

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.420 of 2021

Arising Out of PS. Case No.-151 Year-2016 Thana- RUNISAIDPUR District- Sitamarhi

Deepak Kumar @ Deepak Baitha Son of Godaila Baitha @ Ram Sudhisth
Baitha Resident of Village - Tikauli, P.S. - Runnisaidpur, District - Sitamarhi.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ansul, Adv. Mr. Amit Kumar Jha, Adv.
For the Respondent/s	:	Mr. Ajay Kumar Mishra, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 30-08-2023

We have heard Mr. Ansul, the learned advocate
for the appellant and Mr. Ajay Mishra for the State.

2. The appellant stands convicted under
Sections 302, 376, 366(A) and 201 of the I.P.C. and
Section 4 of the POCSO Act, 2012 vide judgment dated
22.01.2021 passed by the learned 1st Additional
Sessions Judge cum Children Court, Sitamarhi in Trial
No.11/2018, (Reg. No. 766/2018) and by order dated
28.01.2021, he has been sentenced to undergo



imprisonment for life, to pay a fine of Rs.5,000/- and in default of payment of fine, to further suffer imprisonment for six months each for the offences under Sections 302 and 376 of the I.P.C. and Section 4 of the POCSO Act, 2012. For the offence under Section 366(A), the appellant has been sentenced to undergo R.I. for ten years, to pay a fine of Rs.2,000/- and in default of payment of fine, to suffer imprisonment for three months. For the offence under Section 201 of the I.P.C., the appellant has been sentenced to undergo R.I. for three years, to pay a fine of Rs.1,000/- and in default of payment of fine, to suffer further imprisonment for one month. The sentences however, have been ordered to run concurrently.

3. The minor daughter of the Informant (P.W.8) is alleged to have been raped, killed and thrown in the graveyard of the village of the Informant.

4. The FIR was lodged by P.W.8 (mother of



the deceased) at about 11.00 A.M. in the graveyard which was recorded by the S.I. of Police, Sunil Kumar Srivastava (P.W.10). P.W.8 has alleged that in the night of 23.04.2016, she slept along with her daughter (deceased) at about 10.00 P.M.. When she awoke at about 3.00 O'clock in the morning, she did not find her daughter. She looked for her everywhere but could not find her. The main door of the house was found to be open. She immediately contacted her relatives staying in the same house and also went out in search of her daughter along with those relatives. At about 8.30 in the morning on 24.04.2016, some villagers told her that the dead body of a girl is lying in the "*Budhia Gachhi*" graveyard. On such information, she and her brothers-in-law viz. Nathuni Sah (P.W.1) and Ram Narayan Sah (P.W.2) went to the graveyard and came back with the information that the dead body is that of the daughter of (P.W.8). Thereafter, Therefore, the entire family went to the graveyard. Looking at the dead body from close



quarters, it was found by her that the deceased had bled through her nose and there were marks of violence on her jaws. There was swelling at the back of the neck of the deceased. In the same breath, P.W.8 has further stated that her villager viz. the appellant had been harassing the deceased for last one year and had been coaxing her to marry him or else she would be killed. This had become very frequent in the last one month but her daughter was not ready for any matrimonial alliance with the appellant. She therefore suspected that the appellant along with his associates has kidnapped the victim and strangled her to death and threw her dead body in the graveyard.

5. On the basis of the aforementioned *fardbeyan* statement, Runnisaipur P.S. Case No.151/2016 dated 24.04.2016 was registered for investigation under Sections 302, 201 and 34 of the I.P.C.

6. The Informant has disclosed the age of



her daughter to be 18 years in the F.I.R. Precisely, for this reason, no case under the POCSO Act, 2012 was initially registered.

7. The police, after investigation, submitted charge-sheet against the appellant but, as it appears from the records of this case, the investigation with respect to other suspected accused persons remained pending. The appellant was tried for the offences under Sections 302, 201, 366(A) of the I.P.C. and Section 4 of the POCSO Act, 2012.

8. It may also be stated here that the case of the appellant was placed before the J.J.B., Sitamarhi where the appellant was declared to be a child in conflict with law but, since he was more than 16 years of the age at the time of occurrence and was alleged to have committed heinous offence as defined under Section 2(33) of the J.J.B. Care and Protection of Children Act, 2015, his case was transferred to the Children Court.



9. There is nothing on record to indicate whether any assessment of the appellant was done under Section 15 of the J.J. Act, 2015. Nonetheless, cognizance of the offence was taken and charges were framed against the appellant under the aforementioned Sections. The statement of the appellant was also recorded under Section 313 of the Cr.P.C. where he expressed his innocence. The Children Court convicted the appellant and sentenced him as aforesaid after having examined ten witnesses on behalf of the prosecution, which included the Doctor and the I.O., who have been examined as P.W.6 and P.W.10 respectively.

