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State Vs. Ramdeo Prasad

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Court : Patna

Decided On : Sep-17-2009

Reported in : 2010(58)BLJR214

Judge : C.M. Prasad and; Dharnidhar Jha, JJ.

Acts : Evidence Act - Sections 6 and 60; ;Indian Penal Code (IPC) - Sections 302, 375 and 376; ;Code of Criminal Procedure (CrPC) - Sections 313 and 366

Appeal No. : Death Referanc No. 15 of 2008

Appellant : State

Respondent : Ramdeo Prasad

Advocate for Pet/Ap. : Ashwani Kumar Sinha, A.P.P.; Ashwani Kumar Singh, Sr. Adv.

Judgement :

Dharnidhar Jha, J.

1. The solitary convict Ramdeo Prasad was tried by the Ist Additional Sessions Judge, Siwan, in Sessions Trial No. 417 of 2006 for the charges under Sections 376 and 302 of the Indian Penal Code. By the judgment of conviction dated 6th of September, 2008, the respondent was held guilty of committing the two offences and was sentenced to death by order dated 9th of September, 2008 and, as such,

the present Death Reference under Section 366 of the Code of Criminal Procedure for confirmation of the order of sentence passed by the learned Judge.

2. 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. Finding that the respondent is under sentence of death, the Court requested Shri Ashwani Kumar Singh, Senior Advocate of the Court, to assist it in hearing and disposing of the present Death Reference, as may appear from order dated 19.8.2009 passed by this Court.

3. The prosecution case is contained in (Ext. 4) the Fardbeyan of the informant Md. Kamruddin Mian (not examined). It was stated by him that all of his family had retired to their beds after having taken their meals in the night intervening 20th and 21st of December, 2004. He had gone into his room whereas others had slept on the verandah. His four-year-old daughter Laila Khatoon was sleeping with the mother of the informant on one side of the bed created by straw whereas the wife of the informant was on the other side of the same bed with a one and half year old child. The informant awoke at about 12 in the night to attend to the call of nature and when he came at the verandah he found that Laila Khatoon was not by the side of his mother and, as such, he awoke his wife and mother and enquired abut Laila Khatoon. They could not give any satisfactory replies. The informant told his neighbours about the child going missing and upon that P.W.2 Suman Kumar Sah, one of his next door neighbours, informed the informant that he had just seen the present respondent moving headily towards east with a child in his lap who was crying. The informant and his co-villagers set out in the pointed direction and when they had gone about 1 K.M., they heard stomping sound of feet and they moved in that direction from which the stomping sound was coming. The informant claimed that this respondent was seen running away with the informant's daughter who immediately threw the child into a wheat field. When the informant and others went near the child Laila Khatoon, she was found moaning and bleeding from her private part. The informant alleged that he was confident that the present respondent had committed rape upon the child and in order to killing her, he was taking her to some unknown place where he could conceal her.

4. On the basis of Ext.4, the police registered the F.I.R. and P.W.4 S.I. Mahboob Alam Khan took up the investigation of the case. P.W.4 inspected the placed of occurrence and recorded the further statement of the informant besides taking the statements of other witnesses, like, P.W.3 Rukhsana Khatoon, P.W.1 Nasir Mian and others. The fardbeyan (Ext.4) of the informant was recorded in the hospital while the child was being treated there and P.W.4 learnt on 22.12.2004 that the child died. As such, he prepared inquest report and sent the dead body for post-mortem examination. The police submitted chargesheet sending up the present respondent for trial. It is how the respondent was tried and was directed to be hanged by his neck till he was dead.

5. There does not appear a clear-cut defence of the respondent except that he was falsely implicated by the villagers, as may appear from his statement recorded under Section 313 of the Code of Criminal Procedure, when he stated that the villagers came together to brand him as an insane person to falsely rope him in the present case.

6. For proving the charges framed against the respondent, the prosecution examined six witnesses. The informant of the case, as may appear from the judgment of the trial Judge, could not be produced in spite of all efforts made by the court and police. It appears from the judgment as also from the record of the lower court, specially from the orders passed on 28.8.2008 that the police reported to the court that the informant Md. Kamruddin Mian had gone to some foreign land and it was not possible for the police to produce him for his evidence and on consideration of the report as appears indicated in the above order passed by the court in the trial record, the court closed down the prosecution evidence on that particular date, i.e., 28.8.2008.

