REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1354 OF 2012

RAM DEO PRASAD … APPELLANT

VERSUS

STATE OF BIHAR … RESPONDENT

J U D G M E N T

Aftab Alam,J.

1. The appellant Ram Deo Prasad has been awarded death penalty for raping and inflicting injuries to a four year old child causing her death.

2. The prosecution case is based on the statement of one Mohd. Kamruddin Mian made before Sub-Inspector, Birendra Kumar Pandey of Siwan Town P.S. on December 21, 2004 at 8:15 a.m. at the Sadar Hospital, Siwan. Mohd. Kamruddin stated that on the previous night after finishing their meal at about 8:30 p.m. his family had gone to sleep at his house in village Badka Gaon, P.S. Pachrukhi District Siwan. His four year old

daughter Laila Khatoon was sleeping by the side of her grandmother on the outer verandah of the house and on the other side of the straw bed, the girl's mother was sleeping with her infant child. In the middle of the night, the Informant who was sleeping in an inside room came out to relieve himself and found Laila Khatoon missing from the side of her grandmother. A search started for the girl and then his neighbour, Suman Kumar Sah (PW.2) told them that just a little while ago he had seen the appellant swiftly running away towards east, carrying a girl child in his arms who was crying. As informed by Suman Sah, he (the Informant) and the villagers assembled there proceeded towards east in search (of the child). After going for about a kilometer, they heard the sound of heavy foot-steps and on going in the direction of the sound they saw that the appellant, who was fleeing away with the child, flung the child in the wheat field (by the side of the pathway) and ran away. On going to the child, he found that it was his missing daughter. She was moaning and bleeding from her private parts. The informant further stated that he fully believed that the appellant after committing rape on her child was taking her away with the intent to kill her and to hide the body somewhere.

3. The statement was reduced to writing, as the fard-e-beyan (Exhibit 4) by Sub-Inspector, Birendra Kumar Pandey (PW.6) and was duly signed by the Informant and a witness, apart from the Sub-Inspector recording it. It was dispatched to Pachrukhi police station, within the jurisdiction of which the offence was committed, and there the recorded statement was incorporated in the formal FIR (Exhibit 1), registered as Pachrukhi P.S. case No.131/2004 dated December 21, 2004 under section 376 of the Penal Code.

4. The child Laila Khatoon died at the Sadar Hospital Siwan on the same day and consequently section 302 of the Penal Code was also added to the case.

5. On the following day (December 22, 2004) at 11:00 a.m. the Investigating Officer of the case (PW.4) went to the collector's office (in Siwan town) for a meeting in connection with the preparations for the elections that were to be held shortly. There he was told by the officer in-charge of the Siwan Town P.S. that at 9.00 that morning the appellant was caught at the Siwan bus-stand and he was detained at the Town P.S. The Investigating Officer went to the Town P.S., prepared the arrest memo of the

appellant and sent him for production before the Magistrate with the request to take him in judicial custody. The appellant was, thus, produced before the Magistrate on December 22, 2004 and as per the request of the Investigating Officer, was remanded to judicial custody.

6. It did not occur to the Investigating Officer to take the appellant on remand for interrogations or getting him examined by a doctor or seizing his clothes etc.

7. In course of investigation, the Investigating Officer inspected two sites as "the place of occurrence"; one, the verandah of the Informant's house from where the child was lifted and the other, the wheat field where the child was said to have been thrown by the appellant; nothing was found of any significance at either of two places. No attempt was made to find out the spot where the child was sexually abused and brutalized and where it might have been possible to find some blood or some other article that could have thrown any light on the identity of the offender. The "investigation" mainly consisted of recording the statements of witnesses under section 161 of the Code of

Criminal Procedure and as it was completed charge-sheet was submitted on March 30, 2005, naming the appellant as the accused.

8. On the basis of the charge-sheet the appellant was put on trial before the 1st Additional Sessions Judge, Siwan.

9. It needs to be stated here that in support of its case, the prosecution examined six (6) witnesses before the trial court. PW.6 is the Sub-Inspector who had recorded the statement of the victim's father Kamruddin Mian. He was simply called to formally prove the *fard-e-beyan*, giving rise to the FIR. PW.4 is the Investigating Officer. He formally proved the FIR. He also stated that he had recorded the statements of Rukhsana Khatoon (the mother of the victim: PW.3), Suman Sah (PW.1), Hasmuddin (not examined), Nasir (PW.2), Ram Chhabila Prasad (not examined), Gumani Pandit (not examined) and some others. PW.5 is the doctor who was a member of the team of doctors which had conducted post-mortem over the body of the child. She formally proved the post-mortem report.

