

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.108 of 2012

=====

(Against the Judgment of conviction dated 22.12.2011 and Order of Sentence dated 23.12.2011 passed by Addl. Sessions Judge, F.T.C.V, Kaimur at Bhabua, in Sessions Trial Case No. 192 of 2008 / 42 of 2011).

=====

Nakul Tiwary, Son of Late Lali Tiwry, Resident of Village- Paura, P.S- Chand,
District- Kaimur at Bhabua.

.... Appellant.

Versus

The State Of Bihar

.... Respondent.

=====

Appearance :

For the Appellant : Mr. Tribhuwan Narayan, Advocate
Mr. Mithlesh Kumar Vidhyarthi, Advocate
For the State : Mr. A.K. Sinha, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

And

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 02-08-2016

The Appellant has been convicted under Sections 302, 376/511 of the Indian Penal Code vide Judgment of conviction, dated 22.12.2011 and Order of sentence, dated 23.12.2011 passed by the Addl. Sessions Judge, F.T.C-V, Kaimur at Bhabua, in Sessions Trial No. 192 of 2008 / 42 of 2011. For the offence under section 302 of the Indian Penal Code, the appellant has been sentenced to undergo Rigorous Imprisonment for life and fine of Rs. 5000/-. For the offence under Sections 376/511 of the Indian Penal Code, he was sentenced to undergo Rigorous Imprisonment for five years and fine

of Rs. 1000/- and in default of payment of fine, to undergo further Rigorous Imprisonment for two months.

2. The prosecution case, as set out in the fardbeyan of Subhash Tiwary (P.W.4) of village Paura, P.S. Chand, District-Kaimur recorded by S.I. Siyaram Prasad Gupta of Chand Police Station, is that on 19.01.2008 at about 10.00 P.M., while he was sleeping in his 'Marai' situated in front of his house, his daughter, namely, Laxmina Devi wife of Mahendra Chaubey, had gone to the house of his brother Late Lali Tiwary to see film on the C.D. player. All of a sudden, when he woke up on 'hulla', he saw his daughter in flames and running towards the house, but she soon turned towards the house of appellant Nakul Tiwary. Thereafter, the informant along with his wife Ram Dulari Devi (P.W.1), sons Arjun Tiwary (P.W.2), Bhim Tiwari (P.W.3), Bhola Tiwari (Not examined) & Vikash Tiwari (Not examined) also rushed and extinguished the fire and brought her to his house. Laxmina Devi informed them that Appellant Nakul Tiwary, somehow, managed to move his sister Rina Devi away and, thereafter, began to make overtures with bad intent. When she protested, the appellant Nakul Tiwary poured kerosene oil and set fire to her. The informant with the help of his sons Arjun (P.W.2), Vikash (Not examined) and his wife Ram Dulary Devi (P.W.1) carried his daughter to Chand Hospital. Since the condition of his daughter was serious, she was referred to Chandauli Hospital,

where the Doctors referred her for better treatment to B.H.U. Hospital, Varanasi. At B.H.U. Hospital, Varanasi, her daughter was provided initial treatment. The Doctors of B.H.U Hospital informed that the estimated cost of treatment would come around Rs. 5,000/- As the informant was unable to bear the said medical expenses, he brought his daughter back to his house on 20.01.2008. The informant claims that after failing in establishing physical relationship with his daughter, appellant Nakul Tiwary poured kerosene oil and set her on fire. He further stated that the incident was witnessed by a number of persons.

3. During trial, the prosecution examined altogether 11 witnesses in support of its case. Out of the 11 witnesses, P.W. 6 Sunil Kumar Singh, P.W.7 Dilip Kumar Singh, P.W.8 Santosh Kumar Singh and P.W.9 Maheshwar Singh have not supported the case of prosecution and were declared hostile. P.W.1 Ram Dulary Devi, P.W.2 Arjun Tiwary and P.W.4 Subhash Tiwary have claimed to be the eye-witnesses to the occurrence, whereas P.W. 10 Dr. Shyam Kumar conducted the Post-mortem examination on the dead body of the deceased Laxmina Devi. P.W. 11 Siyaram Prasad Gupta is the Investigating Officer of this case.

