

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 1362 of 2008

Arising Out of Lalganj PS.Case No. 323 Year- 2004 Thana -
Lalganj District- Vaishali (Hajipur)

- =====
1. Suresh Rai. (Abated vide Hon'ble Court's order dated 20.04.2015)
 2. Ram Pravesh Rai.
 3. Umesh Rai
- All Sons of Musafir Rai, all resident of Village-Madhusudan Pakari, Police
Station-Lalganj, District-Vaishali at Hajipur.

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : Shri Rajesh Kumar Singh, Advocate.

For the Respondent : Shri Dilip Kumar Sinha, Advocate.

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 08-05-2015

Three persons were put on trial by the learned Sessions Judge, Vaishali at Hajipur in Sessions Trial No. 248 of 2006/370 of 2006 and 173 of 2007 by being indicted with commission of offence under Section 302 read with 34 I.P.C. While accused Amresh Rai and his mother accused Ram Lalli Devi were acquitted by judgment dated 22nd of November, 2008, three others out of the five, i.e., Suresh Rai (since dead and his appeal having abated as appears from order dated 20th April, 2015), Ram Pravesh Rai and Umesh Rai were held guilty of committing the offence they had been charged with. The learned Sessions Judge heard the convicts under Section 235 Cr. P.C. and by order of sentence dated 29.11.2008 each of the three was

directed to suffer rigorous imprisonment for life as also to pay a fine of Rs. 25,000/-, else to suffer rigorous imprisonment for 18 months. The three accused chose to prefer the present appeal to set up a challenge to the judgment of conviction and order of sentence passed upon them.

During the pendency of the appeal, appellant no. 1, Suresh Rai was reported dead and after being satisfied about the reported death of the said appellant, the appeal as on his behalf regarding the substantive sentence passed upon him was ordered to abate as may appear from order dated 20th April, 2015 passed by the court leaving the appeal surviving only on behalf of appellants, Ram Pravesh Rai and Umesh Rai.

2. Some of the facts are not in dispute. Deceased Lila Devi was married many many years back to acquitted accused Amresh Rai and she had given birth to three children out of whom Chandan Kumar and Kabita Kumari were examined as P.Ws. 2 and 3 in the trial Court. The three children were sons of Kundan Kumar. The deceased undisputedly was residing in the house of her husband and she died under circumstances not natural.

3. What was alleged by P.W. 7 Ramdeo Rai, the father of the deceased Lila Devi in his written report Ext-1 was that prior to the lodging of the report, the lady suffered paralytic stroke and in spite of being provided appropriate medical attention and treatment, she could not come round as a result of



which, the accused persons nine in number and named in the written report which is included the five put on trial started systematically torturing the lady mentally and physically so that she could call off her marriage to accused Amresh Rai. The further purpose of the accused persons was that they wanted to eliminate the deceased finally so as to getting her husband Amresh Rai married to another lady and not only the husband but the other accused persons also used to hold out threats in the above behalf telephonically also.

4. As a specific instance of giving threats to the informant, P.W. 7 stated in his written report that one month prior to the occurrence, Amresh Rai, the husband of the deceased Lila Devi had given a call to him from Assam asking him to obtain a divorce from his daughter in favour of the husband as he was fed up carrying on the relationship with a paralytic lady. The informant refused, as per his allegation, upon which the said Amresh Rai is alleged to have stated to him that it may not be legally possible for him to marry another lady during the lifetime of Lila Devi, but when she was dead, he could be in a position to enter into another wedlock with another lady.

