

Death Reference No. 3 of 2016
with
Criminal Appeal (D.B.) No. 1191 of 2016

Against the judgment dated 22.09.2016 passed by Sri Manoj Srivastava, learned Principal District & Sessions Judge, Seraikella-Kharsawan in S. T. No. 90 of 2012.

Death Reference No. 3 of 2016:

The State of Jharkhand Appellant

Versus

Durga Soren @ Bhota Respondent

Cr. Appeal (DB) No. 1191 of 2016:

Durga Soren @ Bhota Appellant

Versus

The State of Jharkhand Respondent

For the Appellant : Mr. A. K. Kashyap, Amicus Curiae
: Mr. Akshay Kumar Mahto, Advocate
For the Respondent : Mr. Saket Kumar, A.P.P.

Present:

HON'BLE MR. JUSTICE RONGON MUKHOPADHYAY
HON'BLE MR. JUSTICE SANJAY PRASAD

C.A.V. on: 05.01.2022

Pronounced on: 06.05.2022

Heard Mr. A. K. Kashyap, learned Amicus Curiae in Criminal Appeal (DB) No. 1191 of 2016 for the appellant assisted by Mr. Akshay Kumar Mahto, learned counsel and opposed by Mr. Saket Kumar, learned A.P.P.

2. This appeal is directed against the judgment dated 22.09.2016 passed by Sri Manoj Srivastava, learned Principal District & Sessions Judge, Seraikella-Kharsawan in S. T. No. 90 of 2012 whereby and whereunder the appellant has been convicted for the offences under Section 376/302 I.P.C. and has been imposed capital punishment for the offence under Section 302 I.P.C. along with a fine of Rs. 50,000/- and has

further been sentenced to undergo imprisonment for life and fine of Rs. 50,000/- for the offence under Section 376 I.P.C.

3. The FIR was lodged by Chandu Soren which reveals that on 08.11.2011 at around 4:00 P.M. when the informant was passing through the Chowk at Barakudar village, he had seen Durga Soren @ Bhota (Appellant) taking away his daughter Puspa Soren (Deceased) on the pretext of playing and along with them two other children namely, Mansa Soren and Nikita were also going. When even at 7:00 P.M., his six year old daughter did not return home, he had gone to the house of Durga Soren and enquired about his daughter, but Durga Soren had given an evasive reply. The informant started searching for his daughter along with the villagers and the matter was also informed to Gram Pradhan. It has further been alleged that on 10.11.2011, the informant could learn from the villagers that his daughter has been raped and murdered and her body was lying in the field at Rakha Dungri. He was of the belief that Durga Soren had allured his daughter to the field and had committed her rape and murder.

Based on the aforesaid allegation, Rajnagar Police Station Case No. 42 of 2011 was instituted against the accused for the offences punishable under Sections 302/376 I.P.C. On conclusion of investigation, charge-sheet was submitted under Section 302/376 I.P.C. against the accused and after cognizance was taken, the case was committed to the Court of Sessions where it was numbered as S. T. No. 90 of 2012. Charge was framed under Section 302/376 I.P.C. and the contents of the charge was read over and explained to the appellant in Hindi to which he pleaded not guilty and claimed to be tried.

4. The prosecution has examined as many as 13 witnesses in support of its case.

5. P.W. 1 - Bholanath Mahato has deposed that on 08.11.2011, Chita Soren had informed that her daughter is missing. All of them started searching, but no trace could be found. On 10.11.2011, the dead body of the girl was recovered from a field. The Fard Beyan was given by Chandu, the father of the deceased - girl and he has put his thumb impression on the same. He has proved his thumb impression on the Fard Beyan which has been marked as Exhibit 1. Chandu Soren had

disclosed that his daughter was playing with Nikita and Mansa Soren, but they had not disclosed about the whereabouts of Puspa Soren. Chandu has stated that Nikita and Mansa had disclosed that Puspa Soren had gone with the appellant. The appellant had confessed in his presence before the police of committing rape and murder of Puspa Soren. He had confessed to have strangulated her to death.

In cross-examination, he has stated that on 08.11.2011, the appellant was working in his field and the work of bundling of paddy continued till 3-4 P.M. The informant Chandu Soren and the appellant Durga Soren both belong to the same family.