7. So far other witnesses are concerned, Nasir Mian (P.W.1), Suman Kumar Sah (P.W.2) and Rukhsana Khatoon (P.W.3) who is also the mother of the deceased child have supported the fact that the child had gone missing and that a search was made and that P.W. 2 Suman Kumar Sah stated that he had seen a man carrying a child towards east whereafter they went in that particular direction in search of the man and the child. P.Ws.1 and 3 Nasir Mian and Rukshana Khatoon,

respectively, have stated that it was P.W.2 Suman Kumar Sah who had stated to the informant and others accompanying him that the man carrying the child was the present respondent Ramdeo Prasad. P.W.2 Suman Kumar Sah, in spite of having supported all other facts, had dumped the prosecution on identification of the accused by resiling from his earlier statement made before the police during investigation that he had named the present respondent as the person who was identified by him, while he was carrying away the child. This has been a major issue raised by learned Senior counsel assisting the Court and I propose to reply to it in the light of the provisions of law and in the light of other facts coming on record through the evidence of the witnesses a little later. As indicated above, Sub-Inspector of Police Mahboob Alam Khan (P.W.4) is the Investigating Officer of the case whereas S.I. Birendra Kumar Pandey (P.W.6) is the Officer who recorded the fardbeyan and endorsed the investigation to be done to P.W. 4.(P.W.5) Dr. Seema Choudhary who was one of the members of the Board of three Doctors holding the autopsy on the dead body, prepared Ext.3 the postmortem examination report and she has given evidence on the finding of the Board and the real cause of death of the deceased.

8. The learned trial Judge accepted the evidence of the witnesses after placing reliance upon each of them and held that in spite of there being no witness on the part of the incident of lifting of the child as also on commission of sexual assault on her, the circumstances, quite strong in character, appeared from the evidence and those formed a complete chain pointing towards the guilt of the accused and completely eliminating any probability of his being innocent. The learned trial Judge inferred five circumstances out of the evidence and then went on to record the order of conviction so as to basing the sentence under consideration.

9. Learned Senior counsel while addressing us on the merits of the judgment and order of conviction left no stone unturned to convince us that the present could not be a case in which the respondent could have been, firstly, found guilty and, secondly, inflicted the ultimate sentence in law. A huge number of reasons were assigned by the learned Senor counsel to castigate the findings recorded by the learned trial Judge. It was contended that the Doctor who first attended upon the victim, on being brought to the hospital, was not examined nor any register/other

documents of the hospital created by the Doctor first attending upon her were brought forward before the learned trial Judge so as to satisfying him that indeed the little child had been sexually assaulted. It was contended that the evidence of doctor, namely, Dr. Seema Choudhary (P.W. 5) does not indicate that there was any offence of rape committed by the respondent on the little child. It was contended that the other members of the Board of Doctors who held autopsy on the dead body, were not examined and this Court could, as such, draw an adverse inference against the prosecution. The other evidence on committing rape upon the child would have been by getting the present respondent medically examined and producing the report of the Doctor so as to testifying to the above but that has also not been done and that has seriously prejudiced the case of the respondent.

10. The contention next, was that the evidence of the witnesses indicated that there was dense fog in the cold night and the informant along with other witnesses were moving without any source of identification though one of the witnesses had stated that someone had a torch light, but the same was not produced before the Investigating Officer. In support of the contention on means of identification, the attention of the Court was drawn to the decisions of the Court reported in 2005 (3) P.L.J.R. 43 Sunil Singh and Anr. v. The State of Bihar and 1990 (1) P.L.J.R. 755 Mangal Singh and 5 Ors. v. State of Bihar and Ors. The contention was that the informant was not examined nor any of the witnesses who signed (Ext. 4) the fardbeyan at the time of its recording and who appeared the person who had stated that a search of the child was made in the fateful night were produced. Even, the grand mother, with whom the child was sleeping, was not examined and many of the villagers who had accompanied the informant were also not produced. It was contended that the evidence of the above persons was necessary for unfolding the prosecution narration and, as such, the Court could draw adverse inference against the prosecution. Learned Senior counsel castigated the judgment and findings recorded therein on the ground that inquest report was not produced.

11. It was next contended that non-examination of the informant is a material defect in the prosecution case and mere filing of a petition in the court by the police indicating as if the informant was living out side India appears not sufficient.

The situation of non-examination of the informant gets further compounded, contended the learned Senior Counsel, because evidence was to be led that steps were really taken for getting the informant into the witness box for his evidence. Some decisions were also cited in support of the contention for drawl of adverse inference which are reported in : (2005) 13 S.C.C. 624 Pratap Singh and Anr. v. State of M.P. and (2006) 12 S.C.C. 321 Ritesh Chakarvarti v. State of M.P.

12. Learned Amicus Curiae, lastly, contended that it could not be a case in which the extreme penalty of death could be inflicted upon the respondent and under circumstances more serious than the present one the Supreme Court either commuted the sentence of death to that of the life imprisonment or sentenced the appellant before them to suffer rigorous imprisonment for life. A couple of decisions, like (2008) 1 S.C.C. (Cri.) 766 Bishnu Prasad Sinha and Anr. v. State of Assam and (2008) 2 S.C.C.(Cri.) 264 Alok Nath Dutta Ors. v. State of West Bengal were placed for our consideration.

