

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.721 of 2017**

Arising Out of PS. Case No.-67 Year-2014 Thana- UDAKISHUNGANJ District-
Madhepura

- =====
1. Meena Devi, W/o Buddu Ram
 2. Laxmi Ram, Son of Late Babu Lal Ram

Both are Residents of Village- Laskari, P.S.- Udakisunganj, District-
Madhepura.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Rajnish Kumar Singh, Advocate
	:	Mr. Rupesh Kumar, Advocate
	:	Mr. Om Prakash Prasad, Advocate
For the Respondent/s	:	Mr. Abhimanyu Sharma, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 27-06-2023

1. Heard Mr. Rajnish Kumar Singh, the learned
 counsel for the appellant and Mr. Abhimanyu
 Sharma, the learned APP for the State.
2. A 35 years old lady and her ten months old



daughter have died out of burn injuries. The mother (deceased) has allegedly made a dying declaration before the doctor who treated her that the appellants and other agnates burnt her and her daughter by sprinkling kerosene oil on their bodies.

3. Hence the prosecution of the appellants for the charge of murdering the mother and daughter.
4. The cause of occurrence is dispute with respect to a road with the neighbours and agnates.
5. The defence before the trial Court was that the deceased/Sangita Devi immolated herself and in that process, also caused injuries to her daughter/Ranju Kumari, both of whom died.
6. While analyzing the evidence recorded in this case, two things struck us the most, namely, the deceased had come to the Primary Health Centre, Udakishunganj in the district of Madhepura, when she had been declared to be burnt by 100 per cent. Could she have been in a position to give any statement to the police ? The other surprising



feature of this case is that the I.O. who conducted the investigation has not been examined even though processes had been issued for his appearance, which *prima facie* appears to have prejudiced the case of the appellant. The postmortem report, however, suggests that the deceased /mother had suffered 60 percent of the 3rd degree burn injuries; and lastly that the doctor who first treated the deceased/Sangita Devi and her daughter has testified that the fardbeyan statement has been given by the mother (deceased) in his presence.

7. The appellants stand convicted under Section 302/34 of the Indian Penal Code and have been sentenced to undergo R.I. for life, a fine of Rs.25,000 each and in default of payment of fine, to further suffer imprisonment for one year vide judgment and order dated 22.4.2017/26.4.2017 passed by the learned 3rd Additional Sessions Judge, Madhepura in Sessions Trial No.19 of 2015 (CIS



No.34 of 2015) arising out of Udakisunganj P.S.
Case No.67 of 2014.

8. The F.I.R./dying declaration has been recorded on 23.6.2014 at about 10.25 A.M. in Primary Health Centre, Udakisunganj. The deceased/Sangita Devi has alleged that on the same day at about 7.15 A.M. the appellants and others had come to her house and had drenched her and her daughter with kerosene oil and lighted fire which caused grievous injuries to both of them. During the course of treatment, the daughter/Ranju Kumari died of her injuries.
9. On the basis of aforementioned fardbeyan statement, which has been taken as dying declaration, a case vide Udakisunganj P.S. Case No.67 of 2014 dated 23.6.2014 was instituted for investigation under Sections 341, 307, 302/34 of the Indian Penal Code.
10. It appears that shortly after such statement was made, the deceased/Sangita Devi also died. According to the certification of doctor /



Dilip Kumar Sinha (PW-10), the daughter died at about 10:20 A.M. whereas the mother died at 11:55 A.M. on 23.6.2014.

11. The investigation proceeded on the aforenoted fardbeyan, whereupon charge-sheet was submitted against the appellants. The appellants were put on trial. The trial Court, believing the statement of the deceased as her dying declaration and the statement of doctor Dilip Kumar Sinha (PW-10) in whose presence the fardbeyan was recorded by one Ramesh Chandra Upadhaya (PW-9) convicted and sentenced the appellants as aforesaid.

12. Be it noted that except for the Doctor Dilip Kumar Sinha (PW-10), Ramesh Chandra Upadhaya (PW-9), the Police Officer who had recorded the First Information Report, Dr. Akhilesh Kumar (PW-8), who conducted the postmortem and Rupesh Raj (PW-5), the person who brought the mother and her daughter in his three-wheeler, all other witnesses (6 of them) have been declared



hostile.

