IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.1026 of 2017

Arising Out of PS. Case No.-53 Year-2017 Thana- KASBA District- Purnia

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Md. Amzad @ Amzad Son of Abdul Karim, resident of Village- Sarochiya, P.S.- Kasba, District- Purnea.

..... Appellant/s

Versus

The State of Bihar ..... Respondent/s

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The incidents in this case are as follows: A girl had gone to answer the call of nature in the morning in the fields where crops had been sown P.W.2 she spotted some movement and when she went to see she spotted the appellant a neighbour raping her sister. Seeing her the appellant ran away. She saw her sister motionless and rushed back to the house to inform her parents and other about what she had seen. Her family member and neighbour brought her home and covered her with a cloth and informed the police. By then the girl was already dead. The assault marks on her

body, she was also bound with ropes and gagged. Appellants Aadhar card was found near the body of victim. Sister is the eye witness. The female Chowkidar who inspected the deceased found a red coloured injury on the private parts of the victim and a towel wrapped around the neck of the deceased. A sentence of minimum term of 20 years imprisonment. Appeal dismissed, sentence modified.

Ref. Section 376 and 302 of IPC

Section 3,4 and 6 of POCSO Act, 2012

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Appearance :

For the Appellant/s : Mr. Amit Kumar Anand, Advocate.

For the Respondent/s : Mr. Satya Narayan Prasad, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE NANI TAGIA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 18-01-2024

We have heard Mr. Amit Kumar Anand, learned Advocate for the sole appellant and Mr. Satya Narayan Prasad, learned APP for the State.

2. The appellant stands convicted under Sections 376, 2(m), 376 (A) and 302 of the IPC and Sections 4 and 6 of the POCSO Act, 2012, *vide*

judgment dated 27.07.2017 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Purnea in Special POCSO Case No. 24 of 2017, arising out of Kasba P.S. Case No. 53 of 2017.

3. The appellant has been sentenced vide order dated 31.07.2017 to undergo imprisonment for the remainder of his life and a fine of Rs. 25,000/- each for the offences under Sections 376(2)(m), 376(A) and 302 of the IPC. No separate sentence has been awarded under Sections 4 and 6 of the POCSO Act, 2012.

4. A 17 year old girl was raped and killed at the hands of the appellant.

5. The report about the occurrence was lodged by her elder sister (P.W. 5), a 19 year old girl, who was practically a witness to the grisly crime. She had reported on 10.04.2017 at about 12 P.M. at her house that in the morning, the deceased had gone to attend to call of nature in the fields and she had also

gone to the fields for the same purpose but somewhat later than her sister. While she was coming back home, she saw some movement in the maze field where the crops had been sown by her uncle/Lakshami Sah (P.W. 2) as he had obtained the land for share cropping. Suspecting some herbivorous animal nibbling away at the crops, she went near the place where she had spotted the movement and was stunned to see that her younger sister (deceased) lay naked, with her hands and legs tied with a rope and her mouth gagged with a piece of cloth and the appellant, a neighbour, raping her. Seeing her, the appellant got up and ran away. She found her sister to be completely motionless with identifiable nail-bite marks and bruises on her body. Perhaps she had died. She shouted for help and also rushed back to her home and informed her parents and others about what she had seen in the field. Her family members and the villagers thereafter went to the P.O. and all of them brought the deceased

home and untied her. She had died by that time.

6. Before reporting the matter to the police, all the family members of P.W. 5 along with other villagers went to the house of the appellant to look for him, but his entire family perhaps had absconded. The police party then arrived at the house of the informant where her fardbeyan/statement was recorded.

7. On the basis of the aforenoted fardbeyan/statement of P.W. 5 Kasba P.S. Case No. 53 of 2017 dated 10.04.2017 was registered for investigation under Sections 376 and 302 of the IPC as well as Sections 3, 4 and 6 of the POCSO Act, 2012.