13. Shri Ashwani Kumar Sinha, learned Additional Public Prosecutor replying to the contentions of learned Amicus Curiae submitted that it is not that the prosecution did not produce the witnesses who were named in the chargesheet, like, Hasbuddin and Gumani Pandit or any other else. It was submitted by drawing the attention of the Court to the order dated 26.7.2007 appearing at page 19 of the Paper Book, that warrant of arrest for production of witnesses was sent with a reminder to the Superintendent of Police and consequent upon the issuance of warrant of arrest Gumani Pandit and Hasbuddin, the two witnesses cited in the chargesheet, were produced under arrest before the court on 5.10.2007. It is indicated by order dated 30.10.2007 appearing at page 21 of the Paper Book that the prosecution produced two witnesses named above besides Ram Chhabila Prasad and the in-charge Public Prosecutor filed a petition that the three witnesses produced on 30.10.2007 were not inclined to support the prosecution story and, as such, he was giving them up and was not in favour of examining them. That petition was disposed of by order dated 13.11.2007 and the three persons were discharged from giving evidence in the case. It was contended, as such, that the P.Ws. were produced and in that light there could not be any drawl of adverse inference against the prosecution.

14. Learned Additional Public Prosecution contended that the witnesses examined in the case including the Doctor, fully substantiated the charges and there was no scope for interfering with the findings arrived at by the learned trial Judge. Shri Sinha, learned Additional Public Prosecutor further submitted that sentencing is a serious jurisdiction of the court and one could hardly submit that it has always to be proportionate to the crime which was committed by an accused.

15. The issue of non-examination of the informant as a witness of the prosecution was vigorously agitated before us by learned Senior counsel appearing as Amicus Curiae in the case. The learned trial Judge was also faced up with the above contention while hearing arguments and he has dealt with, in some detail, the contention, as may appear from the impugned judgment at its page 9. The learned trial Judge has held that it was of no consequence whether the informant was examined or not. I endorse the view taken by the learned trial Judge by pointing out that the evidence of a particular witness, be his the informant of the case or other witnesses, is simply to support or not to support the charges. The informant of the case holds a place primal in the scheme of prosecution case. He happens to be the person who initiates it and his statement could be the basis for launching the prosecution of an accused. The other aspect of the matter could be that the statement of an informant which could be in the form of F.I.R. is the basic prosecution version upon which the whole of the edifice of charges is created and their corroboration is considered judicially by looking to the elementary prosecution version in the light of the criticism the defence could be targeting against the whole charges and the prosecution story. It remains a piece of material-not an evidence-which is sought to be corroborated by the evidence of the informant and other witnesses. In a case in which the informant does not come forward to support the charges and if the prosecution does not satisfy the court by placing before it reasonable explanation for his non-examination, the court could frown with some disdain at the prosecution and may in a suitable case draw adverse inference against it. In other words, if the court has before it a reasonable explanation placed by the prosecution for non-production of the informant, it may not draw adverse inference against the prosecution and could proceed to consider the evidence of other witnesses to record a finding of the charges being proved, disproved or not proved. This should be the approach of courts in a caser in, which the informant is

not coming forward to support the charges or if he had not been produced by the prosecution in spite of its efforts made in that behalf.

16. I have pointed out in some earlier paragraph of the judgment as to what was the reason for non-examination of the informant. The lower court orders are relevant to the above context and a reference may be made to the order passed by the learned trial Judge on 28.8.2008(at page 27 of the Paper Book) which points out that the Public Prosecutor had filed a petition annexing therewith an application of the Officer-in-charge of Pachrukhi Police Station, which had investigated the case, that because the informant Kamruddin Mian was away to some other country it was not possible to produce him at that particular time for his evidence. The learned trial Judge ordered the closure of the prosecution evidence holding that there was no prospect of the informant being produced in near future for his evidence on account of the above reason and other witnesses had been examined by the State. The accused was in custody. He was facing a serious charge and he had the right of getting expeditious justice as a matter of his fundamental right. Unreasonable delay or impediments which could be beyond the control of the court or the agency responsible for production of witness, to me, appears good ground which may convince a court not to linger the proceedings by keeping it pending without any progress if the informant was not likely to come before it for his evidence for reasons that he was not likely to be produced on account of undue delay or necessary expenses. The court, under the above circumstances, may proceed with the trial and dispose it of by looking to the evidence of other witnesses. This could be the only reasonable view under the circumstances as presently obtained in the present case.

