

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr. Appeal (DB) No. 784 of 2005

(Against the judgment of conviction and order of sentence both dated 21st April 2005 passed in Sessions Case No. 202 of 2001/ 44 of 2004 arising out of Jamtara P.S. Case No. 179 of 1995, G.R. Case No.508 of 1995 by the Court of Learned 2nd Additional Sessions Judge, (Fast Track Court) Jamtara, Jharkhand)

Rustam Mian, son of Late Sahid Mian, resident of village-Tulshidabour, P.S. Chitla, District-Deoghar.

--- --- **Appellant**

Versus

The State of Jharkhand

--- --- **Respondent**

CORAM : HON'BLE DR. JUSTICE S.N.PATHAK
HON'BLE MR. JUSTICE NAVNEET KUMAR

For the Appellant

: Mr. Rajeeva Sharma, Sr. Advocate

: Ms. Rita Kumari, Advocate

: Mr. Kunj Bihari Pd., Advocate

: Mrs. Nitu Singh, Advocate

For the State

: Ms. Nehala Sharmin, S.P.P.

C.A.V. on 28.08.2024

Pronounced on : 05.12.2024

J U D G M E N T

Challenge in the appeal:

The aforesaid appellant namely Rustam Mian has been convicted for the offence punishable under Section 342 and 302 of the Indian Penal Code and sentenced to undergo imprisonment for life for the charge under section 302 of IPC and further sentenced to undergo R.I. for 1 year for the charge under section 342 of IPC by the impugned judgment of conviction and order of sentence both dated 21st April 2005 passed in Sessions Case No. 202 of 2001/ 44 of 2004 arising out of Jamtara P.S. Case No. 179 of 1995, G.R. Case No.508 of 1995 by the Court of Learned 2nd Additional Sessions Judge, (Fast Track Court) Jamtara, Jharkhand.

Prosecution Story:

2. The informant (deceased) Nuni Hembrem had given her *fardbeyan* on 2.10.1995 before S.I. Umesh Kumar Singh of Jamtara police station at subdivisional Hospital at one hours that on 1.10.1995

at about 10 Pm in the night while she had stated to her husband Rustam Mian about non-availability of the rice in the house then there was some altercation in between them. The husband of the informant (deceased) confined her in a room and Kerosine oil was poured upon the body of deceased and set fire in her body and after setting the informant's body on fire the accused came out of the room and bolted room from outside. The informant (deceased) was crying but no body turned up to save her. She was living in the house of Arjun Mondal at monthly rental of Rs. 150/- and she had a daughter aged about five years. Near-by people also came to know to the occurrence but none came to save her. it is further alleged that her husband with intention to kill her by pouring the Kerosine oil on her body and set her on fire. She was brought to the hospital in burnt condition through Rickshaw to the hospital but she did not know the name of Rikshaw puller. Her husband was working in Chitra factory and she was married before five years back. She had given her statement in presence of staff of the hospital namely Fagu Kisku and *fardbeyan* was read over to her and she found correct them she has put her T.I. on the *fardbeyan*.

Institution, Investigation, Charge and decision of the Trial Court in the case:

3. On the basis of *fardbeyan* (Ext-5) formal F.I.R. was drawn up u/s 341, 342, and 307 I.P.C. The informant died on the same day and section 302 I.P.C. was added.
4. The Police after completion of investigation submitted the charge sheet and cognizance was taken.
5. Charge has been framed under section 342 and 302 of IPC by the then 1st Additional Sessions Judge, Dumka and the case was committed to the court of session on 16.01.1996.
6. The accused pleaded not guilty to the charge and claimed to be tried. His defence was the total denial of the prosecution case and he had taken plea of false implication. His further defence was that he has been accused on the instigation of one Fagu Kisku because he being the Muslim had married with Adivasis woman (Nuni Hembrem-the deceased). The further defence is that accused went to market to

purchase rice and when he came back to his resident, he found his room was locked from inside and the informant (deceased) was crying for help. Accused with the help of villagers broke open the door and found the informant was burning. In course of saving the informant, he also sustained burn injuries in both of his hand.

