IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.9 of 2021

Arising Out of PS. Case No.-758 Year-2019 Thana- FORBESGANJ District- Araria

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The State of Bihar.

... ... Petitioner/s

Versus

Amar Kumar, S/O Kishan Lal Das, Resident of Mirjapur Dhattatola, P.S. - Forbesganj(Simraha), Dist. - Araria, Bihar.

... ... Respondent/s

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With

CRIMINAL APPEAL (DB) No. 728 of 2021

Arising Out Of Ps. Case No.-758 Year-2019 Thana- Forbesganj District- Araria

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Amar Kumar, Son of Kishan Lal Das @ Kisundayal Tatma, Resident of Mirjapur Dhatta Tola, P.S.- Forbesganj (Simraha), District- Araria, Bihar.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :
(In DEATH REFERENCE No. 9 of 2021)

For the Petitioner/s : Mr. Krishna Chandra, Advocate.

For the Respondent/s : Mr. Abhimanyu Sharma, APP.

(In CRIMINAL APPEAL (DB) No. 728 of 2021)

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

For the Respondent/s : Mr. Abhimanyu Sharma, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 18-12-2023

1. The Death Reference No. 9 of 2021 and Criminal Appeal (DB) No. 728 of 2021 have been heard together and are being disposed off by this common judgment.

2. We have heard Mr. Krishna Chandra, learned Advocate for the appellant and Mr. Abhimanyu Sharma, learned APP for the State.

3. The sole appellant has been convicted under Sections 302/34, 201/34 and 376DB/34 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012, *vide* judgment dated 08.10.2021, passed by the learned Special Judge (POCSO)-cum- Additional District & Sessions Judge-VI, Araria, in Spl. POCSO Act Case No. 46 of 2019, arising out of Forbeisganj (Simraha) P.S. Case No. 758 of 2019. On the same day, he has been sentenced to be hanged by neck till he died. Some

other directions have been issued by the Special Court/Trial Court, *viz.,* destruction of seized articles, if any, in due course of law and referring the matter to D.L.S.A. for granting compensation of Rs.10,00,000/- to the family of the victim etc.

4. A 12 year old girl is said to have been gang-raped and then killed and thrown on a road near a temple, where she along with her grand-mother (P.W. 1) had gone to witness a fair organized on the occasion of *Nagpanchami* festival.

5. The occurrence took place on 05.08.2019, but the FIR was registered after the dead body was recovered on 06.08.2019. The dead body was sent for postmortem examination on the same day.

6. The FIR lodged by P.W. 1, the grand-mother of the victim/deceased, was registered against unknown. In the *fardbeyan,* which was recorded by Sub-Inspector, D.C. Mishra (not examined), she has alleged that her grand-daughter, who was residing with

her, had accompanied her to the fair but she disappeared from the fair. A frantic search was made but to no avail. On 06.08.2019, the grandson of the brother of P.W. 1 informed her that the dead body of the victim was lying on the road near the temple. The dead body was buck naked. She accompanied by her husband (P.W. 2) went to the place where the dead body was lying and identified it to be of her grand-daughter.

7. It appeared to her that some unknown persons had molested and killed her. There were blood drops below her waist. The local *mukhiya* informed about the occurrence to the local administration when the police party arrived and started the investigation. The dead body was seized and was sent for post-mortem examination.

8. On the basis of the afore-noted *fardbeyan* statement of P.W. 1, Forbeisganj (Simraha) P.S. Case No. 758 of 2019, dated 06.08.2019 was

instituted for the offences under Sections 302, 201, 354A, 34 of the IPC and Section 8 of the POCSO Act, 2012 against unknown.

9. The police after investigation submitted charge-sheet against the appellant, who was charged for the offences under Sections 302, 376D, 201/34 of the IPC and Section 4 of the POCSO Act, 2012 and was tried by the Special POCSO Court.

10. The Trial Court, after having examined 13 witnesses on behalf of the prosecution and none on behalf of the defence, convicted and sentenced the appellant as aforesaid.