10. Apart from the two policemen and the doctor the prosecution examined three other witnesses. PW.1 is Suman Sah, the neighbour of the Informant

who was the first to say that he had seen the appellant running away, carrying a girl child who was crying. PW.2 is Nasir, the paternal cousin of the Informant who was one of the group which had gone in pursuit of the appellant and who had seen the appellant flinging the child in the wheat field and making good her escape. PW.3 is Rukhsana Khatoon, the unfortunate mother of the child. We shall presently see their evidences in greater detail. But at this stage it is important to note that the Informant, the father of the child did not appear as one of the witnesses. By the time the trial took place he had gone somewhere abroad to earn the livelihood.

11. Further, the prosecution took steps to examine two other witnesses mentioned in the charge-sheet, namely Hasmuddin and Gumani Pandit and obtained warrants of arrest for their production. They were produced before the trial court on October 5, 2007 but from the order dated October 30, 2007 passed by the court, it appears that though the prosecution produced the aforesaid two witnesses, besides one Ram Chhabila Prasad (also named in the charge-sheet as one of the witnesses), the In-charge Public Prosecutor filed a petition that the three witnesses were not inclined to support the prosecution

case and, as such, he was giving them up and was not in favour of examining them. That petition was disposed of by order dated November 13, 2007 and the three persons were discharged from giving evidence in the case.

12. At the commencement of the trial, the court framed the charge against the appellant. It is relevant to see what was said in the charge which is reproduced below:

> "First - That you, on or about the 21st day of December 4 at Badaka Gaon you committed rape on Laila Khatoon hardly aged about 4 years and thereby committed an offence punishable under section 376 of the Indian Penal Code and within my cognizance.
>
> Secondly – That you on or about the same date/ day of same month and same place you committed murder intentionally and knowingly that the act of rape was likely to cause death of Laila Khatoon and that thereby committed an offence punishable section 302 of the Indian penal Code and within my cognizance.
>
> And I hereby direct that you be tried by the said court on the said charge.
>
> The charge was read over and explained to the accused in Hindi to which he pleaded not guilty and claimed to be tried.
>
> Dated this 19 day of 04, 2007."

13. It is, thus, to be seen that the charge is completely silent in regard to the first part of the prosecution case that immediately after the child

was missing, the appellant was seen running away carrying in his arms a girl child who was crying. There was no charge under section 366A or section 367 of the Penal Code.

14. At the conclusion of the prosecution evidence, the court examined the appellant under section 313 of the Code of Criminal Procedure. It is also important to see how the examination under section 313 took place; hence, the full examination under section 313 is quoted below.

> "Question: Have you heard the statements of the witnesses?
>
> Answer: Yes.
>
> Question: Against you the charge and evidence are that on 20/12/2004 in the night at 12.00 you went to the house of Kamruddin Miyan s/o Babujaan Miyan, village Barka Gaon P.S. Pachrukkhi district Siwan and abducted his daughter Laila Khatoon (6 years).
>
> Answer: No.
>
> Question: There is also evidence against you that you committed rape on her and flung her in the field and as a result she died.
>
> Answer: No.
>
> Question: Do you have anything to say in your defense?

Answer: I have been falsely implicated. The villagers have wrongly declared me as mad."

15. This is all! The first question was an empty formality and the second question was evidently asked even without looking to the charge as there was no charge of abducting the child from her father's house against that appellant. The whole of section 313 was, thus, squeezed into the third and the last question. We shall advert back to this aspect of the matter later but there is something else in the appellant's statement under section 313 which we cannot fail to notice. There is an allusion to the villagers' calling him, "mad". Unfortunately, this aspect of the matter received absolutely no attention either in investigation or during trial. We may here clarify that on the basis of that isolated fragment of a sentence we are not suggesting that the appellant was of unsound mind. But what we wish to emphasize is that in a case involving death sentence, the court cannot afford to leave any detail, howsoever small and apparently insignificant, fully explored.