8. The police was informed on telephone that a girl in a teens had been raped and killed. The police party had arrived at the house of the deceased and then had gone to the field where the occurrence is said to have taken place. The police found an Aadhaar

Card bearing the name, signature and the photograph of the appellant, which was seized.

9. The police after investigation submitted charge-sheet upon the appellant and he was put on Trial.

10. The learned Trial Court, after having examined ten witnesses on behalf the prosecution and two on behalf of the defence, convicted and sentenced the appellant as aforesaid.

11. At the Trial, P.W. 5 has supported the prosecution evidence in its entirety. She has repeated the story with exactitude before the Trial Court.

12. Seeing the appellant mounting over the deceased, she started shouting. Appellant thereafter is said to have run away towards West. She also hurried back home and spoke everything to her parents and others. All the members of family were informed about what she had seen in the fields. The family members then went to the field and brought

back the dead body of the deceased. She had nail-bite marks on her throat. The victim had been bleeding from her nose and there appeared to be contusion and ecchymosis on her neck, suggesting strangulation. The dead body was then covered with a piece of cloth. The dead body was brought back home and the hands and legs were untied. The police arrived at 12 in the afternoon. But before that, as narrated by her in the fardbeyan/statement, she along with others had gone to the house of the appellant only to find that the appellant and his family members had run away.

13. She has confirmed about the seizure of the Aadhaar card of the appellant from the fields. The police, later, in the same transaction, seized the ropes which were used for tying the hands and legs of the deceased as also a small towel by which the deceased had been gagged.

14. Talking about the victim/deceased, P.W. 5 has further stated before the Trial Court that at

the time of the occurrence, the deceased was a student of class-IX and her date of birth was 04.02.1998.

15. Her testimony before the Trial Court could not be shaken on any account. There were no embellishments or diachronicity in her statements.

16. Divya Prakash (P.W. 10), the learned Judicial Magistrate has confirmed that P.W. 5 had appeared before her and had got her statement recorded under Section 164 of Cr.P.C. He had recorded the statement of Chander Mahaldar (P.W. 6) also.

17. In her statement under Section 164 of Cr.P.C., P.W. 5 had also stated the same things about what she had seen in the fields on 10.04.2017.

18. The dead body was subjected to post-mortem examination by Dr. Bijay Kumar (P.W. 8) on the same day at about 02:30 P.M. There were a number of nail bite marks on neck and nose. The neck

muscles were found to be lacerated. The tracheal muscles also were heavily contused. One lacerated wound around the entry of vagina was found by him. The hymen had been ruptured at two to three places. The vaginal swab was sent for semen examination, but the report came in the negative. The time fixed for death was suggested to be 24 hours from the time of post-mortem examination. The death was opined to have been caused be asphyxia as a result of strangulation/throttling and rape.

19. That the deceased died because of gagging, pressure on her neck and physical force while she was raped, stood proved at the Trial.

20. The Investigator of this case *viz.* Shailesh Kumar Pandey (P.W. 9) has confirmed at the Trial that on 10.04.2017, while he was posted as Junior Sub-Inspector at Kasba police station, someone had informed the S.H.O. of the P.S. on mobile telephone that the appellant had raped and murdered

the deceased and had run away.

21. This, therefore, is an evidence of the fact that whoever had telephoned the S.H.O. of the police station knew about the appellant having committed the crime. This is quite in conformity with the prosecution version that within no time of P.W. 5 having seen the occurrence, everybody, staying in and around in the village, had come to know about the occurrence.

22. The I.O. (P.W. 9) proceeded to the P.O village along with a lady Chowkidar and police force. The police party first reached the house of the deceased and recorded the *fardbeyan* of P.W. 5. P.W. 5 had signed the *fardbeyan* in presence of her father/Kritya Nand Sah (P.W. 7). He had inspected the dead body and had instructed the female Chowkidar to inspect the private parts of the deceased. The lady Chowkidar had found a red coloured injury on the private part of the deceased. The I.O. had also found

one red and white coloured small towel wrapped around the neck of the deceased. Two pieces of a special variety of rope was also found near the dead body. He was informed by the people present near the dead body that those pieces of rope were untied when the deceased was brought back home. An inquest report was prepared, which was signed by P.W. 5 and another. The towel and the ropes were seized and a seizure list also was prepared. It was only then that the police party went to the P.O. *viz.* the maize filed of one Govind Yadav, situated very near the house of deceased.