11. We must, at the outset, express our dissatisfaction with the manner in which the Special Court has handled the case and has convicted and sentenced the appellant to death without caring for the basic principles of the law.

12. It would be necessary first to refer to

the circumstance under which the appellant was arrested and then subjected to trial. At the place where the dead body was found, a tracker sniffer dog was brought, who first smelt the dead body and then moved into a villager's house. Since, nothing incriminating was found there, the tracking dog next entered the house of the appellant. The appellant was arrested in his house.

13. Though the Trial Court has listed the evidence of the appellant having closed himself inside a room, which was locked from outside as one of the circumstances against him, but there is no evidence whatsoever of the door having been broken open for arresting the appellant. Thus, for all practical purposes, the only girdle on which the prosecution has rested its case is the sniffer dogs tracking trajectory.

14. Be it noted that there is nothing on record to get any idea about the skills of the dog used for tracking or of the handler who had trained the canine. This is what is troubling us that without

assessing the probative value of the materials, death sentence has been awarded by the Trial Court.

15. To cut the long story short, four pairs of slippers were located at the place where the dead body was recovered. A purse and a chain also was found at that place. The investigating agency jumped to the conclusion that one of the slippers was of the appellant. From the house of the appellant, a pair of soiled jeans of cream color is also said to have been recovered, which surprisingly was never sent for any forensic examination.

16. We also do not find any record of the appellant having been put to medical test under Section 53A of the Code of Criminal Procedure. May be for these reasons, the appellant was granted bail during the investigation by the High Court.

17. The circumstances which have been listed by the Trial Court for establishing the connecting link to the offence and forging the chain, which in the

opinion of the Court was complete in itself, are that : (a) the victim had gone to see the fair with her grand-mother, where the accused also was present and whose presence has been confirmed by P.W. 1, which was never rebutted; (b) the pair of slippers of the appellant was found near the dead body (material Exhibit- 1 to 1/4); (c) blood was spotted by P.W. 1 and few of the other witnesses on the lower part of the body of the victim; (d) from the house of the appellant, soiled clothes were recovered, which pair of jeans he had been wearing at the time of the occurrence and lastly; (e) that the appellant was found locked inside his house and the door had to be forced open for arresting him.

18. All this began when the sniffer dog entered the house of the appellant.

19. The circumstances listed by the Trial Court are either no circumstance in the eyes of law or are factually incorrect.

20. That the victim had gone to see the fair

with her grand-mother (P.W. 1) is no circumstance which could be treated as incriminating against the appellant by any standard of judgment. There is nothing on record to prove that the slipper found near the dead body (four pairs of slippers were found) belonged to the appellant or that the appellant had worn them on the day of the occurrence.

21. With respect to blood on the body of the deceased, the medical evidence does not support such contention. Only P.W. 1 at the time of giving her *fardbeyan* had disclosed that she could spot droplets of blood on the lower part of the body of the victim. There is no reference of any blood spots on the body in the inquest report prepared at the place where the dead body was found.

22. With respect to recovery of the soiled pair of jeans, the Trial Court perhaps forgot that it was not identified or confirmed by anybody that it was the same dress which the appellant had worn to the fair

and the seized pair of jeans were never sent for any forensic examination. In fact, one of the witnesses to the seizure list has specifically stated that only the appellant was arrested from his house after the sniffer dog had entered, but nothing else was recovered from that place. The witnesses to the seizure have, in unison, stated that they had signed on a plain piece of paper.

23. How and under what circumstances then the Trial Court has listed the afore-noted circumstances as forging links in coming to the finding of the guilt of the appellant completely eludes us. The materials on which the Trial Court has based his judgment, appear to be factually incorrect.

24. We deem it appropriate in this context to first examine the post-mortem report and the deposition of Dr. Pravin Kumar (P.W. 11), who had conducted post-mortem examination. The post-mortem examination began at 10:17 P.M. on 06.08.2019. The

Doctor has found the entire body to be swollen. The foreskin of the left hand was found to be completely scaled-off because of decomposition. There were no internal abnormalities detected; rather every organ was intact/*in-situ*. The viscera was preserved as no reason could be detected for the death of the deceased.

