

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.175 of 2014

Arising Out of PS. Case No.-78 Year-2008 Thana- FORBESGANJ District- Araria

Chhutaharu Mandal, Son of Late Thaila Mandal, Resident of Village-Hingna
Aurahi, Tur Tola, P.S.-Simrahi, District-Araria

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ravindra Kumar, Advocate Mr. Manoj Kumar, Advocate Mr. Rajesh Roy, Advocate.
For the Respondent/s	:	None

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 01-07-2022

By this appeal, Appellant/convicted accused Chhutaharu Mandal is challenging the Judgment and order dated 22.01.2014 and 24.01.2014 respectively passed by the learned Adhoc Additional Sessions Judge IV, Araria in Sessions Trial No. 281 of 2011 (Trial No. 49 of 2011) arising out of Forbesganj P.S. Case No. 78 of 2008, thereby convicting him of the offence punishable under Sections 302 and 447 r/w Section 34 of the Indian Penal Code. For the offence punishable under Section 302 r/w Section 34 of the Indian Penal Code, he is sentenced to suffer imprisonment for life apart from imposition of fine of



Rs.10,000/- and in default to undergo rigorous imprisonment for three years. He was not separately sentenced for the offence punishable under Section 447 of the Indian Penal Code. For the sake of convenience, the appellant/accused shall be referred to in his original capacity as “an accused”.

2. Facts in brief projected from the police report leading to the prosecution of the accused can be summarized thus:-

a. It is case of the prosecution that at about 8 P.M. of 11.02.2008, at her own house, the accused sprinkled kerosene on person of Gulabi Devi (since deceased) and set her ablaze causing her death on 19.02.2018.

b. Gulabi Devi wife of Uganand Mandal was resident of village Hingna Aurahi falling under jurisdiction of Simraha Police Station in Araria District of Bihar. The accused is also resident of the same village. Gulabi Devi (since deceased) is the first informant who has set the criminal law in motion. As reflected from the FIR lodged by her at 2.15 P.M. of 12.02.2008 at the Referral Hospital, Forbisganj, at about 8 P.M. of 11.02.2008, she was sitting in the front yard of her house and was peeling the groundnut pods. At that time, accused/appellant Chhataharu Mandal came from behind and sprinkled kerosene



on her person and thereafter set her ablaze by throwing a burning matchstick on her person. It is further reported by First Informant Gulabi Devi that when she turned behind to see, she saw Mungai Mandal, Gopal Mandal, Somal Mandal, Upendra Mandal, Ramdeo Mandal, Anmol Mandal and Mithu Mandal running away from her front yard. The First Informant further reported that thereafter her mother-in-law, i.e, PW 5 Kaila Devi starting shouting as well as extinguishing the fire. Villagers such as Yogendra Mandal, Bulanti Devi, Sita Ram Mandal and others came and extinguished fire from her person. As reported by the First Informant because it was late hour of the night and as no vehicle could be arranged, she stayed in the house and came to the hospital on the next day, i.e., on 12.02.2008. She stated that her medical treatment is going on at the Referral Hospital, Forbisganj. The FIR lodged by Gulabi Devi (since deceased) came to be recorded recorded by ASI Ram Prasan Prasad of the Forbisganj Police Station at the Referral Hospital, Forbisganj.

c. On the basis of the FIR of Gulabi Devi, Crime No. 78 of 2008 came to be registered for the offences punishable under Sections 341, 447 and 304 r/w 34 of the Indian Penal Code against eight accused persons including present appellant/accused Chhutarharu Mandal and the investigation



commenced. Statements of the witnesses came to be recorded by the Investigator. During the course of investigation, while taking treatment at the Sadar Hospital, Purnia, Gulabi Devi wife of Uganand Mandal succumbed to the burn injuries on 19.02.2008. Thereafter Section 302 of the Indian Penal Code came to be added to the case diary of the crime.