7. The statement of the accused recorded U/s- 313 CrPC in which he has stated that he has been falsely implicated in the connivance of Fagu Kisku because he had married with the Adivasis woman.

8. The learned Trial Court after conducting full-fledged trial passed the impugned judgment of conviction and order of sentence as aforesaid, which is under challenge in this appeal.

9. Heard learned counsel for the appellant and the learned S.P.P. for the State.

Arguments advanced on behalf of the appellant

10. It is submitted on behalf of the appellant that the learned Sessions Judge failed to appreciate the evidences adduced by the prosecution in view of the fact that in course of saving the life of the informant both the hands of the appellant were burnt and learned court below has failed to take into consideration that the first information report and dying declaration has not been proved by its author i.e. S.I. Umesh Kumar Singh. It has been further been submitted that learned court below has failed to take into consideration that P.W.5 i.e. Dr. L.K. Lal, who examined the informant, no where mentioned in his examination report about of smell of kerosene oil on the body of the deceased. It has further been submitted by the appellant that one Mahboob Khan, who was residing in the house of Arjun Mandal as a tenant, had heard *hulla*, which was coming from the house of appellant and he further stated that he and Raju Hari came in the meantime Rustam Mian, the appellant also came from the market and found the door was bolted from inside. Thereafter, they pushed the door and the door was opened and the wife of the appellant was burning and the appellant tried to save her and his both hands also burnt. It has further been stated that the learned court below failed to take into consideration that in the *fardbeyan*, an allegation has been made out

that after setting the informant's body on fire, the appellant came out of the room and bolted the room from outside, the informant was crying for help, but no body turned up to save her life and, thereafter, she was brought to the hospital in burnt condition however to manage inconsistency that it is no where explained in the *fardbeyan* that how the deceased was brought to the hospital and further who unbolted the door and therefore, the learned trial Court has committed gross error in passing the impugned judgment of conviction and order of sentence under which the appellant has been convicted for the offence punishable under Section 302 and 342 of the IPC and therefore the same is fit to be set aside.

Arguments advanced on behalf of the State.

11. On the other hand, learned S.P.P. appearing on behalf of the State has opposed the contentions raised on behalf of the Appellant and submitted that the learned Trial Court has rightly passed the impugned judgment of conviction and order of sentence against this appellant in view of the fact that deceased made dying declaration in presence of doctor and witness PW-4 Fagu Kisku and there is no discrepancy between the two declaration and therefore there is no legal point to interfere in the impugned judgment of conviction and order of sentence and this appeal is fit to be dismissed.

Appraisal & Findings

12. Having heard the parties, perused the record of the case including the trial court records.

13. It is manifest from the record that the prosecution has been able to examine 7 prosecution witnesses which are as under:

1. P.W.1- Sudhir Turi
2. P.W.2-Islam Sekh
3. P.W.3-Asia Begum
4. P.W.4- Fagu Kisku
5. P.W.5- Dr. Lalit Kumar Lal
6. P.W.6- Jaishree
7. P.W.7- Sarat Kumar Yadav (Formal)

14. Apart from the oral witnesses, the prosecution has also been able to get marked the following documents: -

- A. Exhibit-1- signature of Sudhir Turi on seizure list;
- B. Exhibit-1/1-signature of Fagu Kisku on fardbeyan;
- C. Exhibit-1/2- is the signature of Fagu kisku on Dying Declaration of Nuni Hembrem;
- D. Exhibit-1/3-is the signature of Dr. L.K. Lal on Dying Declaration of Nuni Hembrem;
- E. Exhibit-1/4- signature of Fagu Kisku on inquest report
- F. Exhibit 1/5 signature of Jayshree on inquest report;
- G. Exhibit-2-Injury report of Nuni Hembrem (deceased);
- H. Exhibit-3-Dying Declaration of injured Nuni Hembrem (informant)
- I. Exhibit-4-Postmortem Report of deceased Nuni Hembram;
- J. Exhibit-5- Fardbeyan written by Umesh Kumar Singh O/C Jamtara
- K. Exhibit-6- seizure list;
- L. Exhibit-7- Inquest Report;
- M. Exhibit -8- F.I.R.