4. P.W.1 Ram Dulary Devi is the mother of the deceased. She stated that a year back at about 10 P.M., she was in her 'Marai' situated in front of her house. Her sons, Bhim Tiwary



(P.W.3) and Arjun Tiwary (P.W.2) were also in the Marai. Her daughter Laxmina Devi had gone to the house of appellant Nakul Tiwary for watching cinema on T.V. The sister of the appellant Rina Devi had taken her daughter to watch cinema. The appellant somehow managed to move his sister and caught her with bad intention, to which she protested, whereupon Nakul Tiwary poured kerosene oil and set her daughter on fire. Thereafter, she ran and turned towards the courtyard of Nakul Tiwary. She further stated that she along with her son Arjun Tiwary (P.W.2), Bhim Tiwary (P.W.3) her husband Subhash Tiwary (P.W.4) and villagers Bunela Tiwary (Not examined), Payere Tiwary (Not examined) and Panna Mian (Not examined) reached there and extinguished the fire and brought Laxmina Devi to her house. Thereafter, she was carried to Chand Hospital, on a cot, from where she was referred to Chandauli, Varanasi. The Doctor of Chandauli Hospital refused to give any treatment to the victim and referred her to B.H.U. Hospital Varanasi. After administering two bottles of saline water, the Doctors of B.H.U, Hospital informed her that they would have to pay Rs. 5000/- per day as expenses for treatment. As they were unable to bear the heavy cost, they brought her daughter back to her house. Thereafter, Darogajee came to his house and took the statement of her daughter, who died 4-5 days later.

In cross-examination, she stated that she came to know

about the occurrence from her deceased daughter. She further stated that on the alarm raised by her daughter, she ran towards her and saw her in flames. At the relevant time, Rina Devi was not there. Apart from her daughter, Payere Tiwary (Not examined) and wife of Jodi Tiwary were also present at the place of occurrence.

It would appear from the evidence of this witness that she is not an eye-witness of the occurrence. It further appears that a number of persons have been named in her statement, but they were not examined.

5. P.W.2 Arjun Tiwary is the brother of the deceased. He stated that about one and half year ago, at about 10.00 P.M., he was sleeping in his '*Marai*' after taking his meal along with his father (P.W.4) mother (P.W.1) and brother Bhim Tiwari (P.W.3). His sister Laxmina Devi had gone to the house of Nakul Tiwary to watch cinema on T.V. She was taken to the house of Nakul Tiwary by Rina Devi, sister of the appellant. After managing to move Rina Devi, Nakul Tiwary tried to establish physical relationship with Laxmina Devi to which she protested, whereupon he poured kerosene oil and set her on fire. In the meantime, Payere Tiwari (Not examined) raised hulla that daughter of Subhash Tiwari (P.W.4) is burning. Thereafter, he along with his mother, father and brothers reached there. His sister informed that Nakul Tiwary poured kerosene oil and had set her on fire. When they reached the courtyard of Nakul Tiwary, he had



already fled by then. His sister was lying senseless on the ground and screaming. He along with others extinguished the fire from the person of his sister and brought her back to the house. Thereafter, she was taken to Chand Hospital, from where she was referred to Chandauli and then referred to B.H.U. Hospital, Varanasi. He further stated that as they were unable to bear the medical expenses, they brought her sister back to his house. Thereafter, S.H.O. of Chand Police Station, D.S.P and BDO also arrived at their house and took the statement of her sister. The D.S.P. assured him that he will make arrangement for treatment of his sister, but in the meantime, his sister passed away. Darogajee took the dead body of his sister for Post-mortem examination and, thereafter, the same was handed back to them.

In his cross-examination, he stated that there were 3 to 4 houses in between his '*Marai*' and the house of Nakul Tiwary. He reached there on hulla. Bundela Tiwari and Payere Tiwari also reached at the house of Nakul Tiwary.

It would appear from his evidence that this witness has not claimed to be an eye-witness of the occurrence, rather he heard about the occurrence from his deceased sister Laxmina Devi.

6. P.W.3 Bhim Tiwary is another brother of the deceased. He stated that a year back at about 10.00 P.M., he was in his '*Marai*' situated in front of his house along with his father,



mother and brother Arjun Tiwary. At that time Rina Devi, sister of the appellant, came and took his sister for watching cinema on C.D. player. Nakul Tiwary, somehow, managed to move his sister and, thereafter, tried to establish physical relationship with his sister, to which she protested. While she tried to flee, Nakul Tiwary poured kerosene oil and set her on fire. In the meantime, Payere Tiwari (not examined) raised hulla, whereupon they ran towards her and managed to extinguish the fire and bring her to his house. Bunela (not examined), Rajesh Tiwary (not examined), Munnu Tiwari (not examined), Arjun Tiwary (P.W.2), along with his mother Ram Dulari Devi (P.W.1) and father Subhash Tiwary (P.W.4) took her to Chand Hospital, from where she was referred to Chandauli Hospital and Doctor of Chandauli Hospital referred her for better treatment to B.H.U. Hospital, where Doctors of B.H.U. after starting small treatment, stated that the cost of treatment per day would be Rs. 5000/-. As they were unable to meet the expenses, they brought her back to his house. He further stated that the appellant Nakul Tiwary is his own cousin and his father has five brothers.