5. After having stated these background facts leading to the commission of the offence, the informant stated that on 01.11.2004, the deceased Lila Devi informed him telephonically that he should come fast as she was apprehending danger to her life. The informant went to the house of the accused



persons at 10.00 A.M. and it was told by the deceased Lila Devi that the nine accused persons named in the written report were conspiring to kill her so that the husband Amresh Rai could enter into another wedlock. The informant stated that he tried to convince the family members of deceased Lila Devi not to do the extreme and as regards his own decision probably of taking his daughter back, he sought time from them. However, on 04.11.2004, he was informed through a news item appearing in some newspaper, that deceased Lila Devi had died and upon that he reached village Madhsudanpur Pakri where nine-year-old daughter of Lila Devi, namely, Kabita Kumari (P.W. 3) stated to her weeping that her uncle, aunt, grandmother and cousin brother had concertedly assaulted her mother to kill her. P.W. 3 is further alleged to have stated to P.W. 7 that while she was sleeping inside the room, her aunt came inside it to pick up the deceased by the lock of her hairs for dragging her out into the courtyard of the house where the uncle, aunt, cousin brother and grandmother all assaulted her mother and when P.W. 3 went near her mother, she was put inside the door and was covered by a quilt and the room was closed from outside. In spite of P.W. 3 having knocked the door vigorously, the accused persons did not unlock it and when finally the doors were opened, the younger aunt of P.W. 3 stated to her that her mother was dead and she must not state the fact to anybody else she might also be killed.

6. The informant stated that hearing the story from

P.W. 3, Kabita Kumari, he and his companions were in a state of shock and came back without going to the police station and after he had regained his composure, he had filed the written report Ext-1 before the officer incharge of Langanj police station for institution of a case and necessary legal action.

7. P.W. 9, S.I. Ravindra Prasad has stated that on 08.11.2004 while he was posted as Assistant Sub Inspector of Police in Lalganj police station, he received the written report Ext-1 of P.W. 7 on which the officer incharge of the police station S.I. Arjun Lal drew up the F.I.R. and directed P.W. 9 to hold the investigation of the case. The F.I.R. has been marked Ext-4. P.W. 9 took up the investigation and he recorded the further statement of the informant and thereafter inspected the place of occurrence. As may appear from the description of the place of occurrence in Paragraphs 4 and 5 of his deposition, he did not appear finding the dead body and, as such, he does not appear also to have held inquest upon it to prepare the inquest report, nor does it appear from his evidence that he dispatch the dead body for postmortem examination to the hospital and what appears from his evidence further is that he could receive the copy of the postmortem report on 08.01.2005 and after completing the investigation, he had sent up the accused persons for their trial.

It was how the appellants were tried and were convicted as noted at the very outset of the present judgment.

8. The defence of the accused persons as appears from

the evidence of P.W. 7, Paragraph-92 was that on account of her chronic illness, the deceased was fed up with her life and she committed suicide by hanging herself, receiving which information, the police had arrived there and Ram Lalli Devi, i.e., the mother-in-law of the deceased had given statement to that effect that the deceased had committed suicide.

9. During the course of the trial, nine witnesses were examined by the prosecution. P.W. 1, Suryadeo Rai was the son of P.W. 7 Ramdeo Rai and brother of the deceased Lila Devi and he was not an eye witness to the occurrence and claimed to have learnt about the incident from P.Ws. 2 and 3, Chandan Kumar and Kabita Kumari respectively. P.W. 2 Chandan Kumar and P.W. 3 Kabita Kumari were the son and daughter of the deceased and they had claimed to have seen the occurrence of their mother being beaten up by the accused persons and further stated that they have narrated the story to the informant when he had arrived at the village. P.W. 4. Arvind Kumar Rai was an independent witness who had again given hearsay evidence about the incident by stating that he had picked some rumours about the incident. Same was the quality of evidence of P.W. 5 Nandeshwar Rai and P.W. 6 Devendra Rai. P.W. 7 Ramdeo Rai, we have already noted, was the informant of the case and his narration of the story to him by P.W. 3 Kabita Kumari is the consent of the report. P.W. 8 Dr. Hari Prasad, had held postmortem examination on the dead body of the deceased Lila Devi and had prepared Ext-2, the

postmortem examination report and as we have just pointed out P.W. 9 Ravindra Prasad was the Investigating Officer.

