

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.162 of 2009

Arising Out of P.S.Case No. 91 Year 2007 Thana -Siswan District- SIWAN

Tufani Sah @ Chhote Lal Sah son of late Dhunmun Sah alias Ramayan Sah,
resident of village-Parari, Police Station-Siswan, District-Siwan

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : Shri Bindhayachal Singh, Advocate.

For the Respondent : Shri Dilip Kumar Sinha, APP.

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 31-03-2015

The present appeal is directed against the judgment of conviction dated 02.01.2009 passed by the learned Presiding Officer, Fast Track Court No.V, Siwan in Sessions Trial No.98 of 2008/38 of 2008 by which the appellant was held guilty of committing the murder of his wife. The appellant was heard on sentence under Section 235 Cr.P.C. on 05.01.2009 and was directed to suffer rigorous imprisonment for life as also to pay a fine of Rs.25,000/-. In case, the appellant having failed in paying up the fine, the learned trial Judge directed him to suffer rigorous imprisonment for two years.

2. Some of the undisputed facts are as under:-

3. Sushila Devi was the wife of the present appellant. She was residing with the appellant in his house. On 17.10.2007 he happened to be burnt by any means and allegedly by the prosecution by this appellant and undisputedly she died of burn injuries. Yet another undisputed fact is that she was taken to Referral Hospital Siswan for treatment by the appellant and was admitted there where she was treated by P.W.2 Dr. Suresh Sharma. It also appears undisputed that she was referred to the Patna Medical College & Hospital for treatment where she died of her burn injuries.

4. The police claimed that while she was in the Referral Hospital, Siswan, it received an out door patient slip informing it that a lady with burnt injuries had been admitted in Referral Hospital, Siswan. P.W.1 who was Sub-Inspector of Police posted in Siswan police station was deputed by the Officer-in-Charge of the police station to verify the truthfulness or otherwise of the information and as may appear from his evidence, he went there and found that the lady

Sushila Devi was hospitalized there. He recorded the fardbeyan (Ext-1) of the lady and on that basis the FIR of the case was drawn up.

5. What was stated by the lady in her fardbeyan as per the prosecution and as per P.W.1 was that on 17.10.2007 at about 8.30 P.M., she was sitting in the courtyard of her house when this appellant came there and started abusing her and when she forbade him to do so, the appellant picked up a *danda* and started beating her up. The lady rushed inside a room but the appellant followed her and threw a lighted matchstick on her body, as a result of which, she caught fire. She raised cries and that attracted the neighbours and villagers who doused the flames of fire and shifted her to Referral Hospital, Siswan.

6. The FIR was drawn up and as may appear from the evidence of P.W.1, the present appellant who was very much by the side of the wife in the hospital was arrested as soon as recording the fardbeyan was complete. After close of the investigation, the appellant was sent up for trial.

7. No witness came to support the prosecution charges.



P.W.1 Kameshwar Paswan, who had recorded the fardbeyan of the deceased Sushila Devi, came to depose about the recording of the firdbeyan as also on different aspects of the investigation and steps taken by him in that direction. P.W.2 Dr. Suresh Sharma stated that he had received a requisition on 18.10.2007 and prior to 4 A.M. and he , on that basis had examined the injured Sushila Devi and had issued the injury certificate (Ext-6). P.W.3 Dr. Arbind Kumar Singh had held postmortem examination on the dead body of deceased Sushila Devi and had issued the postmortem examination report (Ext-7).

8. The defence had examined six witnesses. The gist of the defence witnesses was that deceased Sushila Devi had never been beaten up nor she was set at fire by any means by the appellant rather she caught fire herself while cooking in the kitchen of the house and was rushed to the hospital by the appellant and his family members.

9. The learned trial Judge treated the fardbeyan of the deceased Sushila Devi as her dying declaration and on the basis of that sole evidence, he passed the impugned judgment of conviction and

order of sentence.

10. We have heard Shri Bindhayachal Singh, learned counsel appearing on behalf of the appellant and also heard Shri Dilip Kumar Sinha, learned Additional Public Prosecutor.