23. In the fields, the police party ran through one Aadhaar Card of the appellant, whose date of birth was recorded as 07.06.1988. It also had the photograph of the appellant affixed on it. That was also seized (Ext. 6/1). The investigator (P.W. 9) had recorded the statements of Rajesh Mahaldar, Lakshami Sah and Kanak Lal Mahaldar (P.Ws. 1, 2 and 3)

respectively, who are the villagers of the deceased. They had reached the P.O. on the shouts of P.W. 5 and her having told all of them about the occurrence.

24. One of them *viz.* P.W. 3 had seen the appellant running away. P.W. 2 is incidentally the uncle of the deceased, who had taken the land (P.O.) for share cropping and had sown the maize crops.

25. These persons *viz.* P.Ws. 1 to 3 do not appear to us to be chance witnesses as early in the morning, either they were doing the house hold chores or were about to go in the fields to attending to the call of nature as also for inspecting the crops.

26. Dilip Kumar Sah, the brother of the deceased also had the same story to narrate to the Court. He had also seen the appellant running away towards western direction.

27. Chander Mahaldar (P.W. 6) and the father of the deceased *viz.* Kritya Nand Sah (P.W. 7) have completely supported the prosecution case.

28. It would be necessary to refer to the deposition of the defence witnesses *viz.* Amrina Khatoon (D.W. 1) and Md. Anveer (D.W. 2) before taking into account the arguments of the appellant.

29. Amrina Khatoon (D.W. 1) is the sister of the appellant, who has claimed that the police party had force-opened the house of the appellant and had, under duress, exacted the Aadhaar card and other documents belonging to the appellant.

30. Md. Anveer (D.W. 2) has given an unsubstantiated statement before the Court that the appellant was present in a different village, working as a mason, on the day of occurrence.

31. The testimony of both the defence witnesses are not worth accepting for the reason that the seizure memo regarding the Aadhaar card of the appellant was prepared at 12:50 P.M. on 10.04.2017 *i.e.* the day of the occurrence, which is precisely the same time when the FIR was lodged. Shortly before

that, there is a seizure-memo of ropes and the towel which was recovered near the dead body. The appellant appears to have been arrested on 11.04.2017 and from his house, a bunch of same quality of rope along with a knife and an earthen pot meant for smoking ganja were recovered.

32. D.W. 2 has not been able to give any further detail about the alibi of the appellant, which makes his testimony absolutely unworthy of reliance.

33. It has been urged on behalf of the appellant that if the deposition of the witnesses are carefully seen, it would appear that none of them had seen the occurrence or the appellant at the P.O. All of them have narrated what was told to them by P.W. 5. However, their statements being absolutely contemporaneous before the investigator, the same was admitted in evidence under Section 6 of the Indian Evidence Act, 1872 by the Trial Court and justifiably so. Without any basis, it has also been argued, the

appellant has been framed because of enmity.

34. There does not appear to be any evidence regarding any bad blood between the families of the deceased and the appellant; rather the house of the appellant is only at a stone-throw distance from the house of the deceased. The appellant had been overcome by lust and he had committed a horrendous act of not only raping a minor but also killing her and that too with utmost depravity. The legs and hands of the deceased were tied with a rope, completely immobilizing her.

35. All this was done when the appellant had found her alone in the fields where she had gone to attend to the call of nature.

36. We have carefully examined the inquest report; the post-mortem report; the seizure lists and the deposition of witnesses and have found that it is an open and shut case against the appellant.

37. Similar is the argument on behalf of

the State.