10. The defence had not examined any witness.

11. We were taken through the evidence of witnesses by Shri Rajesh Kumar Singh, the learned counsel appearing on behalf of the appellants. It was contended by the learned counsel appearing on behalf of the appellants that the basic prosecution story, especially the motive behind the killing of the deceased which was initially asserted by the prosecution was not supported by any of the witnesses. Further contention was that there are vital defects in the prosecution evidence and no reliance could be placed on the evidence of P.W. 2 Chandan Kumar and P.W. 3 Kabita Kumari as undisputedly they were forcibly taken away by P.W. 7 from the house of the accused persons and were kept in his custody continuously. Submission was that the evidence of the child witness may not be in itself sufficient to reject the same but circumstances appearing from the evidence indicated that there could be ample chance that they had been tutored to make statement in Court in support of the charges. It was also urged that the very evidence of P.W. 7, the informant of the case indicates as if there had not been any occurrence as was alleged by him and he had reconciled himself to the death of his daughter which was probably the act of suicide committed by the deceased but his son P.W. 1 was very instrumental in putting pressure upon him to file the report and that pressure had probably



fructified into the written report which was based definitely on fabricated facts. The other reason which appears coming out from the evidence of P.W. 7 was that there was some probability that after filing of the report, P.W. 7 had probably bartered the filing of the report against some pecuniary and other benefits for himself and probably some part of the deal had not gone well as per his desire and that was yet another of many reasons that he had come to support the prosecution charges as a witness.

12. Shri Dilip Kumar Sinha, the learned Additional Public Prosecutor was fair enough in conceding that the evidence of the prosecution desired much as regards the support of the charges by the witnesses. It was difficult for him to defend the evidence of P.Ws. 2 and 3, the two child witnesses and it was further difficult for him to categorically negate the circumstances which were appearing from the evidence of P.W. 7 as regards the filing of the report and the reasons behind it besides the reason which could had impelled the informant to come into the witness box to depose in support of the charges. Shri Sinha, was extremely fair in submitting that the prosecution evidence was suspected.

13. We are duly informed and are properly conscious of the legal situation that no written report or F.I.R. is a substantive piece of evidence. It has only the value as is indicated by Section 162 Cr. P.C. It could be used only either for corroborating or contradicting the maker of the document.



However, there are a chain of decisions of this Court as also the Supreme Court that in spite of not being a substantive piece of evidence, the F.I.R. nevertheless has its own importance for inferring many things or deducing many inferences. It may be used for finding out as to what was the initial prosecution case and then the Court may scan the evidence to find out as to what improvements were made by the witnesses in the prosecution, if there are motive attributed to the witnesses in that behalf. Yet another use of the document, like, the F.I.R. is to find out as to who were the witnesses who could have seen the occurrence. This use of the document could be made in case of direct evidence where witnesses were coming to claim that they had seen the occurrence themselves. In our opinion, if the F.I.R. is based on the statement of a person who is not the informant then the use of the document could be made by the Court also for the purpose to test the contents of the document or the evidence of the witnesses in the light of the evidence of that particular witness who had initially narrated the story to the informant as appears in the present case. The forth use which we want to make in the present case is that the story which was told by P.W. 7, the informant of the case and that which was narrated by P.W. 3 Kabita Kumari, who had initially, as per the prosecution story informed P.W. 7 about the manner of occurrence, have to be compared to find out as to whether the prosecution had made any departure if yes then for what reason.