16. At the conclusion of the trial, the court found the appellant guilty of committing rape and causing injuries to the child leading to her death and accordingly, by judgment and order dated September 6, 2008/September 9,

2008 passed in Sessions Trial No. 417 of 2006, convicted him under sections 376 and 302 of the Penal Code and awarded him the death penalty.

17. Since the punishment given to the appellant was death, the trial court made a reference under section 366 of the Code of Criminal Procedure which was registered in the High Court as Death Reference No.15/2008.

18. It needs to be stated here that before the trial court, the appellant was unrepresented and, therefore, the court had appointed an advocate to defend him from the panel of lawyers for undefended accused. Further, even after being punished with death, the appellant did not file any appeal before the High Court and, thus, what the High Court had before it was only the death reference made by the trial court. The High Court in its judgment has brushed aside the fact that no appeal was filed by the appellant, observing as under.

> "The respondent has not preferred an appeal, understandably because he could challenge the findings upon which the orders of conviction and sentence are based as if he had preferred an appeal."

19. In our view, the High Court, attributed to the appellant, knowledge of law and the court procedure for which there does not appear to be any basis. To our mind, the appellant filed no appeal before the High Court either because of the lack of resources or because he did not fully realize the gravity of his position and we are unable to accept the view taken by the High Court for the appellant filing no appeal against the judgment of the trial court giving him the death penalty.

20. Anyway, since there was no one to represent the appellant in the death reference, the High Court requested a senior advocate of that court to assist it in hearing and disposing of the reference and finally by a detailed judgment dated September 17, 2009 accepted the reference and confirmed the death penalty awarded to the appellant.

21. After the High Court judgment, the Registry of the Supreme Court received the jail petition (special leave petition) (death case) on behalf of the appellant through the Superintendent, Central jail, Buxar, Bihar. Though the petition was barred by limitation by 42 days, it was not accompanied by any application for condonation of delay. The jail petition along with copies of

the judgments passed by the trial court and the High Court were handed over to the *Amicus Curiae*, appointed as per the instructions contained in Circular, dated December 6, 2008. The *amicus* then drew up and filed a proper special leave petition on which notice was issued and the execution of the appellant was stayed by order dated March 19, 2010. Leave to appeal was finally granted by order dated September 3, 2012.

22. The *amicus* appointed by the office assisted us to the best of his ability but we also requested Mr. P.S. Patwalia, learned senior counsel, to assist the Court in the hearing of the appeal and Mr. Patwalia rendered admirable assistance to us.

23. Since the appeal involves death penalty, we propose to re-examine all the issues arising in the case ourselves, independently of any findings arrived at by the courts below.

24. It is noted above that the prosecution examined six witnesses in support of its case. Dr. Seema Choudhary (PW.5) is the doctor who was a member of the Medical Board constituted to examine the dead body of Laila Khatoon. She stated before the court the findings of the post-mortem and proved the

post-mortem report which was marked as Ex.3. The evidence of the doctor coupled with the post-mortem report leaves no room for doubt that the child was sexually abused and brutalized with utmost cruelty and perversity and the injuries inflicted upon her in course of the sexual abuse caused her death.

25. Birendra Kumar Pandey (PW.6) is the Sub-Inspector of Police of Siwan (Town) P.S. who had taken down the statement made by Mohd. Kamruddin Mian and recorded it as the *fard-e-beyan*. He identified the *fard-e-beyan* which was marked as Ex.4.

26. Mehboob Alam Khan (PW.4) is the Investigating Officer of the case. There is hardly anything significant in his deposition before the court.

27. This leaves us with the statements of PW.1 to PW.3.

28. Suman Kumar Sah (PW.2) is the Informant's neighbour. In his deposition before the court he stated that about two and a half years before the date of the deposition he woke up one night at about 11- 11.30 for relieving himself, he saw that **a person** carrying a child in his arms was going towards the field of Ram Bachan Mishra. He then went back to sleep. After 10-20 minutes, he saw Mohd. Kamruddin (the Informant), Nasir Mian

(PW.1), Gumani Pandit (not examined), Ram Chhabila Prasad (not examined) and others, coming on the road in front of his house. He went out to meet them and then he came to know that someone had taken away a child from Kamruddin's house. **He further said that he did not tell them that a little while ago he had seen someone carrying a child**. However, he also joined them and proceeded with them. He further said that they found a girl lying in the field of Sachidanand Mishra. The girl was bleeding from her private parts. The girl was brought to Siwan where she died. **He added that he did not know who had abducted the girl**. He concluded by saying that he knew the appellant who was present in court. **At that stage he was declared hostile by the prosecution and was subjected to cross-examination.** He denied that he had made any statement before the police that he had seen the appellant taking away the child from the verandah of Kamruddin and further that in course of search he had seen the appellant with the child. The Investigating Officer (PW.4), however, stated before the court that Suman Sah had said before him that he had seen the appellant coming out from the verandah of Kamruddin and in course of the search too had seen the appellant with the victim child.