38. The opinion of the Trial Court, therefore, with respect of the accusation/guilt of the appellant is absolutely justified and needs no interference.

39. However, looking at the sentence imposed on the appellant under all the charges *viz.* Sections 376, 2(m), 376A and 302 of the IPC, which is R.I. for the remainder of the life, we find that the Trial Court has completely misdirected himself and has sentenced the appellant beyond his jurisdiction.

40. Awarding any fixed sentence for more than 14 years is beyond the pale of the Trial Court.

41. In this connection, it would be profitable and apposite as well to spell out the law with respect to sentencing.

42. In ***Bachan Singh v. Union of India; 1980 (2) SCC 684***, while upholding the capital sentence to the appellant, the Supreme Court had

specified that the death sentence ought to be given in "rarest of the rare" cases.

43. Three years later, the Supreme Court in ***Machhi Singh v. State of Punjab; 1983 (3) SCC 470*** talked about the requirement of making a balancesheet of "aggravating and mitigating circumstances" and that the mitigating circumstances also be accorded full weightage. A balance is required to be struck between the "aggravating and mitigating" circumstances before imposing the punishment. The Supreme Court drew out a two-pronged approach for the Trial Courts to follow *viz*. the Trial Court ought to consider whether there is anything uncommon about the crime in question which has rendered the sentence of imprisonment of life inadequate and that death sentence ought to be awarded and whether according to the circumstances of the crime and the case and giving maximum weightage to the mitigating circumstances in favour of the accused, nothing less

than death sentence would be appropriate.

44. There have been but many departures in the past from the said principle in sentencing the offenders.

45. However, in ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra ; (2009) 6 SCC 498***, the Supreme Court again clarified and propounded the two-step process to decide whether a convict deserved the death sentence. For death sentence to be given, the case had to fall in the "rarest of the rare category" and secondly, the alternative of life imprisonment to be held to be inappropriate against the gravity of the offence. While deciding the case to be of "rarest of the rare" category, the court would be required to identify the aggravating and mitigating circumstances, giving both the conditions equal weightage and would also have to take a call that life imprisonment is not the appropriate sentence but this could be done only when it is found

that the reformation of the offender was not possible / feasible. The State, therefore, in such circumstances, would be under an obligation to provide materials in order to support the suggestion that death sentence only would be appropriate in that case.

46. About five years later, the Supreme Court in ***Shankar Kishanrao Khade v. State of Maharashtra; 2013 (5) SCC 546*** further cautioned the Trial Courts that both, the crime and the criminal have to be taken into account before taking decision with respect to sentencing. What was emphasized by the Supreme court in this instance was that without considering the mitigating circumstances and referring to materials on the possibility of reformation of the convict, sentence should not be awarded off the hat.

47. It would be relevant here to state that in **Swamy Shraddananda @ Murali Manohar Mishra *v. State of Karnataka; (2008) 13 SCC 767***, the Supreme Court after consideration of earlier

judgments in ***Gopal Vinayak Godse v. State of Maharashtra; (1961) 3 SCR 440, Dalbir Singh v. State of Punjab; (1979) 3 SCC 745, Subash Chander v. Krishan Lal; (2001) 4 SCC 458, Shri Bhagwan v. State of Rajasthan; (2001) 6 SCC 29, State of Madhya Pradesh v. Ratan Singh; (1976) 3 SCC 470*** and host of other cases, held that depending upon the gravity of the offence and the manner in which the crime was executed, it would be appropriate and within the parameters of law to sentence the offender for the remainder of his life or for any fixed term without remissions. In a case reflecting depravity of mind, a sentence for life which for all intents and purposes would not be more than 14 years, would be highly unjust to the victim. This recourse, namely, directing for imprisonment for remainder of life or for a fixed term beyond 14 years and without remissions, but could be taken only if the other alternative punishment of a sentence of 14 years

of imprisonment would mean no punishment at all.