13. With this background, we have endeavored to find out whether the deceased was in a position to speak and get her fardbeyan recorded. We are not referring to the deposition of PWs 1 to 4 and 6 as we do not get any clue from their deposition at the trial, all whom have been declared hostile.

14. Rupesh Raj/PW-5 has stated before the trial Court that on the day of occurrence, while he was taking his three wheeler to the road for ferrying passengers, he saw a congregation of many people in the village. Some of them informed him that both the deceased (mother and daughter) were burnt. He carried them to the Primary Health Centre, Udakisunganj whereafter he left. Later, when he went to his village, he learnt that during the course of treatment, both the mother and the daughter had died. However, he has completely denied to have learnt later that the appellants had burnt the mother



and the daughter. In his cross-examination, he has stated that while on way to the hospital, the deceased persons did not speak a word and were unconscious all through.

15. On similar lines is the deposition of Md. Naimuddin/ PW-7, who at the relevant time was posted as a Dresser in the Primary Health Centre, Udakisunganj. He has stated that at about 10:30 A.M., a mother and a daughter, in a heavily burnt condition, were brought to the hospital for treatment. Dr. D.K. Sinha (PW-10) on examining the patients and finding their situation to be grim, immediately informed the police. Both the mother and the daughter died during the course of treatment. The elder of them, namely, the mother was not in a position to speak.

16. With such statement having been made by PW-7, he was declared hostile and cross-examined by the prosecution. In his cross-examination, he has denied to have told the police



that the deceased was burnt by sprinkling kerosene oil on her and that in her fardbeyan statement, the deceased/Sangita Devi had spoken about the appellants of having killed her and her daughter. He has also denied that the deceased had made any statement to the police in presence of Dr. D.K. Sinha. However, in cross-examination, he has admitted that Sangita Devi was not unconscious when she had come to the hospital but because of the severe burn injuries, she was not in a position to speak and that she did not make any statement before him to the police. He had administered first aid to both the injured whereafter the doctor had arrived but during the course of treatment, both died.

17. Pitted against the aforementioned deposition of the two witnesses, one of whom has been declared hostile, are the statements of Ramesh Chandra Upadhaya/ PW-9 and Dilip Kumar Sinha/ PW-10.



18. PW-9 (Ramesh Chandra Upadhyay) is the person who recorded the fardbeyan of the deceased/Sangita Devi. After recording the fardbeyan, PW-9 asserts, he nominated one K.K. Choudhary A.S.I. for investigation who only had prepared the seizure list. The aforementioned witness has proved the formal FIR as also the seizure list and has explained that since K.K. Chaudhary, the Investigator, who has not been examined at the trial, worked in the same police station, he was in a position to identify his handwriting. He has further admitted in his cross-examination that after recording the fardbeyan and handing over the investigation to K.K. Choudhary, he did not participate in the investigation at any stage.

19. Dr. Dilip Kumar Sinha/PW-10 claims that he was posted as In-charge Medical Officer in the Primary Health Centre, Udakisunganj on 23.6.2014 when the deceased and her daughter (since deceased) had come in an injured condition. He had



begun their treatment and on his asking, the police party had arrived. In his presence, deceased/Sangita Devi gave her fardbeyan which was noted down by K.K. Choudhary (not examined). The deceased had given the statement of her own volition without any prompting. However, PW-10 did not remember whether any family member of the deceased was in the hospital at the time of the fardbeyan being recorded. With the condition of the deceased deteriorating, he had referred them to Madhepura Hospital for better treatment. He has identified his signature on such referral as Exhibit-3. For the time he had administered the treatment, he drew up the injury report and had sent it to the Sadar Hospital, Madhepura. At the trial, he has stated that he remembered that the deceased had suffered 60 percent burn injuries. It was only later that he learnt that the deceased had died. He has admitted that Naimuddin/PW-7 worked as a Dresser in the Primary Health Centre, Udakisunganj. He had not stated



before the police that deceased/Sangita Devi was in a position to make any statement and that she had given her statement of her own volition. On seeing the injury report prepared by him, he deposed that he had reported that the deceased had suffered 100 percent burn injuries and that the daughter had died at 10:20 A.M. and the mother had died at 11:55 A.M. He had found 50 percent burn injuries on the daughter. The death was because of cardio-respiratory failure.