17. This could be the place when I must consider the argument of the learned Senior counsel on non-production of other material witnesses of the prosecution also. It was contended that the evidence of other persons, like, Hasbuddin, Gumani Pandit and Ram Chhabila Prasad was material for unfolding of the prosecution case and their non-examination adversely affects the findings recorded by the learned Judge and, as such, the court may draw adverse inference on account of their non-examination.

18. The learned Additional Public Prosecutor has replied to the above contention by making reference to the orders passed by the learned trial Judge on different dates and that appears available to this Court on the Paper Book as also on the records of the trial court. It appears that the witnesses were not coming forward for their evidence and, as such, the court had issued warrant of arrest non-bailable against them and accordingly two persons Hasbuddin and Gumani Pandit were produced by the police under arrest in execution of the warrant before the trial court on 5.10.2007. The two witnesses were let off on execution of their personal recognizance bonds for appearing on the next date. Accordingly, the two, as also P.W. Ram Chhabila Prasad, appeared before the court on 30.10.2007 and their attendance was filed by the learned Public Prosecutor along with a petition that they appeared not supporting the prosecution story and, as such, the Public Prosecutor was not desirous of examining them and was giving them up. The learned trial Judge passed an order dated 13.11.2007 by discharging the three persons from giving evidence on the reason indicated by the learned Public Prosecutor.

The Public Prosecutor has the right to examine the witnesses, specially the witnesses whose examination is necessary for unfolding the prosecution case. He has a right not to examine a particular witness if he finds that the witness may not be supporting the charges and, rather, would be damaging the case of the prosecution on account of being gained over as appeared the stand taken by learned Public Prosecutor. What witnesses could be supporting or not supporting could initially be known to the Public Prosecutor only and he is the only arbiter as regards the production of witness during a trial in support of the charges. If he finds that the examination of a particular witness may not be in the interest of the prosecution, he has the right to give up any of them. Above all, only those witnesses are required to be examined whose examination appears necessary for unfolding the prosecution story. It is not necessary that the number of witness should be multiplied by examining other witnesses. The evidence of a single witness might appear to the Public Prosecutor sufficient to unfold the prosecution story as also to prove the charges. He may not be forced to produce all witnesses if he shows good and satisfactory reasons for non-examination of a particular witness. This appears the case here too. I do not find any case made out for

drawing adverse inference either for production of the witnesses who were indeed produced before the court below or for their non examination. The ground appeared sufficient and the reasons satisfactory.

19. Under the above circumstances, the decisions cited by the learned Senior counsel reported in (2008)1 S.C.C. 766, (2008) 2 S.C.C. 264, : (2005) 13 S.C.C. 624 and (2006) 12 S.C.C. 321 are not applicable to the present situation.

20. P.W.3 Rukhsana Khatoon is the wife of the informant and the mother of the deceased child. Her evidence states that in the night of the occurrence she as also her deceased child were sleeping with her mother-in-law. The informant was sleeping inside the room and he woke up and enquired from her as to where was Laila Khatoon. A search for Laila Khatoon was made during which course Suman Sah (P.W.2) stated to them that it was this respondent Ramdeo Prasad who was seen by him going away with the girl. The villagers and her husband, the informant, set out on search of the girl and saw the present respondent throwing away the child in the field and running away. The child was brought to the house who was unconscious and bleeding from her private parts and was further taken to Sadar Hospital, Siwan, for treatment where she died. The witness stated that this respondent had done similar acts earlier with other girls also. In cross-examination P.W.3 has stated that Suman Sah met them at his Darbaja. P.W. 2 Suman Sah has supported the story that when he woke up to urinate at about 11-11.30 P.M. in the night of the occurrence, he found a man going towards the field of one Ram Bachan Mishra with a child in his lap. He went to sleep again. 10-20 minutes after, the informant, Nasir Mian, P.W. Gumani Pandit and Ram Chhabila Prasad (both not examined) were passing through the road in front of his house upon which P.W.2 also woke up and went near them when he learnt that the daughter of Kamruddin Mian (informant) had been taken away by some one upon which P.W. 2 Suman Sah informed them that he had seen a man moving with a child just a few moments earlier. P.W. 2 Suman Sah also accompanied them in search of the child. He stated that the child was found in the field of one Sachchidanand Mishra who was bleeding from her private parts and that the child was taken to Siwan, for treatment where she died. Thus, the major part of the occurrence is supported by P.W. 2. He supports that some enquiries were made from him also or he had

volunteered some information himself as per which a man was seen taking away the child. The part of the prosecution story which has not been supported by P.W.2 is in respect of the identification of the present respondent- convict that he had not been seen by P.W.2 as taking away the deceased. On consideration of his evidence, I find that he was declared hostile by the prosecution only for the reason that he did not support the prosecution on identification of the present respondent that it was he who was seen moving away by P.W.2 with the child and, as such, his attention was drawn to his statement made before the police as may appear from paragraph 7 of his evidence.