25. In the post-mortem report, the Doctor has specifically stated that no definite opinion could be given regarding the cause of death. The time elapsed since death and the post-mortem examination was assessed to be within 72 hours. Perhaps, the Doctor (P.W. 11) gave a big window for the prosecution to adjust its facts and timings. But then, the very fact that there is no mention of any examination of genitalia of the victim leads to an inference that perhaps it was not the dead body of the victim of this case which was subjected to post-mortem examination. We say so for the reasons that normally in a case of suspected rape/ rape, the first and foremost effort of the Doctor is to

examine the genitals. No injury was found on the entire body of the deceased. The occurrence, if the reporting of P.W. 1 is accepted to be correct, would have taken place sometimes between the time that the deceased disappeared and the time when the dead body was recovered and subjected to the post-mortem examination. Not even thirty hours would have passed by. Despite this, the Doctor has found that decomposition had started. He had surprisingly not found any blood or any injury over any part of the body.

26. To place it in the context, we have also examined the forensic report of the viscera of the deceased. No metallic, alkaloidal, glycosidal, pesticidal or volatile poison could be detected in the contents of the sample sent to the laboratory.

27. What then was the cause of death?

28. There is no evidence of any rape.

29. True it is that medical evidence of rape

is not all that necessary, provided there are other evidence. Admittedly, nobody had seen the occurrence nor had anybody seen the appellant taking away the victim. The victim had disappeared before the eyes of P.W. 1. She has alleged that while she was trying to lay a mattress on the floor of the temple, the victim had disappeared. She was not to be found in the vicinity.

30. Under such circumstances, complete absence of any evidence of molestation or rape sends us doubting whether it was the same body which was treated as *corpus delicti* of the case. There is another reason for us to think on these terms.

31. A deeper scrutiny of the deposition of P.W. 11 would disclose that he had not received any requisition for conducting post-mortem examination. The dead body was produced before him in a sealed cover but with no identification with respect to the deceased. Later, P.W. 11 corrected himself and said that the body was not sealed but was brought in open. There were no

injuries over the external body of the deceased nor was there any sign of rape which he could notice. He found rigor-mortis which would have been 24 hours old. He, as noted above, did not find the exact reason of death.

32. Who had then identified the dead body before the Doctor for it to be subjected to post-mortem examination?

33. That P.W. 1 and others saw the dead body and identified it to be of the deceased, is the assertion of the police for closing the investigation by relying solely on the evidence of the sniffer dog.

34. The Trial Court appears to have gone along side and believed the story to be true.

35. The appellant is said to have confessed his guilt. This story of confession also does not appear to be true for the reason that the appellant was arrested from his house and his confession was recorded before a B.D.O., whose name though has been disclosed in the investigation, but there is no any emblem of the

authority of the B.D.O. is present on the record.

36. Who would believe such story of the prosecution that he had confessed his guilt? Perhaps the Trial Court did and also relied upon the materials which were narrated in the so-called confession.

37. We again remind ourselves, while dealing with a judgment of this kind, that dead body had already been recovered and the services of the sniffer dog was employed thereafter. Perhaps the Trial Court completely lost sight of the fact that an investigating agency could undertake the service of a sniffer tracker dog and rely upon the canine faculties for the dog having forayed into the house of the appellant. But this exercise cannot be the anchorage point for judicial dispensation. The judicial dispensation can ill-afford such heavy reliance on the expertise of a sniffer dog, about whose skill, nothing is known; nor is there any evidence of it having been trained appropriately.

38. Did the Trial Court take it as an expert

evidence even in the absence of the handler of such dog having been brought to the witness-stand for his statement to qualify under Section 45 of the Indian Evidence Act, 1872?

39. We fail to understand as to how the Trial Court proceeded in the same manner as the investigation had proceeded, on the presumption that the dog would never have faulted in entering the house of the appellant. There is evidence of the dog having entered another person's house also. We, for the present, do not say that help of a sniffer dog cannot be taken by the police. Animal science tells us that the dogs can be very proficient if they are trained properly. The advantage with them as compared to the humans is of their possessing a very sharp olfactory sense which could help trace the offender. But this cannot be an evidence, much less strong evidence unless the Court examines the reliability of the dog skills, its past patterns of performance or its handler's capabilities. It cannot ever

be taken as a reliable pointer towards the commission of an offence at the hands of an offender.