The defence has also examined DW-1 Mahboob Khan, DW-2 Raju Hari and DW-3 Parwati Dubey. And has also adduced Injury report of Rustam Mian (appellant) as Ext.-A and letter to D.S. Subdivisional Hospital Jamtara by O/C Umesh Kumar Singh Jamtara P.S. as Ext.-B.

15. In this case two main question has to be determined first is that whether dying declaration has been proved beyond reasonable doubt in order to rely upon the same and on the sole basis of such type of dying declaration, conviction of the appellant can be upheld, and second question is that whether on the basis of deposition of witnesses and materials available on record, conviction of the appellant can be upheld in the light of the facts that there is no eye witness to the occurrence.

16. Now this Court proceeds to take into consideration the depositions of the prosecution witnesses who have been examined on behalf of the prosecution.

17. At the very outset, **PW-1 Sudhir Turi** has stated in his

examination-in-chief that the police officer had not recovered any article in his presence. He further stated that it was his signature on seizure list, which he proved as Ext.-1. In cross examination he has further stated that on being heard *hulla* when he went, he found Nuni Hembrem was in unconscious position and hands of Rustam (appellant) was burnt who was taking Nuni Hembrem for hospital on Rikshaw. He further stated that S.I. had gone for taking of thumb impression of Nuni Hembram in unconscious position (बेहोशी की हालत में दरोगा जी ने मुठ्ठी का टिप ले लिया) and he further stated that his signature was being taken in police station. As per his deposition it appears that when deceased was in unconscious state, then how she made dying declaration before S.I because her “thumb impression” was taken in her unconscious state as per this witness. Thus, a genuine doubt is created in the prosecution case.

18. PW-2 Islam Sekh stated that when he got up to answer the call of nature at 12 A.M., he saw a burning girl going on, then after her husband had taken her by Rickshaw. In cross examination he stated that he had seen a lady being taken in unconscious position.

19. PW-3 Asia Begum has stated that on being heard *hulla* at 12 a.m. she came out side of her house and saw that wife of Rustam was burnt and Rustam had taken her to hospital. In cross examination she also stated that when she saw her (deceased), she was in unconscious position. She further stated that she came to know that Rustam was not at his house when his wife caught fire. She further stated that she has never heard quarrel between them.

20. PW-4 is Fagu Kisku who is key witness and has signed on dying declaration. In his cross-examination at para 4 he has stated that he had no knowledge that who had written dying declaration, but when police officer had asked for sign then he only signed on it. In para 4 of his deposition, he stated that when police officer asked for sign, he had signed on it in field and he had signed on both the paper in field and Doctor has also signed on that paper in field (दरोगा जी ने सही करने के लिए मैदान मे कहा तब हमने सही कर दिया । दोनों कागज मैदान में ही हमने सही किया । डॉक्टर साहब ने भी मैदान मे ही सही किया था । मृत्यु पूर्व बयान किसने लिखा था हमको मालूम नहीं है पर दरोगा जी ने दस्तखत करने कहा तब हम दस्तखत कर दिए ।). Thus,

this witness has denied his presence when dying declaration was noted down and he has no knowledge at all as to who had written dying declaration.

21. The Doctor-P.W.-5 Dr. Lalit Kumar Lal in his deposition has stated that on 02.10.1995 when he was on duty, one Nuni Hembrem wife of Rustam Mian had come for medical treatment who was burnt. He examined her and found superficial injury of burn escaping face and burn injury was amounting to 90%.