6. P.W. 2 - Chandra Soren has identified his signature in the inquest report which has been marked as Exhibit 2. He has denied of having any knowledge about the person committing the murder of Puspa Soren. This witness has been declared hostile.

7. P.W. 3 - Nil Kamal Mahto has identified his signature in the inquest report which has been marked as Exhibit 2/1. He has denied of having any knowledge about how she died and by whom such act was committed. This witness was declared hostile by the prosecution.

8. P.W. 4 - Lakhi Charan Mahato has identified his signature in the seizure list which has been marked as Exhibit 3. He does not know about the person who had committed the murder and therefore he has also been declared hostile by the prosecution.

9. P.W. 5 - Dashrath Soren has denied of having any knowledge about the occurrence and accordingly, he has also been declared hostile by the prosecution.

10. P.W. 6 - Thakura Soren had stated that on 08.11.2011 at about 4:00 P.M., Puspa, Nikita and Mansa were playing and the accused was also present. The girls were eating chick-peas and after some time, the children and the accused proceeded towards the east. Later on, Mansa and Nikita came back home and both had disclosed that Puspa had gone with the accused and after two days, the dead body of Puspa was recovered.

In cross-examination, he has stated that the accused is his Gotia and he is quite affluent.

11. P.W. 7 - Dr. Priya Ranjan was posted as Medical Officer at Sadar Hospital, Seraikella- Kharsawan on 10.11.2011 and on that date, he had conducted autopsy on the dead body of Puspa and the following ante-mortem injuries were found on the person of the deceased:

External Findings:

- (i) One lacerated wound over left temporal area 4" x ½" x ½".
- (ii) Left ear lacerated.
- (iii) Incised wound over left shoulder 1" x ½" x ½".
- (iv) Complete perennial tear with survival tear.
- (v) Multiple lacerated would over lebia and anus.
- (vi) Complete laceration of Hymen.
- (vii) Laceration over left part of neck.

Vaginal swab report indicated that no spermatozoa was found either alive or dead. Epithelial cells present ++, RBC pus cell: Nil. The cause of death was opined to be haemorrhage and shock due to the above mentioned injuries. The cause of injury no. 1 was due to hard blunt object, injury no. 2 due to hard blunt object, injury no. 3 due to sharp cutting weapon and injury no. 4, 5 & 6 due to hard blunt object and forcefully rape.

This witness has proved the post mortem report which has been marked as Exhibit 4.

12. P.W. 8 - Geeta Murmu had deposed that she, Mansa and Puspa were playing when the accused had come and purchased chick-peas for them. The accused had taken away Puspa and she and Mansa were told to return back.

In cross-examination, she has stated that she has been brought to the court by the mother of Puspa. Prior to her evidence, she was tutored by the mother of Puspa and the villagers to depose that they were playing and uncle had taken away Puspa. She has denied to have either seen the occurrence or have known about the incident.

13. P.W. 9 - Chandu Soren is the informant and father of the deceased. He has stated that it was around 4:00 in the evening when his daughter Puspa, Nikita and Mansa were playing near the Chowk of his village. He has stated that the accused had purchased chick-peas and had given it to the children. The accused was taking the children towards the pond

and while Nikita and Mansa were told to return back, he had taken away Puspa with him. He has further stated that his daughter did not return back and even on search of the entire village, he could not find her. When the accused was confronted, he did not give any specific reply. After two days, the dead body of Puspa was recovered from a field. She was raped and murdered. The accused was apprehended by the police and on his confession, the undergarments of the deceased was recovered.

In cross-examination, this witness has stated that the place from where the dead body was recovered was at a distance of 30 feet from the village. The accused is his Gotia. He has stated that the police was informed after the dead body was recovered. One old person namely, Dhanu had informed about the dead body lying in Rakha Dungri. He has further stated that Dhanu had disclosed that the child was subjected to rape. He does not have any enmity according to him with the accused.

14. P.W. 10 - Mansa Soren has stated that she has been brought to the court by the mother of P.W. 4. She cannot say as to how Puspa had died. She and Nikita were returning back after having chick-peas and Puspa was taken by the accused, which fact has been stated to her by her aunt.