20. His statement does not appear to be without variance to Exhibits-3, 5 and 5.1.

21. PW-10 has certified that deceased / Sangita Devi had suffered 100 percent burn injuries and had died at 11:55 A.M. due to cardio-respiratory failure whereas the daughter aged 10 months had suffered 50 per cent burn injuries who had died during the course of treatment at 10:20 A.M. on 23.6.2014. Her death was also due to cardio respiratory failure. Thus, we find that PW-10 has not



made consistent statement with respect to the nature of burn injuries. He has not even vaguely referred to the indicators for him to assess the percentage of burn injuries. He has also not spoken about any vesicles or other symptoms of burn injuries. At the trial, he spoke of only 60 percent burn injuries on the mother thereby justifying that she was in a position to speak when the police had arrived at the Primary Health Centre, Udakisunganj.

22. This, in conjunction with other facts, namely, the deposition of PW-5 who had carried the injured to the hospital, makes the statement of PW-10 doubtful with respect to his assessment and certification that deceased/Sangita Devi was in a position to speak and had named the appellants on the basis of which the appellants have been prosecuted, tried, convicted and sentenced.

23. Let it be tested from the deposition of Dr. Akhilesh Kumar/PW-8, who has conducted the postmortem on both the deceased. With respect to



deceased/Sangita Devi, he has found 90 percent first, second and third degree ante- mortem burn injury, covering almost whole body except foot and the vertex of the hand. The burnt area was found reddened and blistered filled with fluids. Soot particles were found in the nasal and oral cavity as also in the respiratory passage which were sufficient indicators for him to assess that the injuries were ante-mortem in nature. It was further confirmed by the vesicles, which was filled with fluid. The cause of death was assessed to be neurogenic shock due to burn injuries. The time of death was assessed in between 12 to 20 hours of the postmortem examination. The child had received 60 per cent of the first, second and third degree ante-mortem burn injuries.

24. On being questioned whether with such burn injuries, could a person speak, he vacillated and answered that he could or could not depending upon the circumstance. He has also confirmed that with



soot particles in nasal cavity and respiratory canal
also, a victim could speak.

25. In **P.V. Radhakrishna vs. State of Karnataka (2003) 6 SCC 443**, the Supreme Court while considering whether the percentage of burn suffered could be a determinative factor to affect the credibility of a dying declaration and the probability of its recording, held that there could be no hard and fast rule of universal application and that it would depend upon the nature of burn injuries affecting the body parts and the impact of such injuries on the mental faculties of the victim.

26. The Supreme Court in **Chacko vs. State of Kerala, (2003) 1 SCC 112** did not accept the prosecution case based on the dying declaration of the deceased who was 70 years of age and had suffered 80 percent burns. The Supreme Court did not consider it probable that such a person could make a detailed dying declaration.

27. Dying declaration is only a piece of untested



evidence and must like any other evidence satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon.

28. A host of circumstances have been listed by the Supreme Court where dying declaration could be accepted in **Sham Shankar Kankaria vs. State of Maharashtra (2006) 13 SCC 165**. It would only be appropriate to brace ourselves with those circumstances:

(A) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(B) If the court is satisfied that the dying declaration is true and voluntary, it can base conviction on it without corroboration.

(C) The Court has to scrutinize the dying declaration carefully to ensure that the declaration is not the result of tutoring, prompting or imagination.

(D) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.



(E) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it has to be rejected. (refer to **Kake Singh Alias Surendra Singh vs. State of M.P. 1981 (Suppl.) SCC 25**).

(F) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(G) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(H) Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion but where the eye-witnesses say that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.