21. The fact that the child was found missing by her family members is established not only by the evidence of her mother, P.W. 3, but also by the evidence of P.W. 2 Suman Sah and P.W.1 Nasir Mian. P.W.1 Nasir Mian had corroborated the prosecution story by stating that the informant came to him and stated that his daughter had gone missing when he along with the informant and others of the village set out on search of the child and during that course they met P.W. 2 Suman Sah who stated that it was Ramdeo Prasad who was seen going with the child towards east and further towards the orchard of one Ram Bachan Mishra. Accordingly, P.W.1 and others moved towards the said orchard and found in the flash of the torch light that the present respondent Ramdeo Prasad was running with the girl child and when he saw the witness and others coming towards him he threw the child in a wheat field and ran away. The respondent was chased but he made good his escape. P.W.1 has stated that it was the daughter of the informant who was injured and was bleeding from her private parts and, as such, she was moved to Sadar Hospital, Siwan, where she died during treatment.

22. Thus, from the evidence of P.Ws. 1, 2 and 3, as I have pointed out just now, the fact that Laila Khatoon went missing on account of being lifted by some one has been established. P.Ws. 1 and 3 stated that it was the present respondent Ramdeo Prasad who was seen by Suman Sah (P.W.2) taking her away in his lap. The informant not finding his child set out with his wife and others on search of the child and during that course they were told by P.W. 2 Suman Sah that indeed he had seen a man running away with the child. This fact is also corroborated by P.W. 2 Suman Sah. However, he turned hostile on the identification of the

respondent that it was he who had been identified by him.

23. Section 6 of the Evidence Act relates to relevancy of facts forming part of same transaction. It reads as under:

6. Relevancy of facts forming part of same transaction.- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustration (a) is material to the present context and that reads as follows:

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

From the composite reading of the main draft of the provision and the above noted illustration (a), what appears is that anything said or any act done either by the accused or by the deceased or by the by-standers at the time of the occurrence or so shortly before or after it so as to forming part of the same transaction was a relevant fact. What appears from the above provision and the illustration is that if some one states something which he could be picking up on account of hearing the word or seeing the act, as the case may be, he must divulge the same to others just after he had heard or seen the act. What is connoted by the provision is that there should be a close proximity between hearing the words or seeing the act and relating the same to others so that any chances of aberration, improvement or embellishment is completely ruled out. The reason for putting the restriction of proximity in the provision by putting illustration(a) has a pristine purpose. The evidence of hearsay is inadmissible and irrelevant. It is made admissible as per the provision of Section 60 of the Evidence Act or under certain other provisions which are exceptions to the general rule of inadmissibility of the evidence of hearsay. Section 6 of the Evidence Act is one such exceptions. As such, the restriction appears put that the person who relates to others a word heard by him or an act seen by him must do it without any longer loss of time. P.W.2 has stated in paragraphs 1 and 2 of his evidence that he had seen a man going towards the

field of Ram Bachan Mishra with a child just 10-20 minutes ago. Thereafter the informant and other persons were seen by him passing through the road in front of his house and he went near them and stated that he had seen a man carrying a child towards east. The time appears very short and he admits relating the above fact of seeing a man going with the child to the informant and other witnesses who were villagers or his family members. P.W. 2 Suman Sah does not deny it that he had narrated the fact to the informant and other witnesses who were villagers or the family members of the informant. So the narration about seeing the act of taking away of the child appears admissible to me under Section 6 of the Evidence Act as res gestae as also under Section 60 of the Evidence Act.

24. There appears another angle of appreciating the evidence by marshalling the facts. P.W.2 Suman Kumar Sah stated that Laila Khatoon was taken away and that a man had been seen by him taking her away. Thereafter, the group of persons, as may appear from the evidence of P.Ws. 1, 2 or 3, who were on search of the child proceeded in that direction which was shown by P.W. 2 and as soon as they reached a particular place they found a man running away. In fact, stomping sound of feet of the culprit was the lead for the above witnesses to follow the man. The witnesses stated that as soon as the accused saw that he was being followed by a group of persons, he threw the child in a wheat field and ran away. Thus, the evidence on the point of taking away and throwing the child in the wheat field and the identification of the accused appears direct. It, to me, is not the circumstance which could lead one to the inference that Laila Khatoon, the deceased, was picked up by a man and was taken away and then all P.Ws. had seen throwing of the child in the wheat field'. The evidence on these transactions of the offence is direct. Now the question to be established is as to who was that man?