On 02.10.1995 he conducted the autopsy of dead body of Nuni Hembrem and found the following findings-;

1.EXTERNAL APPEARANCE; Average built dark complexion, black seized hair. Kerosene oil smelling over the body. Pieces of burn- Saree and blouse, adhere to skin of body. Mouth semi- open. Eyes closed, Godhana of left fore-arm. Anti-mortem superficial burn injury with redness basicular blebs and pilling of skin all over the body except face amounting about 90%. One bandage and ricoplast with underline ½"x ¼" muscles deep incised wound near meliodius of right leg with vein expose with ligature. Rigermortice, fentaly present in upper lips and absent in lower lips.

2. INTERNAL APPEARANCE: Skull no fracture meninges are slightly congested. Chest and neck- no fracture ribs. Black short particles with congestion, lungs congested. Heart- empty. Stomach- semi digested food about two ounces. Small and large intestine with gas and fises. Abdomen, lire, spleen and kidney, pale. Time elapse since death at the time of examination and six hours.

Cause of death due to hypovolemic- Shock as a result 90% superficial burn injury due to dry- heat. He proved the P.M. report which has been marked Ext-4.

In his examination-in-chief he stated that patient statement was recorded in my presence in the Sub Divisional Hospital by S.I. Mr. Umesh Kumar Singh in presence of Fagu Kisku staff of his hospital. And in para 3 in his cross examination, he deposed that he had not given any certificate to the effect that whether the patient was mentally or physically conscious during the alleged dying declaration statement. Thus, there is contradiction in the statement of PW-4 Fagu Kisku and this witness P.W.-5 Dr. Lalit Kumar Lal, as PW-4 Fagu Kisku stated that dying declaration has not been noted down in his presence and he had signed on both the papers in field and Doctor has also signed on that paper in field. Thus, the versions Fagu Kisku

PW-4 (the dying declaration witness) and the doctor PW-5 (also dying declaration witness) are full of major contradictions leading to the conclusions about uncertainties of (a) not sure about her conscious state of mind to record her statement (b) the witness PW-4 was not present at the time of recording the so-called dying declaration and (c) even the doctor PW-5 was not present when the dying declaration of the deceased was being recorded. Thus, a serious doubt is cast upon the truthfulness of the charges levelled against the accused appellant.

22. Another witness is **PW-6 Jayshree** who has deposed that inquest report was prepared in hospital when she was on duty and in presence of Fagu and on that she and Fagu Kisku has signed, which is marked as Ext. 1/5.

23. PW-7 Sarat Kumar Yadav is formal witness who has proved the *fardbeyan* which was written and signed by Umesh Kumar Singh which has been marked as Ext.-5. He has also proved seizure list, Ext.-6, inquest report Ext.7 and formal F.I.R. Ext.-8. But in his cross examination he has stated that *fardbeyan*, seizure list and inquest report has not been written in his presence and he has never worked with said S.I. Umesh Kumar Singh. It is evident from the deposition of P.W.-7 that he was Advocate's clerk who had proved FIR, Seizure list and Inquest report. Thus, it is found that the prosecution has miserably failed to prove the manner, mode place of occurrence, so called dying declaration of deceased when there is no eye witness or even hear-say witness of the occurrence. It is a fatal to the case of prosecution and the learned Trial Court committed gross error.

24. From the above observations, analysis and findings, it is clear that the S.I. Umesh Kumar Singh who had noted down the dying declaration has not been examined and thus the F.I.R. and dying declaration have not been proved by author and another key witness PW-4 Fagu Kisku, who has signed on dying declaration has stated in his deposition that when police officer has asked for sign, he had signed on it in the field and he had signed on both the papers in the field and Doctor PW-5 has also signed on that paper in the field and as

such both PW-4 and PW-5 denied their presence when dying declaration was being noted down.