11. While addressing us, learned counsel appearing for the appellant took us through the evidence of witnesses and submitted that P.W.1 might have stated that he had gone to the hospital and had recorded the fardbeyan but he did not speak as to what were the words stated to him by deceased Sushila Devi. It was contended that the proof of dying declaration could be complete and acceptable only when the actual words spoken by the deceased to P.W.1 could have been brought on record by the witness by telling the Court the exact words which he had heard from the deceased regarding the cause of her death or the circumstances of the transaction which had resulted in her death. The second attack towards the acceptability of the document of dying declaration was that he had not obtained either the presence of the doctor or his certificate regarding the conscious state



of mind of the deceased so as to convincing the Court that she was fit mentally to make her statement. Submission was that the evidence of P.W.2 Dr. Suresh Sharma as also the evidence of P.W.1 Kameshwar Paswan leads to one irresistible conclusion that the document might be spurious. Submission was that the decree of burn which was found on the deceased should not have made it possible for her to be in conscious state of mind for such a long period of over 12 hours under the poor facilities which was admittedly prevailing in the Referral Hospital, Siswan as per the evidence of P.W.2.

12. Shri Dilip Kumar Sinha, learned Additional Public Prosecutor had initially set up lukewarm resistance to the submission of the learned counsel for the appellant but subsequently happened to submit that there were serious loopholes as regards the proof of the document so as to recover by Section 31 of the Evidence Act. Sri Sinha was conceding that such a weak evidence as appears from the record ought not to have been used for convicting the appellant.

13. The claim of P.W.1 S.I. Kameshwar Paswan who



had scribed the fardbeyan of deceased Sushila Devi is divergent as regards the presence of the doctor in the hospital. In his evidence, in paragraph-14, he stated that he came to the hospital, as per the direction of the officer-in-charge of the police station to verify the truthfulness of the information conveyed to the police through the O.D. slip and he found no doctor present there and straightway proceeded to record the statement of deceased Sushila Devi. This evidence in cross-examination of P.W.1 is contrary to his own evidence in examination-in-chief when he stated that after receiving the O.D. slip, he came to Referral Hospital, Siswan and recorded the fardbeyan of injured Sushila Devi but before that he was fully satisfied that the deceased was in a fit state of mind to give her statement and then only he could proceed to record her statement. Regard being satisfied fit state of mind and physical health to the deceased to make statement, the witness was stating the same in paragraph-14 at page-16 of the paper book that before recording the statement, he had met the doctor and had orally asked about mental



fitness of deceased Sushila Devi and he was told by the doctor that she was mentally fit to give her statement. We have already referred to his statement in the same paragraph-14 that when he had arrived at Referral Hospital, Siswan, he did not find any doctor present there. Thus, what appears coming from P.W.1 is that there are two contradictory statements regarding the presence of the doctor. The doctor P.W.2 himself stated that he had never been contacted by any police officer before some one had recorded the fardbeyan of deceased Sushila Devi regarding the mental fitness of the deceased in giving her statement. Besides that statement P.W.2 also stated that prior to 4 A.M. on 18.10.2007 he had received a requisition from the police to examine the deceased Sushila Devi and he proceeded on that basis to examine Sushila Devi at 4 A.M. Thus, what appears from these lines of evidence of P.Ws.1 and 2 is that there had not been any meeting between the doctor and P.W.1 after 4 A.M. and the claim of P.W.1 in that behalf is very very difficult to be acceptable.