25. For the above purposes the evidence of P.W. 2 Suman Kumar Sah could not be of any help. In spite of having made a statement that it was this respondent who had been seen by him carrying a child in his lap in the fateful night, as may appear from his earlier police statement his attention to which was drawn in paragraph7 of his evidence, the witness appears resiling from the earlier statement and refusing to say as to whom he had identified. This was the reason

that he was declared hostile. However, the evidence directly on identification comes through other witnesses, like, P.Ws. 1 and 3, i.e., Nasir Mian and Ruksana Khatoon. They have stated that that they went into the direction pointed out by P.W.2 with other persons to find out the culprit who was seen moving with the child as narrated by P.W.2 Suman Kumar Sah and they found that it was this respondent who was going fast towards east. As soon as this respondent Ramdeo Prasad saw that the family members of the deceased child and others were following him he threw the child into the wheat field and ran away. The witnesses have stated that it was Ramdeo Prasad who had thrown the child. Thus, the identity of the real culprit has also been established by the evidence of P.Ws. 1 and 3, even if P.W.2 refused to really identify him by disclosing his name in court during evidence. Thus, the whole chain of actions of being seen with the child and then also of going into a particular direction and subsequently on being followed by the witnesses, throwing the child into the wheat field, appears forming the whole complete transaction and, as such, leaves no room to doubt that it was this respondent who had thrown the child. The inferential circumstance is that he was the man who had lifted the child also.

26. An argument was raised by learned Amicus Curiae that P.W. 1 Nasir Mian has stated that he and others were carrying a torch light and the respondent was identified in the light thereof, no torch was, though, produced in court though the witness has stated in paragraph 20 of his evidence that he had handed over the torch to the Investigating Officer. It was contended in the above connection that the witnesses, like P.Ws.1 and P.W.2, have stated in their respective evidence in paragraphs 11 and 9 that it was a cold winter night and the fog was dense. It was contended that it may safely be concluded that non-production of the torch was only because the witness did not carry any torch. The date of occurrence is the night of 20th/21st of December, 2004 and the part of this State in which the occurrence had taken place might have some foggy weather. It is also true that the informant did not state in his F.I.R. that he set out with others on search of his daughter with any means of light. But it could be improbable and illogical to hold that people could have set out on a search of the child without any means of light. It was not an ordinary incident. A little child of four years had gone missing from the lap of her family members. The whole of the neighbourhood was awoke. P.W.1

had stated that most of the people were in the comforts of their beds in that cold winter night. They could not have set out on search of the little child without any means of light. As such, the statement of P.W.1 in paragraph 3 that the convict-respondent was seen in the flash of the torch light does not appear a false statement. P.W.1 has stated, as was contended by the learned Senior Counsel, that he handed over the torch to the Investigating Officer. It could have been proper for the defence to cross-examine P.W.4, Sub-Inspector Mahboob Alam Khan, who had investigated the case on this point to verify that, but no question was put to him by the defence presumably because the Investigating Officer had received the torch from P.W.1 or any other witness. Its non-production is of no consequence. It might be a fault on the part of the prosecution which could not have any serious bearing upon the ultimate result of the case. In the above background the decisions cited by learned Senior Counsel reported in 2005(3) P.L.J.R. 43 and 1990(1) P.L.J.R.755 appear not applicable. On reading the evidence of the witnesses I have no hesitation in upholding the findings recorded by the learned Judge trying the case that it was this respondent who was seen taking away the child and who was ultimately seen moving with it in that fateful night and was further seen throwing it in the wheat field.

The witnesses have stated that they attempted to chase the present accused but he made good his escape and the witnesses picked up the child to comeback. It appears reasonably acceptable because no one would keep chasing the accused, though one could attempt to do it, as the whole attention of persons would be centered on or around the child who had been thrown in a field so as to picking her up. The child was picked up and was found badly battered with injuries. The witnesses have stated that she was bleeding from her private part. P.W.1 has stated in paragraph 7 of his evidence that there was soil in her mouth and she was also bleeding from her nose. As appears from the evidence of her mother P.W.3, the child was hale and hearty when she went to sleep with her grandmother. This also appears from over all reading of the evidence. However, when the child was picked up from the field by the witnesses and her family members they found her bleeding from her private part and she was unconscious. Even P.W.2 who declined to support his initial version that it was this accused who was seen by him moving headily with the child, has supported this part of prosecution story in his

evidence in paragraph 4. Thus, it remained a question to be answered by the respondent as to how the child could have those injuries on her person. It was the present respondent- convict who had taken away the child and who had thrown the child in the field. The child could be presumed continuously in the custody of the present convict respondent and he has to account for the injuries. Ordinarily, the inference could be that it was this accused who had inflicted the injuries. P.W. 3 has stated in paragraph 5 of her evidence that prior to this incident the accused had committed similar offence with other girl children.