15. P.W. 11 - Anand Lohar is the seizure list witness who has not supported the prosecution case and accordingly has been declared hostile.

16. P.W. 12 - Nand Lal Kalundia has stated that he had brought the material exhibits to the court which included two under-garments and which were marked as material exhibit nos. I & II.

In cross-examination, he has stated that the material exhibits were not sealed, but were kept in plastic packets.

17. P.W. 13 - Shiv Kumar Thakur is the Investigating Officer. He has proved the formal FIR which has been marked as Exhibit 5. He has also proved the fard beyan and inquest report which have been marked as Exhibits 1/1 and 2/2 respectively. On the confessional statement of the accused, he had recovered two under-garments from two different places and separate seizure lists were prepared which were proved by him and marked as Exhibits 3/3 and 3/4. Confessional statement of the appellant has been marked as Exhibit 6 with objection. He has stated that the occurrence was supported by the informant Bhola Nath Mahto, Chandra

Soren and Dashrath Soren. The other witnesses namely, Nilkamal Mahto, Ando Lohar, Lakhi Charan Mahto, Thakura Soren have also supported the occurrence in their statements. The statements of Mansa Soren and Nikita Murmu were recorded and both have supported the occurrence. This witness had inspected the place of occurrence which is the Parti land of Rajan Kisko which is situated at Matkam Bera village. The dead body was found in the south east of the field. About 10 yards towards north-west side from the place of occurrence, a deep green under-garment kept in the bush was recovered. According to him, another under-garment of black colour was recovered from a place 200 meters away from the bush situated near the field of Manu Patro.

In cross-examination, he has stated that he has not received any information from any source that on 08.11.2011, the accused was bundling paddy in the field of the Pradhan - Bhola Mahto. No medical examination has been conducted of the accused after his arrest. He has stated that under-garments recovered were not sent for forensic examination.

18. In his statement under Section 313 Cr.P.C., the accused has merely denied of being involved in the offence.

19. Mr. A. K. Kashyap, learned Amicus Curiae for the appellant has submitted that the entire evidence of the prosecution is fraught with disparities and contradictions. The prosecution has also suffered due to non-examination of some material witnesses. Mr. Kashyap, submits that admittedly there is no eye-witness to the occurrence and only on the basis of circumstantial evidence, and that too scanty, the appellant has been convicted. Referring to the evidence of the witnesses, Mr. Kashyap has stated that both the child witnesses being P.W. 8 and P.W. 10 have virtually not supported the case of the prosecution. Learned Amicus Curiae has submitted that P.W. 8 has stated that she was tutored by the mother of Puspa and the villagers prior to recording of her evidence. Mr. Kashyap, submits that P.W. 10 also cannot be relied upon since she has stated that the fact regarding the appellant taking away Puspa was disclosed to her by her aunt. Mr. Kashyap has relied upon the evidence of P.W. 6 and P.W. 9 in order to point out the inconsistencies appearing in their evidences as the presence of P.W. 9 has not been acknowledged

by P.W. 6 while the presence of P.W. 6 has also not been acknowledged by P.W. 9. Mr. A. K. Kashyap, has further submitted that some important and relevant witnesses namely, Guruwa Manjhi, Dhanu, Raibu Mahto, the mother of the deceased and the chick-pea seller have not been examined by the prosecution. It has been stated that the entire case is based upon weak circumstantial evidence. Learned Amicus Curiae adds that the maker of the confessional statement Sri Bhramhdeo Prasad has also not been examined and the confessional statement was exhibited with objection. The under-garments which were supposedly recovered on the confession of the appellant were not sent to the Forensic Science Laboratory. According to Mr. Kashyap, there has been violation of Section 53A Cr.P.C. as the appellant after his arrest was not examined by a Medical Practitioner. He further submits that P.W. 9 has categorically stated that he had instituted the case on the advice of the villagers. Mr. Kashyap assailing the impugned judgment and order of conviction submits that no cogent reasons have been assigned by the learned trial court while convicting the appellant. It has been submitted that no consideration was given to the lacunae in the prosecution case and only on the basis of confessional statement of the appellant, the purported recovery of under-garments and a fleeting glimpse to the last seen theory had weighed upon the learned trial court while convicting the appellant.