14. The other aspect emerges from the evidence of



P.W.2 is that he had definitely received a requisition for examining the injured Sushila Devi and on that basis, he proceeded to examine her at 4 A.M. We may not be wrong in noting down that issuing a requisition for examination of injured as one of the steps in investigation and that step could never be taken without there being any basis to take up the investigation. The police could have issued the requisition to address to P.W.2 for examining Sushila Devi only when it had some sort of report in the form of the statement of any person indicating the commission of cognizable offence. This inference of ours thus raises a legitimate question as to what was that information on the basis of which the police had issued the requisition requesting P.W.2 to examine Sushila Devi and why that was not brought on record and that instead the police found it necessary to proceed itself to record the dying declaration. We do not see any reason as to why the police should have explained the provisions of Rule 169 of the Bihar Police Manual, 1978 which had placed many directions to the police officers regarding the procedure and



deputation of officers for recording of the dying declaration. As per Rule 169, it has firstly, to be a Judicial Magistrate who has to be requested for recording the statement and in absence of a Judicial Magistrate it should either has to be an Executive Magistrate or any gazetted officer. We do not find anything from the record and especially from the evidence of P.W.1 as to why, he did not obey the provisions of the Bihar Police Manual by not placing a requisition before the Chief Judicial Magistrate for deputation of a Judicial Magistrate or any Executive Magistrate for recording the dying declaration of deceased Sushila Devi. Assuming that, it was urgently required that the statement of Sushila Devi was to be recorded, then in that case, we do not see any reason why the investigating officer P.W.1 chose not to request the very doctor P.W.2 who was a gazetted officer to record the statement of the victim as a dying declaration. These procedures and formalities which were legally recognized principles on appropriate recording of the dying declaration, we find completely not followed by P.W.1.



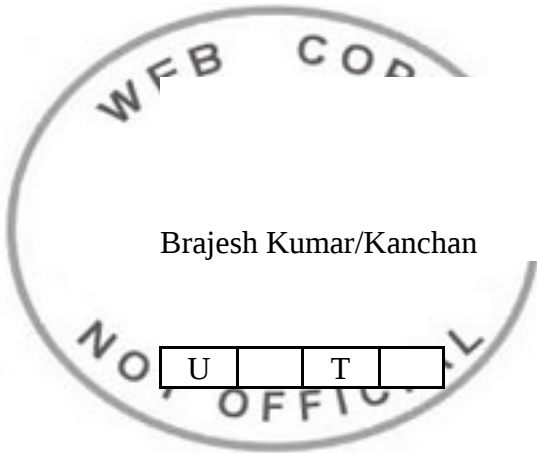
15. In addition what we have just discussed in preceding paragraphs, we simply want to recall that in order to proving a dying declaration the exact words which were said by the deceased to the person who had recorded it should be spoken by the person who had scribed the dying declaration if it was a written declaration. While perusing the evidence of P.W.1 S.I. Kameshwar Paswan, we were only searching from the words which were spoken by the deceased Sushila Devi to him and we fail to find out a single line reproduced by P.W.1 which could be claimed to have been stated by Sushila Devi to him. No words spoken by Sushila Devi least to talk of consistent line which were stated by her and which were recorded by P.W.1 in the form of fardbeyan was brought on record. Thus, what we find is that the rule on the proof of dying declaration appears completely ignored or not followed and thus making the very record not fit to be acted upon. These are some of the reasons upon which, we find that the learned trial Judge had erred seriously in appreciating the law in the light of the facts available to him and applying appropriately so as to

reaching the conclusion.

16. In addition to the above, what we find is that the very story which is recorded in the fardbeyan of the deceased appears a bit contrast. There is no motive assigned as to why the husband of the deceased Sushila Devi should come into the courtyard and start abusing to her. We could not find out any reason even a single line in that behalf as to why the husband should come and start abusing his wife and took up a *danda* to beat her. If she protested there was no motive assigned to the husband to beat up firstly and then to kill her by setting her ablaze. This lacks of strong circumstances in absence of any motive for a husband to kill his wife as also weight much with us to hold that the charges were indeed not proved.

17. In the result, the appeal succeeds and the same is allowed. The judgment of conviction and the order of sentence passed upon the appellant Tufani Sah @ Chhote Lal Sah are hereby set aside. The appellant is acquitted of the charge, he had been found guilty of. The appellant is in custody, he shall be released forthwith, if not

wanted in any other case.



(Dharnidhar Jha, J)

(Amaresh Kumar Lal, J)