29. The second witness Nasir Mian (PW.1) stated before the court that about two and a half years earlier, at about 12:00 in the night, Kamruddin got up and found that his daughter was missing from the side of his mother with whom she was sleeping. Kamruddin came to him and then there was an outcry that the child was missing. He, along with Kamruddin and other villagers started searching for the child. In course of the search they went to Suman Sah who told them that the appellant had gone towards east, in the direction of Ram Bachan Mishra's orchard, carrying a child. They then went to Ram Bachan Mishra's orchard and, lighting the torch there, they saw the appellant running away with a child. The appellant, on seeing them coming after him, flung the child in Ram Bachan Mishra's wheat field. They ran after him but he succeeded in fleeing away. In the wheat field they found Kamruddin's daughter who was about 4 years old. She was injured and was bleeding from her private parts. They brought the child to the Sadar Hospital, Siwan, where she passed away the following morning. The mouth of the child was filled with earth and she was also bleeding from her nose.

30. In cross-examination he stated that the occurrence took place on a winter night which was very cold and there was a dense fog on that night. He also stated that he had produced the torch in the light of which he had identified the appellant before the *darogaji*. The torch, however, was not presented before the court.

31. On an overall scrutiny of the deposition of Nasir Mian we find that he remained quite firm and unshaken on his part of the story.

32. The third witness, Rukhsana Khatoon (PW.3), is the mother of the child. She stated that as the child was found missing and a search started, Suman Kumar Sah one of the neighbours informed that (he had seen) the appellant going away carrying a child. She then stated about the group of villagers going in search of and finding the girl whom the appellant had flung in the field. In the course of cross-examination, however, she said that she was also a part of the group which had gone in search of the child on the fateful night and her mother-in-law was also a part of that group.

33. This is all the oral evidence adduced by the prosecution.

34. We may here broadly divide the prosecution case in two parts. In the first part, soon after the child was found missing, the appellant was seen close to the house of the Informant, swiftly going eastwards in the direction of Ram Bachan Mishra's fields/orchard carrying in his arms a girl child who was crying. This was at a point when the child was lifted from the verandah of her house and before she was subjected to the sexual abuse. In the second part of the prosecution case the appellant was seen carrying the child and on seeing the group of villagers coming in pursuit of him he threw down the child in the wheat field and fled away. This was at a point after the child was subjected to the sexual abuse and brutality.

35. The first part of the prosecution case, as seen above, did not form part of the charge. Further, this part of the prosecution case was based on the solitary evidence of Suman Sah and as he turned hostile, this part of the case falls to the ground.

36. However, the second part of the case is fully established by the evidences of Nasir Mian (PW.1) and Rukhsana Khatoon (PW.3). What is thus established against the appellant is that he was seen carrying the child

soon after she was sexually abused and brutalized in the most cruel manner and on seeing the group of villagers coming after him he threw down the child in the wheat field and ran away. It was, therefore, for him to explain how the child came in his possession and in the absence of any explanation the court would be fully justified in invoking section 114 of the Evidence Act and to hold him guilty of causing the injuries to her private parts leading to her death. No exception can, therefore, be taken to the appellant's conviction under sections 376 and 302 of the Penal Code.

37. But the vital question is that of the sentence to which he should be liable.

38. Mr. Samir Ali Khan, learned counsel appearing for the State of Bihar, strongly submitted that the offence committed by the appellant showed not only extreme cruelty but also great depravity and urged that this Court while confirming his conviction should also confirm the death penalty awarded to him by the courts below. In support of his submission he relied upon a decision of this Court in *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*[1]. Like the present appellant, Wasnik was also held guilty of

[1] (2012) 4 SCC 37

raping and killing a three year old girl and in his case this Court confirmed the death penalty awarded to him. It is true that the case of *Wasnik* relied upon by Mr. Khan is similar to the case in hand insofar as in both cases girls of very tender age were subjected to extreme sexual brutality resulting in their death.