10. Mr. Ansul learned advocate has assailed the judgment on several counts and has submitted that the Trial court did not at all weigh the evidence and merely because a girl had lost her life and there was some suspicion against the appellant, jumped to the conclusion that the appellant along with his associates had committed the murder after raping the deceased and



threw the dead body in the graveyard.

11. In support of the aforementioned contention, he has submitted that P.W.8 has, in the first instance, stated about the age of the deceased to be 18 years but, during trial, she, for some reason of the other, declared the age of the deceased to be 15 years. It has been urged before us that this was a deliberate attempt of P.W.8 to bring the case within the mischief of the POCSO Act, 2012 by showing the deceased to be a minor.

12. He has further submitted that the Trial court relied upon a School Leaving Certificate which was never proved but was only annexed with the case diary that the deceased was only a minor at the time of the occurrence. He laments that the procedure adopted by the Trial court was absolutely unknown and the reasoning given in the judgment is also perverse. The Trial court has erroneously relied upon the provisions



contained in Section 172 (2) of the Cr.P.C. which permits any criminal court to send for the police diaries of a case under enquiry or trial in such court and such diaries may be used but not as an evidence of the case, but only to aid it in such enquiry or trial.

13. This provision is only for facilitating the courts to satisfy themselves that the line on which the trial has proceeded is the correct trajectory to be followed. Section 172 (2) does not dispense with the requirement of law under the J.J. Act, 2015 as also the POCSO Act, 2012 for the determination of the age of either victim or the malefactor.

14. The other grounds urged on behalf of the appellant is that during the Trial, P.W.8 claims to have learnt about the dead body of the deceased lying in the graveyard from Pramod Sah (P.W.3), Samina Khatoon (P.W.4) and Ravindra Kumar (P.W.7). At the trial, Pramod Sah and Samina Khatoon have not supported



the prosecution case and have been declared hostile. They do not claim to have met P.W.8 ever or of having told her about the dead body of the deceased lying in the graveyard.

15. Ravindra Kumar (P.W.7) has only stated that he informed the P.W.8 in the morning of 24.04.2016 at about 8.00 O'clock that in the night intervening between 23rd and 24th April, 2016, he had seen the appellant talking to the deceased on road and he identified them in the torch-light. The reason for his coming out of his house was to attend to the call of nature. Apart from this, no other statement is stated to have been made by P.W.7 to P.W.8, specially with respect respect to the appellant along with his forcibly taking away the deceased with him. He did not even know as to that when did the deceased come out of her house to meet the appellant.

16. The other limb of argument on behalf of



the appellant is that even the postmortem report is not in consonance with the accusation levelled against him. The hymen of the deceased was found to be ruptured but it was an old rupture, which is not suggestive of the deceased having being subjected to sexual intercourse recently. There was no injury on the private parts but blood clots were found in the vaginal track.

17. The pathological report, which is not part of the record but referred to by Dr. Prem Pushp Lohia (P.W.6), who had conducted the postmortem examination, no spermatozoa was found. In fact, the pathological report did not talk of any presence of epithelial cells in the vaginal swab. Despite this finding in the postmortem report, P.W.6 (Doctor) has opined that there could be a possibility of sexual attack before the death. Interestingly, the cause of death has been opined to be asphyxia because of strangulation.

18. The deceased had her clothes on her body.



This, Mr. Ansul asserts, is a definite indicator of the fact that the deceased was not raped. There can be no gainsaying that the death of the deceased is homicidal but there is no evidence whatsoever linking this death to the appellant. There is no evidence on record of the appellant either having called the deceased to which she responded by coming out of her house or of having taken her to some unknown destination in the company of his associates, where she was raped or that she was killed by smothering.

19. The last of the evidence used by the prosecution to prop up its case is the CDR of the mobile telephone number belonging to the appellant. Though, the I.O. has told the Trial court that he had seized the telephone of the appellant during the course of the investigation but, no seizure memo has been exhibited nor was it put in the police papers. Even assuming that the telephone of the appellant was seized in the absence of any seizure of the telephone of the deceased or of her



mother, it could not have been ascertained whether there was any call by the appellant or any other source of communication between him and the deceased.

20. When did the deceased come out of the house and why and that also in the dead of the night remains unknown. Thus, he sums up his argument by suggesting that only because, in the past, there was some inkling of a love-relationship between the appellant and the deceased, that a suspicion has been raised that it was the appellant who must have raped and killed the deceased.