14. To begin with, on a careful consideration of the written report, what we find is that the informant had claimed in Paragraph-5 of his report that he had been telephonically asked by the deceased Lila Devi to come to her house as she was suspecting danger to her life and, accordingly, he had himself gone to the house of the accused persons where he was told by the deceased that the accused persons were conspiring together to kill her so that they could get Amresh Rai, husband of the deceased, married to another lady. This subsequent story which related to the 1st of November, 2004 was based on a telephonic call received by P.W. 7 from Assam and through which the husband of the deceased had asked the father of the deceased to ensure a divorce from his daughter in his favour as it was not further possible for him to carry on the relationship with a paralytic. The informant had declined to concede to the request of the husband upon which he had held out a veiled threat that it may not be possible for him to enter into another wedlock but it was possible when the deceased was dead. Thus, what appears from these lines of the written report was that the informant was somehow or the other imputing some motive to the accused persons and especially to the husband for killing the deceased. However, when it came to deposing in Court, we find that the two stories on the motive part of the occurrence were not stated by P.W. 7 and he was very consciously evading to state those facts which were mainly the statements of the husband of the



deceased. In fact, the informant had stated some other story in his evidence and what we find is that he was directly or indirectly attempting to shield the husband of Amresh Rai from any legal punishment when he was stating that the lady was properly looked after as well treated and that treatment was provided till the lifetime of the father of the husband for 3-4 years whereafter it fell upon the informant to arrange for the treatment of the deceased and he had taken her to different doctors and in spite of the lady residing in the house of her husband, he used to provide medicines and other articles to her. (P.W.7 paragraphs 21 & 22) These were never the story in the written report and as we have just noted the story which constituted the motive part of the occurrence was very consciously left out from being narrated by the informant in his evidence.

15. The deceased was undisputedly suffering from chronic paralysis. She was residing in her house and none of the witnesses even the two children P.Ws. 2 and 3, who were the son and daughter of the deceased stated that their mother was not being cared by the accused persons or she had ever been ill treated or tortured for any particular reason and all of a sudden, the prosecution was coming up with a story that the deceased was dragged out of her house by being picked up by the lock of her hairs into the courtyard of the house, to be assaulted by the accused persons. No incident ever preceded that particular incident and that simply does not convince us that the lady who



was the mother of three children and who was married to Ameresh Rai for more than seven years and had been provided as appears from Paragraph-21 of P.W. 7 an appropriate and sufficient treatment for her ailment could be picked up all of a sudden, to be killed by the accused persons. We could not persuade ourselves to that part of the story. This one major defect in our opinion was very much staring in our face from the evidence of the prosecution especially that of P.Ws. 2, 3 and 7.

16. P.Ws. 2 and 3, we have already noted, are the son and daughter of the deceased and we do not reject the claim of the prosecution that they could not be present in the house with their mother. We have just noted that the relationship between the family members of the deceased on the one hand and the deceased on the other does not appear bad as well. We have also noticed just now that we do not see any reason as to why the uncle of the two children P.Ws. 2 and 3, the aunt, her grandmother should have one fine morning without any rhyme or reason barged into the room which was in occupation of the deceased to pick her up by lock of her hairs into the courtyard and finally to assault her as brutally as to kill her. P.W. 2 who is the star witness of the prosecution as per P.W. 7 does not say that any ligature was put on the neck of the deceased to strangulate her. There is no story of the prosecution that the deceased had been killed that way. The story is of assaulting the deceased to kill her. However, the doctor (PW8) who had held postmortem



examination was stating that an oblique ligature mark about 1 C.M. in width black in colour all around the neck was found which was measuring 1 C.M. x 1 C.M. x 8 C.M. We appreciate the evidence of the doctor. We have doubt that any such mark could be left by a ligature which could be either by hand or foot as was stated by P.W. 7 in his evidence. P.W. 7 stated that he was told by P.W. 3 Kabita Kumari that appellant Suresh Rai had put one of his feet on the neck of the deceased when she was on ground to asphyxiate her to death. P.W. 8, the doctor, it may be profitably noted, stated that an oblique ligature mark of around 1 C.M. black in colour all around the neck which is due to ligature of 1 C.M. x 1 C.M. x 8 C.M. One C.M. is such a small measure which could not be fitting in the feet of a person like Suresh Rai. This manner of occurrence which was narrated by P.W. 3 to P.W. 7 completely overrules the manner in which the lady could have been asphyxiated to death. In addition to the above, the two witnesses P.Ws. 2 and 3, i.e., Chandan Kumar and Kabita Kumari had been uniform in stating that her aunt, uncle and grandmother had all come together to beat the deceased brutally in the courtyard. We could have accepted the doctor if had found such injuries which could have resulted out of such beating which was administering to her by the accused persons, but again we find that the doctor did not find any mark of violence externally or internally all over the body including the dragging mark which could have been created due to the dragging of the deceased and