39. There can be no doubt that the offence committed by the appellant is heinous and revolting but the nature of the offence alone may not in all cases be the determining factor for bringing the case in the "rarest of rare" category and to impose the ultimate and irreversible punishment of death. There are certain features of this case which are not to be found in *Wasnik's* case and make the present case distinguishable from the decision relied upon by Mr. Khan.

40. In the earlier part of the judgment we have indicated the deficiencies of investigation. Apart from the post-mortem report there is no medical evidence. There is not a scrap of forensic evidence of any kind. Even the torch in the light of which the appellant is said to have been identified in the cold wintry and foggy night was not produced before the court.

41. We have also recounted the lapses in the trial proceedings in the framing of the charge and especially in the examination of the appellant under section 313 of the Code of Criminal Procedure. On an earlier occasion, in the decision in *Sajjan Sharma v. State of Bihar*[2] (to which, one of us, Aftab Alam J. was a party) this Court had commented upon the careless and the unmindful way in which examination of the accused under section 313 of the Code of Criminal Procedure was generally conducted in the State of Bihar. The present case is another glaring example. It was incumbent upon the trial court to clearly tell the appellant that according to the prosecution evidence, the child soon after being sexually abused in the most cruel manner was seen in his arms and to ask him to explain this very vital circumstance against him. But the section 313 examination made in this case completely falls short of the requirements of the law.

42. We have also seen that the appellant was represented before the trial court by a lawyer appointed by the court from the panel of advocates for undefended accused. Though facing death penalty, he did not file an appeal before the High Court and in this Court his appeal came through the Jail

[2] (2011) 2 SCC 206

Superintendent. We presume that the appellant did not have sufficient resources to engage a lawyer of his own choice and get himself defended up to his satisfaction.

43. We are very clear that the aforesaid facts and circumstances are also relevant factors to be taken into consideration while confirming the death penalty given to an accused.

44. Mr. Patwalia, senior counsel, invited our attention to the decision of this Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*[3]. In Santosh Kumar, after surveying a large number of decisions on death penalty, this Court in Paragraph 56 of this judgment observed as under:

> "56. At this stage, *Bachan Singh* informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. **Quality of evidence adduced is also a relevant factor.** For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission."

[3] (2009) 6 SCC 498

(emphasis added)

45. Mr. Patwalia submitted that the above passage from the decision in Santosh Kumar was cited and followed by the Court in *Ramesh v. State of Rajasthan*[4]. In Paragraph 68 of the judgment in Ramesh this Court observed as under:

> "68. Practically, the whole law on death sentence was referred to in *Santosh Kumar case*. In SCC para 56, the Court observed: (SCC p. 527)
>
> "*56*. … The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. *Quality of evidence is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis*. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission."
>
> (emphasis supplied)
>
> The Court, thus, has in a guided manner referred to the quality of evidence and has sounded a note of caution that in a case where the reliance is on circumstantial evidence, that factor has to be taken into consideration while awarding the death sentence. This is also a case purely on the circumstantial evidence. We should not be understood to say that in all cases of circumstantial evidence, the death sentence cannot be given."

[4] (2011) 3 SCC 685

46. Mr. Patwalia also cited before us the decision of this Court in *Amit v. State of Uttar Pradesh*[5]. In the case of Amit, though this Court upheld his conviction under sections 376 and 302 of the Penal Code finding him guilty of raping and killing a three year old girl, commuted the death penalty awarded to him by the courts below.

47. In the overall of facts of the case and for the reasons discussed above we feel it quite unsafe to confirm the death sentence awarded to the appellant. Hence, while confirming his conviction under sections 376 and 302 of the Penal Code, we set aside the death sentence given to the appellant and substitute it by imprisonment for life that should not be less than actual imprisonment for a period of 18 years. The case of the appellant for any remission under the Code of Criminal Procedure may be considered only after he has served out 18 years of actual imprisonment.

48. In the result, the appeal is dismissed subject to the modification in sentence.

.....J.
(Aftab Alam)

[5] (2012) 4 SCC 107

.....J.
(Ranjana Prakash Desai)

New Delhi;
April 11, 2013