d. Postmortem examination on dead body of Gulabi Devi came to be conducted by P.W. 8 Veer Kumar Singh. On completion of routine investigation, as seen from the record initially two other accused persons namely Somal Mandal and Mungai Mandal came to be charge sheeted and after committal, Sessions Trial No. 540 of 2009 came to be registered for prosecuting them. Subsequently, accused herein Chhutaharu Mandal came to be charge sheeted and on committal, Sessions Trial No. 281 of 2011 came to be registered against him separately for prosecuting him.

e. The accused was then charged for the offence punishable under Sections 302 r/w 34 and 447 of the Indian Penal Code. He pleaded not guilty and and claimed trial. In order to bring him the guilt to the accused, the prosecution has examined as many as nine witnesses. The defence of the accused was that of false implication and accidental death of



Gulabi Devi caused by sustaining accidental burns while heating peanuts legumes on the earthen stove at her house.

3. After hearing the parties, the learned trial court was pleased to convict and to sentence the accused as indicated in the opening para of this Judgment. At this stage itself it would be opposite to put on record the reasons which weighed the mind of the learned trial court for convicting the accused, as found in paragraph 18 of its Judgment. Those reads thus:-

“18. On the basis of above discussed evidences of the prosecution witnesses, it is apparent from the Fradbeyan of the inforamnt Gulabi Devi (deceased) as well as the evidence of other prosecution witnesses that the aforesaid accused Chhutaharu Mandal came behind the informant Gulabi Devi in her Angan and poured Kerosen oil on her body and put her on fire, on alarm her mother in law (p.w.5) came and saw the informant Gulabi Devi on fire and she tired to save her and also saw the aforesaid accused Chhutaharu Mandal fleeing from the P.O. The other witnesses, who have engaged in Sarswati Puja have also came to the P.O. on alarm and saw the Gulabi Devi was set on fire and also they tried



to save her.”

This makes it clear that the learned trial Court was oblivious of the evidence regarding the dying declaration of the deceased but by relying on the FIR which was not proved at all and on the basis of version of the witnesses who had not seen the incident, the conviction and resultant sentence came to be recorded against the accused.

4. We heard the learned Advocate appearing for the accused. He argued that the FIR which is in fact a written dying declaration of the deceased is not proved by the prosecution. It was neither recorded in presence of the Doctor nor the officer who had recorded it was examined by the prosecution. He further argued that there is no eye witness to the incident of alleged murder of Gulabi Devi. The spot of the occurrence is not proved as the Investigator is not examined by the prosecution. Even the circumstances incriminating the accused were not put to him while examining him under Section 313 of the Cr.P.C.

5. Though this appeal is listed for final hearing since long and despite the fact that the accused is undergoing the jail sentence imposed on him right from the date of his arrest in the year 2010, the respondent-state has not taken care to prosecute the instant appeal by engaging the prosecutor.



Therefore, instead of waiting indefinitely for appointment of the prosecutor by the State of Bihar to prosecute this appeal, we closed the appeal for judgment on 30.06.2022, by putting on record our strong disapproval to this conduct of the prosecuting agency.

6. We have carefully considered the submission so advance and we have also perused the record and proceedings including the entire evidence adduced by the prosecution.

7. According to the prosecution case, deceased Gulabi Devi came to be incinerated in the front yard of her house by accused Chhuthaharu Mandal, by acting in concert with other accused persons after entering thereat with an intention to commit the crime. Let us therefore, examine whether the deceased died homicidal death and the accused is the author thereof. Factum of death of Gulabi Devi wife of Uganand Mandal is not disputed by the defence. On the contrary, according to the, defence, Gulabi Devi died accidental death while heating the peanuts legumes on the earthen stove in her house. On this background, it is in evidence of PW 8 Dr. Veer Kumar Singh, Medical Officer of the Sadar Hospital, Purnea that on 19.02.2008, he conducted postmortem examination on dead body of Gulabi Devi and found that the



dead body was having 80 per cent antemortem burn injuries located on right and left hand, abdomen, back as well as both lower limbs. This Autopsy Surgeon has opined that Gulabi Devi died due to these extensive burn injuries. It is thus seen from the evidence of this Autopsy Surgeon that Gulabi Devi died because of burns but after scanning the evidence adduced by the prosecution we will have to ascertain whether her death was homicidal or otherwise.