25. The Hon'ble Apex court in *Govind Narain v. State of Rajasthan*, reported in **1993 Supp (3) SCC 343** has held that examination of person who reduced dying declaration in writing is essential. The relevant para is as under-

14. That takes us now to the consideration of the dying declaration alleged to have been reduced into writing, Ex. P-3. The High Court as well as the trial court have disbelieved Ex. P-3 for a variety of reasons. Even if we agree with Mr Makwana, learned counsel for the complainant, that some of the reasons given by the High Court to discard Ex. P-3 were not sound, we find that no reliance can be placed on the document Ex. P-3 for the simple reason that the scribe of the document, Shri Jagdish Narain, Constable, for reasons best known to the prosecution, was not examined at the trial and the defence therefore, had no opportunity to cross-examine him. Mohammed Ali PW 4 has failed to explain the cause for non-production of Jagdish Narain. We are, therefore, in agreement both with the trial court and the High Court, that there are sufficient reasons on the record to justify the discarding of the alleged dying declaration contained in Ex. P-3 and we do not place any reliance on the same.

Further in *Kans Raj v. State of Punjab*, (2000) 5 SCC 207 the Hon'ble Apex Court has observed as under-

11. In other words, the statement of the deceased relating to the cause of death or the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of such statement as a fact. If it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement.

26. In this backdrop this Court proceeds to examine the evidences adduced on behalf of defence by appellant.

27. On the other hand, 3 DWs have been examined on behalf of defence. **DW-1 Mahboob Khan** has stated in his deposition that on being heard *hulla* he and Raju Hari rushed to the place of occurrence, in the mean while Rustam also reached who had gone to shop and we have pushed the door and saw that Rustam's wife, (the deceased), was burning. Rustam had started extinguishing the fire with both the hands and we have thrown water. Rustam had taken her hospital by Rickshaw and her wife was unconscious.

28. **DW-2 Raju Hari** has stated in his deposition that when he heard *hulla* he and Mahboob had gone to the place of occurrence and saw

that door was closed from inside and Rustam's wife was crying from inside in the mean while Rustam has also reached who had gone to shop and we have pushed the door and saw that the deceased, was burning. Rustam had started extinguishing the fire with both the hands.

29. DW-3 is Parwati Dubey who is formal witness and proved Ext.-A-injury report of Rustam Mian and Ext.- B.

30. In view of the aforesaid analysis and appraisal of the evidences adduced on behalf of the prosecution and on behalf of the defence, it is clear that dying declaration has not been proved beyond reasonable doubt. The author of the dying declaration has not been examined and the witness who have signed on it i.e. PW-4 Fagu Kisku has stated that he has only signed on it on the direction of S.I. Umesh Kumar Singh and said dying declaration has not been reduced in writing in his presence and further the Doctor PW-5 has deposed that he has not given any certificate to the effect that whether the patient was mentally or physically conscious during the course of recording the alleged dying declaration statement. Second most important thing is that there is no eye witness who had seen the appellant for committing the crime rather most of the witnesses (such as PW-1 Sudhir Turi, PW-2 Islam Sekh, PW-3 Asia Begum, DW-1 Mahboob Khan, DW-2 Raju Hari) stated that accused/appellant Rustam Mian was attempting to save the life of his wife and had sustained injury in course of extinguishing fire and had taken the deceased to the hospital by Rickshaw.

31. In view of aforesaid findings, it is found that the learned trial court has committed gross error in appreciation of the evidences of the witnesses adduced on behalf of the prosecution and wrongly came to the finding under which the appellant namely, Rustam Mian has been convicted for the offence punishable under Section 302 and 342 of IPC and sentence thereof.

32. In the result, impugned judgment of conviction and order of sentence both dated 21st April 2005 passed in Sessions Case No. 202 of 2001/ 44 of 2004 arising out of Jamtara P.S. Case No. 179 of 1995, G.R. Case No.508 of 1995 by the Court of Learned 2nd Additional Sessions Judge, (Fast Track Court) Jamtara, Jharkhand is hereby set aside.

33. The appellant is acquitted from the charges leveled against him. Since the appellant is on bail, he is discharged from the liabilities of bail bond.

34. This appeal is allowed.

35. Let the Trial Court Record be sent to the court concerned along with copy of this Judgment.

(Dr. S.N. Pathak, J.)

(Navneet Kumar, J.)

Basant B.

Jharkhand High Court

Dated 05.12.2024