In his cross-examination, he stated that only after hearing hulla, he saw his sister having got burnt. He further stated that with the help of others, he extinguished the fire of Laxmina Devi. He has not claimed to be the eye-witness of the occurrence. His knowledge is based upon the statement made by his sister to him.

7. P.W.4. Subhash Tiwary is the informant and father of the deceased. He stated that a year and two months ago, at about 10.00 P.M., he was sleeping in his 'Marai' along with his wife Ram Dulari Devi (P.W.1) and sons Bhim Tiwary (P.W.3) and Arjun Tiwary (P.W.2) and his younger son Vikash was also there. The sister of Nakul Tiwari, namely, Rena Devi, had come to his house and taken his daughter to watch cinema on C.D. In the meantime they heard hulla, they saw Laxmina Devi in the grip of fire and was running hither and thither. She finally ran towards the courtyard of Nakul Tiwary and fell precariously on the ground. The fire was extinguished and they brought her to his house. On query, she stated that Nakul Tiwary, after moving his sister Rina Devi, tried to establish physical relationship, to which she protested. Thereafter, Nakul Tiwary poured kerosene oil on her person and set fire to her. The informant along with others carried her to the Chand Hospital, from where she was referred to Chandauli Hospital and thereafter to B.H.U. Hospital, Varanasi. In B.H.U. Hospital, after giving initial treatment, the Doctors stated that per day cost of medical expenses would be Rs. 5000/-. As he was unable to bear the heavy medical expenses, he brought his daughter back to his house. After one day, Darogajee came and took his statement. The D.S.P. had also come and recorded his statements as well as the statement of his daughter. The B.D.O. also took the statement of his daughter. Darogajee asked

them to take his daughter to Bhabua Hospital, but in the meantime, her daughter died in the night. Thereafter, Darogajee got the Post-mortem examination of his daughter.

In his cross-examination, he stated that for the first time, when he saw Laxmina Devi, she was west to his house in flames and was running hither and thither. Then he took her to the hospital.

It would appear from the evidence of this witness that he is also not an eye-witness to the occurrence.

8. P.W.5 Rajesh Singh is a formal witness, who has proved his signature on the Inquest Report, which has been marked as Ext.1.

9. P.W.10 Dr. Shyam Kumar stated that on 23.01.2008, he was posted at Sadar Hospital, Bhabua (Kaimur) and on the same day, he conducted the Postmortem examination on the dead body of the deceased Laxmina Devi and found the following injuries:

External examination:-

Old burn injury present over skull face, neck, chest, abdomen, both upper and lower limbs above the knee joint discharging fowel. Swelling some were deep burn some were superficial extensively 85%.

Internal examination:- All thoracic and abdominal vesera intact pale hurt left chamber empty, right chamber contain little amount of dark blood, stomach are

most empty. Intestine gas, liquid fears uterus normal in size and empty.

On dissection, urinary bladder contains about 30 ml of urine.

The Doctor opined that she died of burn injury.

10. P.W.11 Siyaram Prasad Gupta is the Investigating Officer of this case. He stated that on 21.01.2008, he was posted as S.H.O of Chand Police Station. He received information of the case in the night of 19.01.2008 through the informant Subhash Tiwary (P.W.4). The informant had brought his deceased daughter to the Police Station in serious condition. He immediately arranged an Ambulance to take her for treatment and she was taken to B.H.U Hospital and after initial treatment, he advised the informant to give his statement to the local Police on reaching the hospital. However, the statement of the victim could not be taken as she was not in a position to give her statement and informant brought her back to his house. The local Chowkidar Mudrika Singh on 21.01.2008 at about 12.30 P.M. gave information to the effect that the victim is in a position to make her statement. On receipt of information, the Police came to the house of the informant. However, he could not record her statement as she could not utter her words clearly. Instead, he recorded the statement of informant Subhash Tiwary (P.W.4) and instituted the case and started investigation. He further stated that