8. The charge sheet contained the written dying declaration of Gulabi Devi in the form of the First Information Report lodge by her while taking treatment at the Referral Hospital Forbesganj at 2.15 PM of 12.02.2008. The incident allegedly took place on 8 PM on 11.02.2008. It is not in dispute that while taking treatment at the Sadar Hospital Purnea, this First Informant Gulabi Devi succumbed to the burn injuries on 19.02.2008. The record shows that her FIR was recorded by Ram Prasan Prasad, ASI Forbesganj Police Station in presence of PW 1 Uganand Mandal and PW 2 Sita Ram Mandal who had acted as witnesses to the FIR by putting their signature on the FIR. As noted in the opening para of this judgment, this officially recorded dying declaration in the form of the FIR of the deceased is to the effect that the accused sprinkled kerosene



brought by him in the bottle and set Gulabi Devi ablaze by throwing a burning matchstick on her person. The FIR also shows that other accused persons were also present and they all ran away. Thus the FIR lodged by Gulabi Devi on the next day of the incident at the Forbesganj Hospital and recorded by Ram Prasan Prasad ASI is vividly showing the reason and cause of death of Gulabi Devi occurring 7 days thereafter that is on 19.02.2008. This FIR is a very important piece of evidence and is relevant under Section 32 of the Evidence Act for inferring the guilt of the accused. Section 32 of the Evidence Act is an exception to the rule of hearsay evidence and makes admissible the statement of a person who dies, whether the death is homicidal or suicidal, provided the statement so made relates to the cause of death of such person or exhibits circumstances leading to the death. The law regarding the dying declaration is well settled and if any authority is required for this purpose, then we may cite the Judgment of Hon'ble Supreme Court in the matter of **Khushalrao Vs. State of Bombay** reported in **A.I.R. 1958 Supreme Court 22**. It is held therein that in order to test the reliability of a dying declaration, the Court should keep in view the circumstances such as:-

(a) Opportunity to the dying man for observation



(b) Whether the capacity of the man remembering the facts stated had not been impaired at the time he was making the statement by the circumstances beyond his control.

(c) That the statement has been consistent throughout if the dying man has several opportunities for making a dying declaration apart from the official record of it.

(d) That the statement has been made at the earliest opportunity ; and

(e) That it was not the result of tutoring by the interested parties.

9. By now it is settled that it cannot be laid down as an absolute rule of law that an oral or written dying declaration cannot form the sole basis of conviction unless it is corroborated and each case is required to be determined on its own fact keeping in view the circumstances in which the dying declaration was made. The dying declaration either oral or written stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing weighing of evidence. The dying declaration is required to be subjected to a



very close scrutiny keeping in view the fact that it is the statement made in absence of the accused who had no opportunity of testing the veracity of such statement by cross-examination of the declarant. Therefore, it becomes the duty of the Court to find out that the deceased was in a fit state of mind to make the dying declaration. If the dying declaration is suspicious then it could not be acted upon without corroborative evidence. For being conviction on the basis of the dying declaration it is always required to be ascertained whether the deceased was in a position to see and identify the assailant.

10. We have seen from the record that the written dying declaration of Gulabi Devi is not proved by the prosecution by following due process of law. The official witness who had recorded the same namely Ram Prasan Prasad, ASI of the Forbesganj Police Station is not examined by the prosecution to prove this dying declaration in the form of the FIR of Gulabi Devi. PW 1 Uganand Mandal – husband of the deceased and PW 2 Sita Ram Mandal brother in law of the deceased, are the witnesses in whose presence the dying declaration in the form of the FIR came to be made by deceased Gulabi Devi to Ram Prasan Prasad, the ASI of the concerned police station. Despite careful scrutiny of evidence of PW 1



Uganand and PW 2 Sita Ram, we could not note that this dying declaration in the form of the FIR of the deceased was ever put to them by the prosecution for proving the same. These two witnesses were not at all confronted with the FIR lodged by Gulabi Devi on 12.02.2008. They were not made even to identify their signatures on the said FIR. However by adopting a very strange procedure unknown to law, the learned trial Court had read evidence in other session trial, i.e., Session Trial No. 540/2009 in respect of that co-accused and observed in para 8 of the judgment that signature of PW 1 Uganand Mandal is at Exhibit-1 on the FIR of the deceased. While in dock in this case, PW 1 Uganand was not confronted with his signature on the Fradbeyan of Gulabi Devi at any point of time. Thus we will have to keep the unproved document in the form of the FIR cum the dying declaration of Gulabi Devi out of consideration in the instant case and it cannot inure to the benefit of prosecution for proving the charge.

