was recorded on the day of incident or two days thereafter cannot be given any overbearing importance. As other available evidence on record is sufficient



to prove the guilt of the accused, non-examination of the uncle of the deceased cannot create a doubt in the prosecution case.

20. In the result, the appeal is devoid of merit and the same is dismissed.

21. We put on record words of appreciation for the able assistance rendered by Ms. Archana Palkar Khopde, learned Amicus Curiae, to this Court in arriving at the proper conclusion for deciding in that appeal. We direct the High Court Legal Services Authority to pay an amount of Rs.5,000/- to Ms. Archana Palkar Khopde, learned Amicus Curiae, for the services rendered by her.

22. Let the Lower Court Records be sent back to the learned Court below with a copy of this judgment and order.

(A. M. Badar, J)

(Rajesh Kumar Verma, J)

Mkr./-

AFR/NAFR	AFR
CAV DATE	04.07.2022
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