40. Precisely for this reason, the Supreme Court in ***Abdul Rajak Murtaja Dafedar vs. State Of Maharashtra AIR 1970 SC 283*** has laid two objections against the reception of dog tracking evidence. The first is that the dog cannot take an oath and submit itself for cross-examination; however, its handler can go to the witness-stand and give his evidence which would but only be a hearsay evidence. Secondly, if it is received as an evidence in Courts of Law, then there would be a feeling that the liberty of a human being is being held ransom to the inferences made by a canine because of its olfactory sharpness.

41. Thus, even if it could be the starting point for the police to begin its investigation, it cannot be received as an evidence so strong as for the Trial Court not to need any corroborative evidence.

42. Let us then test the evidence adduced

at the Trial.

43. The grand-mother of the victim (P.W. 1) somehow or the other tried to improve upon her version by stating before the Trial Court that four boys were in the vicinity of the deceased in the temple premises where the fair was held. She had gone to the extent of alleging, without there being any investigation on this aspect of the matter, that it was the appellant who had organized the fair. However, in her exuberance, she forgot what she had stated in her fardbeyan. In her fardbeyan, she had claimed to have seen the dead body as also the blood spots on the lower portion of the body. But at the Trial, she has claimed that no sooner was she informed about the dead body lying on the road, she ran back home and informed the guardian of the house. However, she admitted that against the appellant, there was no case from before.

44. Her husband (P.W. 2) though does not claim to have ever visited the fair but has identified one

pair of sandles to be belonging to the appellant. He was questioned and rightly so whether there could be only one such pair of slippers, to which he answered in the negative. He had disclosed before the Trial Court that the sniffer dog did not go to any other place and that the purse, slippers and the chain were not recovered in his presence.

45. One of the maternal uncles of the deceased (P.W. 4) has also confirmed that except for arresting the appellant from his house, nothing else was recovered. He was made to sign on a blank piece of paper and what was inscribed on it was not known to him.

46. Dayanand @ Dayanand Sharma (P.W. 5) did not support the prosecution version with respect to recovery.

47. Rajesh Kumar Mehta (P.W. 6) had seen the sniffer dog entering the house of one Nago Das, where nothing incriminating was found. It was only

thereafter that the dog entered the appellant's house where the appellant was found to be locked inside a room. Despite protest by the mother of the appellant, the lock was broken. However, no paper was prepared with respect to breaking of the locks.

48. Kanhiya Kumar Das (P.W. 9), one of the witnesses to the seizure list, has grieved that he was made to sign on a blank piece of paper on the asking of the police. He is one of the members of the committee which had organized the fair.

49. The Investigator of this case has been examined as P.W. 10. He has admitted of not having recorded the *fardbeyan* or having prepared the inquest report. It was in his presence but that the *fardbeyan* was recorded. He had recorded the confession of the appellant in presence of the B.D.O. of Forbesganj, who though had signed the confession but has not put his official emblem in token of his having signed. No description was given by him in the charge-sheet of the

seized articles.

50. The seizure list was prepared by one D.C. Mishra, who has not been examined. The other seizure list was prepared by one M.A. Haidri of Simraha Police Station but the Investigator had no idea as to the context, as also the case in which that seizure list was prepared. Even the original copy of the post-mortem was not available in the Court. He had not stated about the dog having gone in the house of the appellant.

51. We have already examined the deposition of the Doctor who conducted the post-mortem examination.

52. This takes us to the statement of the appellant recorded under Section 313 of the Cr.P.C. It need not again be reiterated that in every inquiry or trial, for the purposes of enabling the accused personally to explain away the circumstance appearing in evidence against him, the Trial Court could, at any stage, without previously warning the accused, put such questions to

him as it would consider necessary; and shall after the witnesses for the prosecution have been examined and before the accused is called on for his defence, question him generally on the case.