11. Though the learned trial Court is oblivious of the fact that there is other evidence in the form of oral dying declaration made by the deceased, we will have to consider those oral dying declarations in order to ascertain whether they constitute trustworthy reliably and truthfully account of



sustaining burns by deceased Gulabi Devi. PW 1 Uganand who happens to be husband of the deceased has stated that the deceased told him that when she was peeling the peanuts legumes in the front yard of her house, somebody from behind sprinkle kerosene on her person and set her ablaze. She further told him that she saw the accused running away. PW 1 Uganand could not give any reason or motive with the accused for this incident. On the contrary he has stated that the accused use to act *Punch* witness in resolving their disputes.

12. PW 2 Sita Ram Mandal who is brother in law of the deceased stated that he was at Pooja and heard shout and therefore came at the door of Gulabi Devi. He told that Gulabi Devi disclosed him that the accused set her ablaze and ran away.

13. PW 3 Fudia Nand Mandal is son of the deceased. He has also stated that he was at Pooja when he heard “*Hullah*” and came to the front yard of his house and saw his mother burning. As per his version, his mother Gulabi Devi told him that the accused came and set her ablaze. He denied the suggestion that while she was heating the peanuts legumes on the earthen stove, she sustained accidental burns.

14. PW 4 Usha Devi is sister in law of the deceased. She deposed that while in Pooja, she heard shouts and



rushed to the house of the deceased. She claimed that the deceased told her that the accused set her ablaze and ran away. This witness denied the suggestion that the deceased sustained accidental burns due to lamp.

15. PW 5 Kaili Devi is mother in law of the deceased. As per the prosecution case reflected from the FIR this witness was very much present in the house at the time of the incident. As per version of PW 5 Kaila Devi when she was in the house, the accused set Gulabi Devi on fire. However in further part of her evidence, she clarified that she had not seen the incident but Gulabi Devi told her that the accused set her ablaze.

16. PW 6 Asheshwar Mandal is a co-villager who rushed to the spot but he has not spoken about any oral dying declaration of Gulabi Devi, though he saw her in burnt condition at her house. In cross-examination this witness has stated that he heard from the people gathered there that the deceased sustained burns accidentally due to the lamp while she was peeling the groundnut legumes.

17. PW 7 Ranjit Mandal is the co-villager. He claimed to have rushed on the spot of the incident from Pooja on hearing shouts. He had seen the deceased with the burn injuries.



He has not spoken about the oral dying declaration of Gulabi Devi. His cross-examination shows that this witness had seen the deceased lying near the brick stove and she was heating the peanuts legumes on that brick stove.

18. This is the evidence adduced by the prosecution to attribute guilt to the accused. PW 1 Uganand, PW 2 Sita Ram, PW 3 Fudia Nand, PW 4 Usha Devi and PW 5 Kaili Devi are near and dear once of deceased Gulabi Devi, they being husband, son, brother in law, sister in law, and mother in law of the deceased. As per their version, deceased Gulabi Devi made oral dying declaration to then to the effect that the accused set her ablaze and ran away. Only PW 1 Uganand is making the things more elaborate by stating that his wife Gulabi Devi told him that somebody from behind sprinkled kerosene on her and set her ablaze and at that time she saw the accused running away. The mode and manner of setting Gulabi Devi on fire is not claimed to be heard from her by PW 1 Sita Ram, PW 3 Fudia Nand, PW 4 Usha Devi and PW 5 Kaili Devi. As against this PW 1 Uganand claims to have heard from the deceased that by sprinkling kerosene on her person from behind, she was set ablaze by somebody and thereafter she saw the accuse running away. The oral dying declaration to him is not to the effect that



the accused sprinkled Kerosene on the victim and set her ablaze.