27. It was very strenuously contended by learned Senior Counsel appearing as Amicus Curiae that there was no medical evidence indicating that the child was raped. He made references to Tailor's Practice And Principles of Medical Jurisprudence as also to Wester's Dictionary so as to pointing out as to what could be the meaning of 'rape' and what could be the injuries or informations for which the Doctor could hold the examination of a victim or the perpetrator as well. One does not need go to those literally details as was pointed out to us by learned Amicus Curiae because the very definition of the offence of 'rape' in Section 375 of the Indian Penal Code is itself sufficient to point out as to what acts could be 'rape'. With certain exceptions the act of sexual intercourse of a man with a woman has been defined 'rape' under six circumstances as contained in that provision. The explanation to the provision is of much wider import as that expands the meaning of sexual intercourse which may constitute 'rape' and that indicates that penetration is sufficient to constitute sexual intercourse necessary to the offence of rape. In other words, mere penetration tantamounts to rape. One need not go to any Text or require any external aid so as to understanding the meaning of 'rape' as defined by the Indian Penal Code, if one has carefully gone through the definition of that particular offence as contained in Section 375 of the Indian Penal Code.

28. Now coming to the evidence of the Doctor, what I find is that the little child of four years was ravished by the present convict who, to me, appears ravished her brutally, in a diabolic and savage manner. One of the members of the Board of three Doctors performing autopsy has been examined as P.W. 5, Dr. Seems Choudhary, and she has stated that the injuries found on the person of the

deceased child were as follows:

Rigor Mortis present. Dried mud found over her body, and hairs of scalp metalled with thick mud.

Both eyes were swollen blood and clots seen around nostrils of nose.

Multiple bruises 1/2' to 1 1/2'X 1/4' to 1/4' over left side of face and left ear. Epilieptical teeth bite bruise over right side of chin and neck seen.

Clotted blood seen over external genitalia. Multiple tiny vulval abrasions seen over both labia majora. Laceration around clitoris seen. There was laceration of perineum involving hymen and fourchotte extending up to anal splincter.

On dissection:

Sub scalps- clotted blood seen over frontal part of head. Lower part of abdominal cavity contained blood and clots.

Right lung, Rt. Side of Liver bruised. There was rupture of vault of vagina up to exterior.

Heart: Rt. side contained blood & clot while left side was empty Stomach contained blood and clot. Bladder was empty.

Cause of Death: Due to excessive haemorrhage leading to shock from above mentioned ante-mortem injuries around genitalia and private parts by some sexual offences.

Time elapsed: within 6 to 24 hours.

This P.M. Report is in writing of Dr. Ashok Kumar and it bears my signature and signature of Dr. Sudhir Kumar.

She has further stated that considering the age of the victim and injuries, the Board found the injuries sufficient to cause death in ordinary course of nature. On perusal of the evidence of P.W. 5 one could have the complete picture as to how brutally the little child of four years was ravished. It was virtually tearing apart the

child, the whole of her private part as also inside. The perineum and hymen were lacerated and whole of the wall of vagina and its vault up to the exterior was found ruptured. Even the right side of liver was bruised. This shows the brutality. The Doctors have found epilleptical teeth bites over right side of chin and neck with multiple bruises over face and ear. This probably showed as to how the present convict was acting. His behaviour appears beastly, his acts monstrous. If vagina was ruptured and lacerated and if the Doctor reported that the injury could have been the result of sexual offence with the little child, no one could go to disbelieve that the child was lifted for any purpose than for being ravished.

29. The learned Amicus Curiae criticized the prosecution for not examining other two members, namely, Dr. Ashok Kumar and Dr. Sudhir Kumar who were sitting on the Board and also for not examining the Doctor who had initially admitted the child in Sadar Hospitala, Siwan, and examined her. The learned Amicus Curiae further argued that non-production of the relevant records created by the Doctor who first attended upon the child makes out a fit case for drawing adverse inference. Even if the two Doctors who were members of the Board had not been examined in court, it could make little impact upon the prosecution case and their non-examination, to me, appears of no consequence. The opinion was shared by all the three Doctors who were the experts and they could have expressed the same opinion. Above all, the document was prepared in performance of their official duties and they had shared every word of it and every finding recorded in it. One of them, Dr. Seema Choudhary or any of them for that purpose could have come and could have deposed. P.W. 5 one of the members did depose by stating as to what was the finding of the Medical Board after holding autopsy upon the dead body. It was the opinion given by a Board of three Doctors and even if the Doctor who had initially attended upon the child had appeared what more he could have said than as has been stated by P.W.5 as the medical evidence in such cases could confine only as to what were the injuries found by the Doctor. Most importantly, the Doctor initially examining the child could not have done better because he could have not given more a detailed information as was obtained to the court simply for the reason that he had not done any autopsy and he could not have said as to what could be the damage to the child internally. Thus, non-examination of the two other members of the Board and the Doctor who had first

examined the deceased appears of no consequence to me and no case of drawing up of adverse inference is made out.