29. The facts of the decision of the Supreme Court in **Surinder Kumar vs. State of Haryana, (2011) 10 SCC 173** would clearly demonstrate the law in this regard. In that case, the victim was admitted in hospital with burn injuries and her dying declaration



was recorded by an Executive Magistrate. The Supreme Court doubted whether the victim could have given a thumb impression when she had suffered 97 percent burn injuries. There was no endorsement of the doctor about her position to make such statement. Thus, the certificate of the doctor given after recording of the dying declaration that she was fit to give statement did not inspire confidence.

30. Consistent with the afore-noted principle, the Supreme Court did not uphold the conviction in **Sampat Babso Kale vs. State of Maharashtra, (2019) 4 SCC 739** where the victim had made a declaration after having suffered 98 percent burn injuries. In that case, sedatives were administered to the victim.

31. In the case in hand, there is no such evidence that before the recording of the dying declaration, the capability of the victim to make such statement was certified. Normally, the opinion of an expert has



to be accepted but in the present case, his assessment does not appear to be correct. With 90 percent injuries and soot particles in nasal and respiratory canal, it would be well-nigh impossible for any victim to speak even a word.

32. It is only in this context that we find the accusation against the appellants to be doubtful.

33. The situation gets further confounded because of the prosecution not being particularly successful in bringing necessary evidence in support of its case. There is no witness with respect to the carrying of both the injured viz., the mother and daughter to the Primary Health Centre. Nothing has been recorded towards the history of the patient or the details of the persons accompanying the victims. We have also no idea whether the referral of PW-10 of the victims to Madhepura Hospital for better treatment was executed or whether the deceased died in Primary Health Centre only.

34. The certificate of PW-9 that the deceased died



at 10:20 A.M. and 11:55 A.M. respectively, in such circumstance has to be accepted. If this is the case, the death took place in Primary Health Center only. The statement of PW-10, therefore, that only later did he learn that the deceased had died is rendered false and unacceptable.

35. After having said that, we have also given anxious consideration over the fact that if Sangita Devi was not in a position to speak, who provided the names of the appellants to PW-10, who arraigned them in the column of the accused persons. Either Sangita Devi had really taken the names or those were at the prompting of others who may have accompanied the deceased But this remains unknown, for we have *prima facie* doubted the physical condition of Sangita to be such that she could have made a statement arraigning the appellants.

36. In this circumstance, we tend more to accept the statement of Rupesh Raj/PW-5 who has testified



that while being carried from home to the Primary Health Centre, the victims were absolutely unconscious and did not speak a word.

37. Non-examination of the I.O. in this circumstance has really prejudiced the case of the appellants. The statements made by PW-10 and PW-5 could have been corroborated or contradicted, if the investigator would have been examined at the trial. Thus, in the absence of any witness who could have testified as to under which physical health, the victims were admitted in Primary Health Centre and how did the name of the malefactor came to the fore, we find the conviction of the appellants to be based on non-existent materials. There is no denying that a dying declaration, if reliable and acceptable, can be the basis of conviction without any corroboration, but if there is any doubt with respect to such statement being completely blameless, it would be highly unsafe to rely on such dying declaration without any corroboration. Such dying



declaration by a person who has received 90 percent burn injuries with burnt soots in the respiratory passage, a Court of law has to look for corroboration after a deeper scrutiny.

38. Two causes of death have been reported, namely, cardio-respiratory failure and neurogenic shock. Under such circumstances, it is difficult for us to accept that the deceased had made that statement implicating the appellants. As noted above, necessary inputs by the prosecution are completely absent because of non-examination of relevant persons and the I.O. at the trial.

39. With such doubts in our mind, we do not get persuaded to affirm the judgment and order of conviction of the appellants.

40. The judgment of conviction and order of sentences of the appellants are, therefore, set aside. They are acquitted of the charges.

41. Since the appellants are in jail, they are directed to be released from jail forthwith, if not



detained or required in any other case.

42. The appeal stands allowed.
43. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail for record and compliance.
44. Let the records of this case be returned to the trial court forthwith.

(Ashutosh Kumar, J)

(Shailendra Singh, J)

SunilKumar/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	05.07.2023
Transmission Date	05.07.2023.