19. No doubt the officially recorded dying declaration of the deceased is not proved by the prosecution but it is the document of the prosecution which is not proved by it. The document of the prosecution which remained unproved cannot be utilised by the prosecution but it is wrong to deny the defence its user if it supports the defence in any manner. The defence should not be shut out from making the use of such document because the prosecution has not formally proved it. In the officially recorded dying declaration on which case of the prosecution is based, the deceased is stated to have attributed the role of causing burn injuries to her to seven more persons than the accused. Not only that as seen from the impugned Judgment two of them are facing the trial in respect of the very same offence. However none of the near and dear once of deceased Gulabi Devi have claimed to have heard from her about presence of those seven accused on the spot of the incident at the time of the incident. Thus oral dying declaration of deceased Gulabi Devi is not at all consistent with her officially recorded dying declaration. Apart from that version of PW 1 Uganand regarding the oral dying declaration of Gulabi Devi makes the prosecution case suspect. He claimed that



Gulabi Devi disclosed him that some body from behind sprinkled Kerosene on her and set her ablaze. He claims that she further stated that she saw the accused running away. This implies that according to oral dying declaration of Gulabi Devi made to PW 1 Uganand, Gulabi Devi was not aware as to who had set her ablaze. According to the prosecution case there were seven other persons on the spot of the incident. As against that her other relatives including son, brother-in-law, sister-in-law and mother-in-law are making a statement before the court that Gulabi Devi told them that the accused herein had set her ablaze without making whisper of presence of any other person on the spot. This inconsistency in multiple oral dying declarations of Gulabi Devi makes the prosecution case suspect and it cannot be said that her oral dying declarations are trustworthy and reliable. It cannot be said with certainty that Gulabi Devi was in a position to see the assailant and to identify him when by sprinkling Kerosene on her person, she was set ablaze by some body from behind.

20. Let us now search whether there is any corroborative evidence in that regard. The prosecution case is to the effect that the Kerosene was sprinkled on the deceased from the bottle. The prosecution has not seized any bottle from the



scene of offence nor had conducted any spot Panchnama of the scene of the occurrence. Burnt cloths of the deceased were not seized and sent for chemical analysis in order to ascertain whether those were having traces of Kerosene. The soil from the front yard was not seized by the Investigator in order to ascertain whether it was having any traces of kerosene. This exercise was important in the light of the fact that unrelated co-villagers such as PW6 Asheshwar Mandal and PW 7 Ranjit Mandal are stating about possibility of sustaining accidental burns by deceased Gulabi Devi. PW 7 Ranjit had seen Gulabi Devi lying near the earthen stove while she was heating the peanuts legumes. None of the prosecution witnesses have spoken about the situation on the scene of the incident. Though they rushed on the spot of the incident immediately, nobody has claimed to have seen the Kerosene. Container or bottle of Kerosene (may be empty) lying on the spot. They have not stated that the soil of the front yard was wet with Kerosene or having smell of Kerosene. Thus there is no corroboration to the divergent versions given by the prosecution through its witnesses in this case of oral as well as written dying declaration of the deceased. There is no sufficient evidence to connect the accused to the crime in question as oral dying declarations of



the deceased cannot be said to be reflecting the truthful account of the incident and those are suspicious in nature. It is highly unsafe to place reliance on oral dying declarations coming from the mouth of nearest relatives of the deceased particularly when those are not corroborated by any other evidence on record.

21. In the result, we are enable to endorse the finding of the guilt recorded by the learned trial court. The appellant/accused is certainly entitled for benefit of doubt in the instant case and therefore, we proceed to pass the following order:-

a. The appeal is allowed.

b. The impugned Judgment and order of the conviction and resultant sentence is quashed and set aside. The appellant/accused is acquitted of the offences held to be proved against him. He be set at liberty if not required in any other case.

(A. M. Badar, J)

(Rajesh Kumar Verma, J)

Bhardwaj/-

AFR/NAFR	AFR
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