(emphasis provided)

53. It is now well settled and apodictic that a Trial Court cannot ignore or avoid putting all the incriminating circumstances to an accused for knowing his response.

54. It appears very clear to us that all the circumstances which were relied upon by the Trial Court for holding the appellant guilty, were not put to him and the answers given by him to some of the circumstances, have not at all been taken into consideration.

55. None of the circumstances so put to the appellant have been proved at the Trial.

56. We have already noted that there are doubts about the recovery of the wearing apparel of the appellant and even if it were, it was never sent for any

forensic examination.

57. The mandate of Section 53A of the Cr.P.C. has been completely flouted.

58. Though, obedience to the mandate to Section 53A may not be mandatory (***Rajendra Prahladrao Wasnik vs. The State Of Maharashtra (2019) 12 SCC 460***) but in the same decision, the Supreme Court has held that there must be reasonable grounds for believing that the examination of a person will afford evidence as to the commission of an offence of rape or an attempt to commit rape before taking any decision of not examining the accused of the crime medically. If reasonable grounds exist, then a medical examination as postulated by Section 53A (2) of the Cr.P.C. must be conducted and that includes examination of the accused and the description of materials taken from the person of the accused for DNA profiling.

59. Is it that the charge of rape was not in

existence when the appellant was arrested? What could, then, be the reason for the Doctor not examining the genitals of the deceased who was only a 12 year old girl and was alleged to have been gang-raped by many persons.

60. We, thus, hold that the Trial Court completely ignored the observations of the Supreme Court in ***Gade Lakshmi Mangraju @ Ramesh vs State Of Andhra Pradesh (2001) 6 SCC 205*** that there are inherent frailties in the evidence based on sniffer or tracker dogs. The possibility of an error on the part of the dog or its master is the first amongst them. The possibility of a mis-representation or a wrong inference from the behaviour of the dog also cannot be ruled out. From a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable the police dogs to track and identify criminals.

61. So far as the response of the appellant,

which has been cited as an instance of "guilty mind" by the Trial Court is concerned, we have already noted that the claim of the prosecution that the deceased was locked inside a room, could not be proved. Even if the appellant were found inside the room, it would be absolutely naive to give any hard and fast rule having any universal application, with regard to reaction of a person in a given circumstance. The reaction differs from humans to humans. A person may loose his equilibrium and balance of mind but another may remain a silent spectator till he is able to reconcile himself and then react in his own way.

62. We have, thus, found that the Trial Court has only given a lip service to the panchsheel principle of circumstantial evidence as enunciated in ***Sharad Birdhi Chand Sarda vs. State Of Maharashtra (1984) 4 SCC 116*** where it has been conclusively held that for arriving at a finding with respect to the guilt of the accused, it must be established that:

(I) the circumstances from which the conclusion of guilt is to be drawn is fully established;

(II) the facts so established should be consistent only with the hypothesis of the guilt of the accused and should not be explainable on any other hypothesis except that the accused is guilty;

(III) the circumstances should be of a conclusive nature;

(IV) there must be a chain of evidence, so complete, as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused on preponderance of probability.

63. The Trial Court, as we have observed, somehow or the other has used disputed issues of fact, completely unproved, as beacon light for him to come to the finding of the guilt of the appellant.

64. We say no further.

65. With this evidence, we find the conviction of the appellant under any one of the Sections

of the IPC or of the POCSO Act, 2012 to be highly unjustified in law.

66. For this reason, we have not delved into the aggravating and mitigating circumstances noted down by the Trial Court, for affording the appellant, death sentence.

67. For the reasons afore-noted, we set aside the judgment and order of conviction and sentence of the appellants and acquit the appellant of the charges levelled against him.

68. The reference is dismissed.

69. The appeal stands allowed.

70. It is informed by the learned Advocate that the appellant is in jail. He is directed to be released forthwith from jail, if not detained or wanted in any other case.

71. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

72. The records of this case be returned to the Trial Court forthwith.

73. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Alok Kumar Pandey, J)

Sauravkrsinha/
manoj-

AFR/NAFR	AFR
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