48. This proposition was questioned in the ***Union Of India vs V. Sriharan @ Murugan & Ors; (2016) 7 SCC 1***, in which the Constitution Bench upheld the ratio in ***Swamy Shraddananda*** (supra) that a special category of sentence, instead of death, for a term exceeding 14 years and putting of such category of sentence to be beyond the application of remission. While doing so, the view expressed by the Supreme Court in ***Sangeet & Anr v. State of Haryana; 2013 (2) SCC 452*** that the deprival of remission power of the appropriate Government by awarding sentences of 20 or 25 years or without any remission is not permissible and in consonance with law, was specifically overruled.

49. However, the Supreme Court retained to itself and the High Courts the power to exercise the option of imposing special or fixed term sentences and not the Trial Courts.

50. In ***Vikash Chaudhary vs. The State of Delhi; (2023) SCC Online SC 472***, the Supreme Court again analyzed all the judgments in seriatim and found that the concept of special or fixed term sentences which could be awarded by the Supreme Court and the High Courts as Constitutional Courts served many purposes, which are as follows:-

> *"(a) As a feasible alternative in capital cases where the Court was of the opinion that death sentence is inappropriate, and:*
>
> 51. *(b) That the Court was of the opinion that there were elements in the crime and or the conduct of the criminal which warranted imposition of a mandatory sentence beyond a minimum of 14 years prescribed by the Code of Criminal Procedure.*
>
> 52. *(c) Where the court felt, independently, that the serious nature of the crime and the manner of its commission warranted a special sentence, whereby the state's discretion in releasing the offender, should be curtailed so that the convict is not let out before undergoing a specified number of years, of*

incarceration."

53. The Trial Courts thus are absolutely prohibited from imposing any modified or specific term of sentence or life imprisonment for the remainder of the convict's life as an alternative to the death penalty. The Trial Courts thus have only two option viz. to award a life sentence with all remissions or death sentence. For death sentence to be awarded, the Courts shall have to consider the mitigating circumstances as also the aggravating circumstances, for which, materials would be provided by the State for the Courts to undertake the balancing test. The State is under an obligation to show, in case it proposes death sentence, that there is complete absence of mitigating circumstances and that there are no chances of reformation of the accused.

54. In ***Vikash Chaudhary*** (supra), the Supreme Court after taking into account the judgments in ***Manoj v. State of Madhya Pradesh; (2023) 2***

SCC 353, Rajendra Prahladrao Wasnik v. State of Maharashtra; (2019) 12 SCC 460, Channulal Verma v. State of Chhatisgarh; (2019) 12 SCC 438 further held that it is imperative to conduct evaluation of mitigating circumstances at the trial stage "to avoid slipping into a retributive response to the brutality of the crime" by eliciting information both from the State and the accused.

55. In the case at hand, we find that the Trial Court took note of the fact that the appellant was the first offender and that he did not have any criminal history and bore good reputation about his conduct and social behavior as also that he was a person of young age and from a poor strata of society.

56. The Trial Court also found that the facts and circumstances of the case, kind of fell short of "*Rarest of the Rare*" test but still held that the appellant deserved imprisonment for remainder of his natural life.

57. As explained above, this was beyond

the jurisdiction of the Trial Court. The sentence upon the appellant for the offences for which he has been proved to be guilty will now have to be awarded/imposed by us.

58. There is complete paucity of material with respect to his conduct in jail for all these years or any assessment regarding chances of his reformation. However, in the absence of any negative report regarding his conduct and taking into account the age of the appellant at time of the occurrence and his social background, we are of the view that a sentence of a minimum term of twenty years of actual imprisonment for all the three counts *viz.* Sections 376 (2)(m), 376 (A) and 302 of the IPC concurrently would be appropriate.

59. We order accordingly.

60. The appeal is dismissed but the sentences are modified to the extent indicated above.

61. Let a copy of this judgment be

dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

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

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

(Ashutosh Kumar, J)

(Nani Tagia, J)

manoj/krishna-

AFR/NAFR	AFR
CAV DATE	NA
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