after seeing the condition of the victim, he informed SDPO to depute a Magistrate for recording her dying declaration. Thereafter, SDM deputed Circle Officer Sri Suman to record dying declaration of the deceased. On being instructed, Suman Kumar recorded the dying declaration of the deceased. He identified the signature of Suman Kumar on the dying declaration, which has been marked as Ext.3. The informant, thereafter, inspected the place of occurrence, which is newly constructed house of Nakul Tiwary. However, he did not find any sign of kerosene oil nor any earthen lamp, which is said to be used to pour kerosene oil on the person of the victim. The house of Nakul Tiwary is situated in the east of the village. In the eastern room of Nakul Tiwary, a T.V and C.D. Player were found, where Laxmina Devi is said to have gone to watch cinema. He recorded the statement of the witnesses and prepared the Inquest report and after collecting the Post-mortem report of the deceased, submitted Chargesheet.

In his cross-examination, he stated that though he received information about the incident on 19.01.2008, but he did not record the F.I.R., rather he made a Sanha Entry of the incident, which also does not find entry in the case diary. He further stated that when he saw Laxmina Devi, for the first time, she was unconscious and was not able to speak clearly. The place where the informant saw the victim, for the first time, was 'Ghura' situated in front of his house.



11. Learned counsel appearing on behalf of the appellant submits that admittedly, there is no eye-witness to the occurrence. The informant and the rest four witnesses have claimed to have seen her, but only after she had caught fire. He further submits that P.W.1 Ram Dulari Devi, P.W.2 Arjun Tiwary, P.W.3 Bhim Tiwary and P.W.4 Subhash Tiwary, who happen to be the mother, brothers and the father of the deceased, have claimed to see the occurrence but all of them have stated that when they saw the victim, for the first time, she was in grip of fire. Even the I.O said that the informant in his statement stated that when he saw, for the first time, his daughter was in the flames and was near Ghura in front of his house. Furthermore, P.W.4 in his statement stated that his daughter Laxmina Devi ran towards the courtyard of Nakul Tiwary, where she fell on the ground. Learned counsel next submits that the Circle Officer, who had recorded the dying declaration, has not been examined nor he has given certificate to the effect that she was in a position to make dying declaration. Besides this, there are material discrepancies in the prosecution case and, as such, the appellant is entitled to be acquitted of the charges.

12. On the other hand, Sri Ashwini Kumar Sinha, learned A.P.P. appearing on behalf of the State, justified the impugned Judgment of conviction and sentence.

13. We find that none of the family members of the



deceased Laxmina Devi, namely, mother (P.W.1), father (P.W.4) and brothers (P.W.2 and P.W.3) are eye-witnesses of the occurrence. On the other hand, the I.O stated that the informant P.W.4 Subhash Tiwary stated that when he saw the victim, for the first time, he was in his house. Furthermore, no incriminating material was found in the courtyard of Nakul Tiwary. All the aforesaid circumstances create a doubt whether the deceased, in fact, had sustained burn injury in the manner in which the prosecution has tried to prosecute the appellant. Besides this, it would further appear from the statement of the Investigating Officer (P.W.11) that he received information of the case on 19.01.2008 and instead of lodging an F.I.R., he only made a *Sanha* entry in the case diary and even he recorded the statement of the witnesses after two days of the occurrence, i.e., on 21.08.2008. Besides this, we are of the view that the dying declaration recorded by the Circle Officer also appears to be doubtful, as according to Investigating Officer (P.W.11), the victim was not in position to speak clearly. It is surprising as to how soon thereafter, the Circle Officer was able to record the dying declaration of the victim. In view of the aforesaid facts, the recording of the dying declaration is not bereft of doubt and does not inspire confidence. We are thus of the view that prosecution has failed to prove its case beyond all reasonable doubt that it is the appellant, who poured kerosene oil on her.

14. In the result, the appeal is allowed. The impugned Judgment of conviction dated 22.12.2011 and Order of sentence dated 23.12.2011 passed by the Addl. Sessions Judge, F.T.C.-V, Kaimur at Bhabua in connection with Sessions Trial No. 192 of 2008 / 42 of 2011 is set aside. The appellant, who is in jail custody, is directed to be released forthwith, if not wanted in any other case.

(Samarendra Pratap Singh, J.)

(Rajendra Kumar Mishra, J.)

manish/-

AFR/NAFR	NAFR
CAV DATE	N.A
Uploading Date	11.08.2016
Transmission Date	11.08.2016