21. As opposed of the aforesaid contention, Mr. Ajay Mishra, learned advocate for the State, has submitted that the circumstances speak for itself. The deceased was being stalked by the appellant for a long time. The evidence suggests that within last one month of her death, the pressure on her had been mounted by the appellant to marry him, to which she was not



agreeable. This was the motive and reason strong enough to commit the offence. The deceased came out of the house in the night sometimes after 10.00 P.M. when her mother had gone to sleep. When did she come out of the house may not be relevant but, since the appellant and the deceased knew each other and the deceased had not been responding favourably to the pressures exerted by the appellant upon her for marrying him, the deceased was killed. There are though some missing links, Mr. Mishra admits, but only for that, the prosecution case cannot be jettisoned altogether.

22. He further submits that it is a serious case of rape and murder of a minor girl and in the absence of any enmity or any clue about any other persons having killed the deceased, it was the appellant only who had been harassing her for the last one year, was held to be responsible.

23. In this context, it has been urged by the



State that no interference is required with the findings of the Trial court and the ultimate conviction and sentencing of the appellant.

24. The mother of the deceased (P.W.8) has in the *Fardebeyan* narrated a story which is difficult to believe. She has spoken about the age of the deceased to be 18 years. During trial, she has stated that she handed over an already prepared statement to the I.O. of the case. By 8.30 in the morning, she had learnt that a dead body was spotted in the graveyard of the village was of none else but of her daughter. After this information, she along with her family members went to the graveyard to find the dead body of her daughter.

25. These sequence of events presuppose that if the deceased was identified by the witnesses, who are the residents of the village, some of whom had even suggested that it was the appellant who had taken away the deceased along with his associates and had killed



her, those witnesses would have told the P.W.8 about the complicity of the appellant. In the F.I.R., which may not be the most comprehensive of all documents, she has only jumped to the conclusion on the basis of suspicion on the appellant and not on the basis of any information provided to her by the villagers.

26. We have noticed that three of the persons, who were named by P.W.8 as having informed her about the occurrence, did not support the prosecution case in its entirety. Two of them have turned hostile and P.W.7 is only said to have seen the deceased in the company of the appellant in the night. This statement of P.W.7 and his identifying the appellant in the company of the deceased appears to be highly doubtful. As a villager, he may not be interested in the safety of the daughter of another house but for sure would have questioned the appellant and the deceased the reason for their roaming on the road in the dead of the night.



27. Some of the witnesses have stated before the Trial court that there was a pre-marriage function in the house of the appellant. Whether the deceased visited the house of the appellant of her own or on the asking of the appellant remains unknown. Whether she went go on the asking of the appellant in her own capacity or in the capacity of the daughter of the house representing her family also remains unknown.

28. There would have been some reasons of planning for the deceased to come out of her house in the night. That she had come out of her house is certain. The P.W.8 had found the main door of the house open and kept ajar early in the morning. This was the time when she entertained doubts about some mishap in the family. Did the deceased walk out of the house as part of any pre-hatched plan with the appellant or the appellant had come to her house, called her from outside to which he responded favourably is not known. In either of the circumstances, some persons residing in the



family would have got a hint of a member of the family coming out of the house in the night. Evidence suggests that P.W.8 was residing with her brother-in-law's family and the younger brother-in-law was residing next doors. If at all, the deceased had walked out of the house of her own as part of any plan engineered by the appellant or by the appellant and deceased together, then how and when the murder took place remains unknown. All these conjectures therefore entitle the appellant to argue that he was not at all concerned with the deceased having walked out of her house in the night.

29. In this context, the statement of P.W.8 that the deceased did not have any strong liaison with any person in the village assumes importance. Even if it is assumed that the appellant had some love relationship with the deceased, the deceased was never spotted by her mother in the company of the appellant.

30. In order to test the case from another



angle, we have examined the deposition of the I.O. (P.W.10) of this case. He claims to have arrested the appellant after six days of the recording of the F.I.R. on 30.04.2016. After his arrest, the appellant is said to have told the I.O. that beneath the pillow in his house, the mobile telephone is kept with which he used to call the deceased in the past. The aforementioned mobile telephone was seized by the I.O.

31. As noted above, there is no seizure memo on record.

32. Whose telephone was that which was seized? Whether any telephone was seized or not is also not certain.

33. There is nothing on record and there is no statement of the P.W.10 that the CDR, which was obtained by him, was of the telephone number which was registered in the name of the appellant. All that the I.O. could learn from the telephony company that the



mobile set had a sim card of Voda-phone. This information is not complete in any way. Assuming for the moment that the telephone of the appellant had been seized, for proving that such telephone was used by him for calling the deceased in the night, it was necessary to have proved the CDR and the CAF which could only have been proved as a secondary piece of evidence with necessary certification under Section 65B of the Indian Evidence Act. Since the seizure memo also is not on record, it would not be necessary for us to even go into the question of admissibility of the CDR when it is not known that the CDR obtained by P.W.10 was of a telephone which belonged to the appellant.