20. Mr. Saket Kumar, learned A.P.P. has submitted that the offence committed by the appellant of rape and murder of a child deserves capital punishment. He submits that the deceased was last seen with the appellant as stated by the informant (P.W. 9) and his brother (P.W. 5). The onus of explaining the circumstances shifts to the appellant, but in his statement under Section 313 Cr.P.C., he has failed to give any explanation. The confessional statement of the appellant was recorded and on such confession under-garments were recovered and such recovery enhances the legality of the confessional statement. So far as the sentence imposed upon the appellant is concerned, it has been submitted that aggravating as well as mitigating circumstances have been considered by the learned trial court and the venomous and dastardly act committed by the appellant does not deserve any lesser punishment.

21. We have considered the submissions advanced by the learned counsel for the respective sides and have also gone through the Lower Court Records. The FIR reveals that the appellant taking away the daughter of the informant was witnessed by the informant himself and the two girls Mansa Soren and Nikita Murmu. We will first consider the evidence of the child witnesses who have been examined as P.W. 8 and P.W. 10. P.W. 8 - Geeta Murmu (mentioned in the FIR as Nikita) has stated about she, Mansa and Puspa playing together when the appellant came and had taken away Puspa while asking the others to return back. However, her cross-examination has rendered her evidence redundant since she has categorically stated of being tutored by the mother of Puspa and the villagers. She has gone on to add that she does not know anything about the occurrence. The other child witness P.W. 10, on being questioned as to whether she has been tutored by the mother of Puspa and the police, has remained silent. However in her cross-examination, she has stated that her aunt (Badi Maa) had told her that she, (P.W. 10) and Nikita after having chick-peas were asked to return back while Puspa was taken by the appellant. This statement when juxtaposed with her evidence in her examination-in-chief unerringly points to the fact that she is not a witness to the appellant taking away Puspa. *"Silence speaks louder than words"* would be an apt adage to describe her examination-in-chief and what she has stated in her cross-examination.

22. In the case of *"Suryanarayana Vs. State of Karnataka"* reported in (2001) 9 SCC 129, it was held that, *"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"*. It further held, *"corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence"*.

23. Viewed in the background of the parameters for considering the testimony of a child witness, the evidence of P.W. 8 and P.W. 10 miserably fail to adhere to such parameters. It is abundantly clear that both the child witnesses have been tutored prior to their deposition and not an iota of reliance can be placed on their evidences.

24. So far as the evidence of other witnesses are concerned – P.W. 2, P.W. 3, P.W. 4, P.W. 5 and P.W. 11 have not supported the prosecution case and hence they have been declared hostile by the prosecution. The deceased having been last seen with the appellant appears to have been witnessed by P.W. 6 & P.W. 9. P.W. 6 claims to have seen the children going with the appellant after having chick-peas towards the east. He however could not see further due to the distance. At that point of time, he was repairing his bicycle in the shop of Guruwa Manjhi. The said Guruwa Manjhi has not been examined by the prosecution. P.W. 6 has not stated about Mansa and Nikita returning back while the appellant had taken away the deceased – Puspa Soren and his version also seems to be based on the disclosure made by Mansa and Nikita. This witness who is the brother of the informant (P.W. 9) does not disclose about the presence of P.W. 9 nearby. P.W. 9 has stated about the children playing and the appellant after buying them chick-peas had taken away Puspa while the other two children returned back. The appellant was confronted, but he did not disclose anything. P.W. 9 has not stated the presence of P.W. 6. In his evidence P.W. 9 had disclosed about an old person named Dhanu, who had stated that the Puspa was raped and her body was lying at Rakha Dungri. Dhanu therefore seems to be a vital witness as he could have stated the source of such information. His non-examination seems to a certain extent endangered the case of the prosecution. Coming back to the evidence of P.W. 6 and P.W. 9 notwithstanding the inconsistencies enumerated by them, their evidence suggests that the deceased was last seen with the appellant. The principle underlying the ‘last seen theory’ has been delineated in the case of *“Satpal Vs. State of Haryana”* reported in (2018) 6 SCC 610 and which reads thus:

6. *“We have considered the respective submissions and the evidence on record. There is no eyewitness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time,*

the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

25. The dead body of the daughter of the informant was recovered on 10.11.2011 while she had become traceless on 08.11.2011. Therefore, there is a considerable time gap between the appellant having been last seen with the deceased and the recovery of the dead body. The conduct of the appellant has also to be seen. There is no allegation that the appellant had absconded after the incident. In fact P.W. 9 has stated that on the date, his daughter became traceless, the appellant was confronted to which he did not give any specific reply. Subsequently, on 10.11.2011, the appellant was arrested and his confessional statement recorded pursuant to which two under-garments were recovered from different places. As per the evidence of P.W. 13, the said under-garments were not sent for Forensic examination. There is also nothing on record to indicate that the under-garments belong to the appellant as well as to the deceased. Mere recovery of the under-garments would not point the needle of suspicion towards the appellant in absence of any authentication of the under-garments and absence of Forensic examination. P.W. 13 in very categorical terms has stated that after the arrest of the appellant, he was not sent for medical examination. The investigation of the case seems to have been done in a very casual manner. In the case of *"Sunil Kundu Vs. State of Jharkhand"* reported in (2013) 4 SCC 422, the fact of lapses in investigation has been considered and it has been held as follows:

29. *"We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims*

which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. In this case, the lapses are very serious. PW 5 Jaldhari Yadav is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been examined. The investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet. They were kept in the malkhana of the police station. He has admitted that the seized articles were not sent to the forensic science laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the forensic science laboratory. The investigating officer admitted that no seizure list of the clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized articles and the blood of the deceased. It is difficult to make allowance for such gross lapses. Besides, the evidence of eyewitnesses does not inspire confidence. Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. It is well settled that suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. In the circumstances, we quash and set aside the impugned judgment and order¹. The appellant-accused are in jail. We direct that the appellants A-1 Sunil Kundu, A-2 Bablu Kundu, A-3 Nageshwar Prasad Sah and A-4 Hira Lal Yadav be released forthwith unless otherwise required in any other case."

26. The lapses committed in the investigation of the case are of such nature which are gross and which goes to the basic root of the case which is writ large. Coupled with the lapses in investigation is the paucity of evidence of the prosecution. As discussed above, there has been no corroborative evidence that the appellant had taken away the deceased with him while asking the other two children to go back. The evidences of P.W. 6 and P.W. 9 seem to be with respect to the deceased having been last seen with the appellant, but in absence of any corroborative evidence or incriminating circumstances, no inference can be drawn towards the guilt of the appellant. The witnesses who could have been the pivot in the prosecution case, P.W. 8 and P.W. 10 have been tutored and all the circumstances fail to indicate that the deceased was last seen with the appellant.

27. The learned trial court in a cursory manner without discussing thread-bare the evidences of the witnesses has convicted the appellant. The learned trial court should have desisted of being overtly possessed by the nature of the offence which no doubt is ghastly and heinous and instead should have dissected the evidences appropriately before coming to the conclusion, it had arrived.

28. The appeal therefore has to succeed. Accordingly, the judgment and order of conviction and sentence dated 22.09.2016 passed by the learned Principal District & Sessions Judge, Seraikella-Kharsawan in S. T. No. 90 of 2012 by which the appellant has been convicted for the offences under Section 376/302 I.P.C. and has been imposed capital punishment for the offence under Section 302 I.P.C. along with a fine of Rs. 50,000/- and has further been sentenced to undergo imprisonment for life and fine of Rs. 50,000/- for the offence under Section 376 I.P.C. is set aside. Since the appellant is in custody, he shall be released immediately and forthwith, if not wanted in any other case.

Before parting with this judgment, we must endorse our appreciation for the effort put in by the learned Amicus Curiae Mr. A. K. Kashyap in assisting the court.

Accordingly, these appeals stand disposed of.

(Rongon Mukhopadhyay, J.)

I agree

(Sanjay Prasad, J.)

(Sanjay Prasad, J.)