30. Thus, from the appreciation of the evidence on record I have no hesitation in upholding the conviction of the present respondent under Section 376 of the Indian Penal Code.

31. As regards his conviction under Section 302 of the Indian Penal Code, the act of the accused appears the only reason for the death of the child. For satisfying his lust the respondent lifted her from the safety and warmth of her grandmother's arms with whom she was sleeping and was taken for being brutally ravished. The act of the accused could be appreciated by the fact that so as to gagging her from crying or for shutting down the sound of cries, the mouth of the little girl was stuffed with soil. As such, the Doctor found soil in her mouth. The merciless manner in which she was raped resulted into the complete devastation of her vital organs including liver and it appears that she was also otherwise assaulted as the Doctor found bleeding from her nostrils. P.W. 5 had found clots of blood around her nose. The Doctor opined that only a sex maniace could commit such acts and because of such acts there was rupture of the external or internal organs around and inside the private parts of the child. She has further stated, and even an untrained person in medical science could say so, that the act of the accused was sufficient in the ordinary course of nature to cause death. A man, about 36 years of age on the date of occurrence, sexually assaulting a child of four years, could very well be knowing the consequence which is probabilised by the fact that he was consciously doing all acts with the child so much so, as indicated above, that he was also stuffing the mouth of the child with soil and then when being pursued by her family members and villagers he mercilessly threw the child in a field. The whole body of the child was plastered with mud which remained till the Doctor held Post-mortem examination on her dead body. This could outrightly be a case under Section 302 of the Indian Penal Code also.

32. This brings me to consider as to what could be the sentence which could be passed upon the respondent. The learned trial Judge has held the case to be one of rarest of rare cases. It is very difficult to differ from the above finding of the

learned trial Judge because the act was brutal, savage, barbarous and diabolic which was simply revolting to the conscience, for, a four-year-old child was being picked up so as to be ravished in the manner as appears from the evidence. The convict was a fatherly figure to her. It could be an ordinary expectation of any person that he had been as caring to her as his own father or other close relative. The whole act could be revolting to the conscience when one looks to it as to how her mouth was stuffed with soil so as to gagging her voice and cries. Her cheeks were bitten. Bruises were found around her neck and by the side of ears. The devastation was complete. The rupture was tearing as the whole external and internal organs of the child up to the vault of vagina was found ruptured. Her liver was lacerated. It could be the act of a brute. It could be simply signifying as to how monstrous the act could be. It simply appears revolting to the conscience and it must have caused revulsion in the society about the acts of the accused. There is evidence through P.W.3 that the convict had indulged into such acts earlier also. The Doctor, P.W.5, has stated that the act could be only of a sex maniace which the Court found the convict to be. The above are the aggravating circumstances. The sentencing jurisdiction of the court is based on the principles of proportionality, i.e., that the sentence must commensurate with the offence committed by an accused so that assurance and safety is given to the society which is further assured that justice has been done. A new dimension to the field of sentencing is the principle of rehabilitation by virtue of the convict also enjoying some fundamental rights and a right to live if there could be a possibility for that, as may appear discussed in the decision of the Supreme Court reported in : (2009) 6 S.C.C. 498 Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra. There has been a difference of opinion also on the sentencing of a particular convict whose appeal was being considered by the Supreme Court and the matter appears referred to the larger Bench only for deciding the limited question of maintaining or not maintaining the sentence as may appear from the decision of the Supreme Court reported in (2009) 5 S.C.C.740 Rameshbhai Chandubhai Rathod v. State of Gujarat. The decision reported in (2008) 13 S.C.C. 767 Swamy Shraddananda (2) alias Murli Manohar Mishra v. State of Karnataka laid down the principle of sentencing in any case where the court may find death sentence excessive and imprisonment for life, meaning 14 or 20 years also not

sufficient which required to be extended. I have considered all these cases and I find that none of the cases could be applied in the present case, for the reasons as I have just stated and I have also discussed while appreciating the evidence. In my considered view the sentence of death was rightly inflicted upon the respondent and that is hereby confirmed.

33. The Reference is accepted for the death to be executed.

34. Before I part with the decision, I want to record our sincere appreciation of the assistance rendered by Shri Ashwani Kumar Singh, learned Senior counsel who acted as Amicus Curiae at the request of the Court. Without his able assistance, it may not have been possible for this Court to consider the facts of the case and their ramifications in such details while considering the present Death Reference. His fee shall be paid by the High Court Legal Services Committee.

C.M. Prasad, J.

35. I agree.

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