that further creates doubt in our mind that P.Ws. 2 and 3 could be the eye witnesses to the occurrence.

17. Then the question is as to why P.Ws. 2 and 3 could have come to depose in the Court in a case and that too in a trial which was faced by their father. We have noted many circumstances. The first circumstance is that which appears from the evidence of P.W. 7 when he had stated in his evidence in paragraphs-49 and 50 that in spite of being opposed by the family members and persons present there at the house of the husband not to take away the three children of the deceased, he picked them up and brought them to his house. He has stated that no one there resisted his act of taking away the children and further as appears admitted from the prosecution, the children remained in custody of P.W. 7 throughout and even after they had deposed in the Court. On the day P.W. 2 had deposed in Court, he was aged about 13 years and thus he was aged about 10 years on the day of occurrence. P.W. 3 Kabita Kumari was aged about 9 years on the day of her evidence and thus, she was about 6 years on the day the occurrence had taken place. They were continuously kept in the custody of the informant and there is no evidence that they had ever the chance of meeting the accused persons. P.W. 7, the informant himself has stated that after he had come back to his house after visiting the house of the accused persons after the death of the deceased which he learnt from a newspaper, he did not file any report and as may appear from his evidence in



Paragraph- 55 he was rather convinced by his son Suryadeo Rai (P.W. 1) and then he went to the police station to file a report. He has further admitted in Paragraph-58 that there were deliberations between him and his son in order to taking a decision as to whether the matter should be reported to the police and it took 2-3 days in receiving the final action to be taken and after that period of 2-3 days, he had filed the written report. What appears further from his evidence is that there was some negotiation between the parties as appear from Paragraph-71 and onwards and that negotiation had been through a Panchayati and some decisions were reached in the Panchayati. As per the decision some parcel of land was transferred by Amresh Rai, the husband of the deceased in favour of P.W. 2 Chandan and P.W. 7 was appointed as guardian in the deed of transfer. Some land purchased by the accused from one Kali Prasad in the names of the two sons of the deceased and as appears from Paragraph-73 of the evidence of P.W. 7, that deed was not acceptable to P.W. 7 probably because he was not appointed their guardianship in that deed. There emerges another probability from the evidence of P.W. 7 that an amount of either 50,000/- or 75,000/- had also to be deposited by the accused as expenses to be incurred in future at the time of the marriage of Kabita Kumari and the sum was to be paid to PW7 but that was never paid to him in breach of the terms of an agreement reached between the parties (PW7, Page-74) but that amount was not deposited. We believe that the particular



breach of agreement which was reached in the Panchayati between the accused persons on the one side and the informant at the other was probably the motivating factor for him to go to the police station to lodge a report, else while coming from the house of the accused persons by a zep he had very well passed by the side of Lalganj police station on the day he was bringing the children with him as appears from Paragraph-54 of P.W. 1 but he was not stopping there to lodge a report and had taken these long days in lodging the report. The initial explanation in the written report was that the incident of the murder of his daughter had shattered him so much so that he was not in a fit state of mind to approach the police to lodge a report. But when he came to support that story in the written by P.W. 7 by giving evidence to that effect in Court, what we find is that he did not state a single line on the explanation he had provided for the long and delayed reporting of the matter to the police.

18. We have serious doubt the correctness of the reason which was assigned by the informant in the written report for explaining the six days delay in lodging the report stated therein, rather P.W.7 had reported the matter after six days after his expectations of getting some pecuniary or other benefits had probably been shattered on account of non payment of the amount of money or transfer of the land with some control over it to the informant.