34. Apart from this, we have also found from the records that on the disclosure of the appellant of the telephone number belonging to the deceased, some attempt was made by the I.O. to find out the ownership of that telephone. The telephone number was found to be registered in the name of the late father of the



deceased. However, when P.W.8 was asked to hand over the telephone for any further investigation in the matter, she expressed her complete ignorance about the existence or ownership of any telephone with any number whatsoever.

35. This leads to two inferences. The P.W.8 was not truthful in her disclosure and that the information about the telephone numbers, on the analysis of which the I.O. has concluded in his investigation report that it was the appellant who had called the deceased out of her house and had killed her, is based on no evidence whatsoever.

36. We have also tried to find out whether the deceased was a minor in order to attract the mischief of the provisions contained in Section 29 and 30 of the POCSO Act, 2012.

37. As rightly argued by the appellant, the Trial court committed an error by relying upon an



unsubstantiated School Leaving Certification which was part of the case diary in holding that the deceased was a minor. If the deceased was a minor, there was no reason for the mother/Informant/P.W.8 to have told the age of the deceased to be 18 years right in the beginning when the F.I.R. was lodged. The Doctor conducting the postmortem has also assessed the age of the deceased to be 17-18 years.

38. There is no circumstance which could be the starting point for doubting that the appellant may have had his hand in killing the deceased. The only circumstance which appears to have weighed with the Trial court is that the appellant had been pressurizing the deceased to marry him and that the deceased was not to be found in his house after the lodging of the case. Both the circumstances are not strong enough to presume the culpability of the appellant.

39. The law regarding the nature and



character of proof of circumstantial evidence has been settled by several authorities of the Supreme Court as also by this Court. The locus classicus of all the decisions is ***Hanumant Vs. The State of Madhya Pradesh, AIR 1952 SC 343*** wherein the Supreme Court has clearly expounded the various concomitants of the proof of a case based purely on circumstantial evidence.

40. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved that it must be such as to show that within all human probability, the act must have been done by the accused only. This line of reasoning has been followed continuously till date in ***Sharad Birdhi Chand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622***; in which the “*Panchsheel*” principle has been codified by the Supreme Court. It says that (i) the primary principle is that the accused “must be” and not merely “may be” guilty before a court can convict and the mental distance



between "may be" and "must be" is long and divides vague conjectures from sure conclusions; (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, i.e. to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) the circumstances should be of conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved and (v) there must be a chain of evidence, so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of accused and must show that in all human probability, the act must have been done by the accused.

41. We have already discussed and analyzed that there is no link evidence from the time when the deceased had gone to sleep in her house along with her mother till the time that her dead body was recovered from the graveyard.



42. The questions viz. why did the deceased come out of the house; on whose asking; whether under a plan; whether on the asking of the appellant; whether other persons also accompanied the appellant when the deceased was in his company; when was she killed; whether any person saw the act of murder or of the deceased being thrown in the graveyard, remain unanswered till date.

43. The attempt of the prosecution to chip in the story of one of the witnesses seeing the appellant in the company of the deceased in the night of the occurrence, does not inspire confidence. Even if it is taken as a link evidence, the pre and post evidence is completely missing.

44. The hypothesis of the prosecution is knocked out from the bottom by the postmortem report and the deposition of the Doctor, who did not find any injury on the private parts of the deceased. Even the



evidence with respect to throttling is very superficial. Was she killed in the graveyard or somewhere else and thrown in the graveyard also remains unknown. With such deficient evidence, we are in total disagreement with the opinion rendered by the Trial court in convicting and sentencing the appellant.

45. We have also not been able to find out any evidence with respect to the charge under Section 366(A) of the IPC.

46. Per force, we set aside the judgment and order of conviction of the appellant. The appellant is acquitted of all the charges.

47. The appeal is allowed.

48. The appellant is in custody. He is directed to be released from jail forthwith, if he is not required or detained in any other case.

49. The copy of this judgment shall be



transmitted to the Superintendent of the jail for record

as also for compliance.

50. The Trial court record shall be dispatched

to the court below also.

51. Interlocutory application/s, if any, also

stand disposed off accordingly.

(Ashutosh Kumar, J)

(Alok Kumar Pandey, J)

rishi/-

AFR/NAFR	AFR
CAV DATE	NA
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