19. The two children we have noted were aged about



10 years and 6 years on the day of occurrence when they were in the witness box. P.W. 2 was aged about 13 years and P.W. 3, 9 years. Section 118 of the Evidence Act directs that all persons are to be competent witnesses to testify unless the Court considers that they were prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extremely old age, disease, whether of body or mind, or any other causing the same kind. As may appear from the explanation appended to that section that even a lunatic unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them is a competent witness. The Courts who are to record evidence of a child often, carries out an exercise by putting some questions to such a witness to satisfy themselves regarding the competence of such a witness to as regards his maturity in understanding questions and his capability of giving rational answers to them. It is never a rule of law, it is rather a rule of prudence. It is by way of caution also that Courts generally puts such questions to child witnesses in order to satisfying themselves to the competence of the child in retaining the facts which was relating to an incident which had been seen by him and his competence to relate those facts again to the Court. This rule of prudence had crystallized itself into a rule of practice when a child witness is put into the witness box for his evidence. While going through the evidence of P.Ws. 3 and 4, we did find in the case of P.W. 2 that the learned trial Judge



without putting any question to the witnesses had recorded his satisfaction that the witnesses appeared competent to understand the questions and appropriately responded to them. We do not have any factual data to appreciate this observation of the learned trial Judge recorded at the top of paragraph-1 of the deposition especially of Chandan Kumar. When it was the turn of examining P.W. 3 Kabita Kumari who was nearly 9 years of age on the date of evidence as per the Court's own assessment and who could be about 6 years on the date of occurrence, the learned trial Judge did not make any attempt to satisfy himself that the little child of 9 years could be as competent to appreciate the questions which could be put to her in respect to the incident and she was possessed of sufficient level of understanding to respond to those questions rationally which could be put to her. In spite of these non compliance with the practice prevailing in Courts, we have not rejected the evidence of the witness on account of this reason. We in fact proceeded to read the evidence of both P.Ws. 2 and 3 and we have considered their evidence independently of these observations which we have just recorded. We have considered the evidence of P.Ws. 2 and 3 also in the light of the admission which came from P.W. 7 that he forcibly picked up the three children from the house of the accused persons in spite of some semblance of resistance to his act and took them to his house, not allowing them to come to their parent's house or to meet anyone from that side. Children are prone to tutoring. It is very easy for



an elderly person to put facts into their minds and seek the reproduction of these facts as per their desire as and when situation so required. This was the reason that P.W. 3 was not understanding the implication of her statement when she stated that one of her aunts locked her up when she rushed out of her mother's house where she was sleeping to be put inside it and further to be locked there to be brought out only after the dead body of her mother had been removed. If she had been so put under a quilt and locked into a room, the commonsense answers that she could not ever have seen the manner, in which her mother had been assaulted. As appears from her own statement, she had never been assaulted by her family members, but still she had narrated the incident from stage to stage and that probably was the accomplishment of P.W. 7 in tutoring the witnesses in such a way as to be accepted as a competent witness.

20. We have already noted that the prosecution story is based on the narration of the evidence by P.W. 3 to P.W.7 but when it came to supporting the story by P.W. 3, we found many facts not stated by her which were stated in the written report.

21. Thus, on appraisal of the evidence of the witnesses, what we find is that the prosecution evidence suffered from many infirmities and it appeared to us very clearly that the evidence was not trustworthy and it was not safe to act upon such class of evidence which appears giving an inkling as if they had been fabricated.

22. For the reasons noted above, we find merit in the appeal. The appeal is allowed by setting aside the judgment of conviction and order of sentence passed upon the appellants. The two appellants, namely, Ram Pravesh Rai and Umesh Rai are on bail. They are discharged from the liabilities of their respective bonds.

(Dharnidhar Jha, J)

(Ahsanuddin Amanullah, J)

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