

(2006) 10 JH CK 0025

Jharkhand High Court**Case No:** Criminal Appeal No. 190 of 1998 (R)

Sanjay Upadhyay and Others

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision: Oct. 16, 2006**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 304B, 34

Citation: (2006) 4 JCR 671**Hon'ble Judges:** Dilip kumar sinha, J**Bench:** Single Bench**Advocate:** T.R. Bajaj, for the Appellant; Assistant Public Prosecutor, for the Respondent**Final Decision:** Allowed

Judgement

Dilip Kumar Sinha, J.

The appellants herein have preferred this Criminal Appeal against the judgment and order dated 22.7.98 passed by Shri S.P. Thakur, 2nd Assistant Sessions Judge, Dhanbad in Sessions Trial No. 247/96 whereby and whereunder the appellants were convicted u/s 304B/34 I.P.C. The appellant Nos. 1 & 2 i.e. Sanjay Upadhyay & Bishnu Nand Upadhyay were sentenced to undergo rigorous imprisonment for 10 years whereas appellant No. 3 Gayatri Devi was sentenced to undergo simple imprisonment for 7 years.

2. The prosecution story is in narrow compass the informant's cousin (sister) Rakhi (since deceased) was married to the appellant No. 1 Sanjay Kumar Upadhyay on 8.7.95. On 23.1.96 Sanjay Upadhyay when came to the informant's house for execution of "Rukhsodi" to take away his wife Rakhi, he demanded a sum of Rs. 50,000/- to start a business of his own and a motorcycle to which the informant and the members of his family expressed their inability to fulfill his demand on account of their poverty. It is alleged that upon such expression the appellant Sanjay Kumar Upadhyay extended threat to them that they would not see the face of Rakhi again

in future. However, Rukhsodi was executed on 25.1.96 and Rakhi went to her matrimonial home. The members of the family of the informant were very much perturbed for the gesture and threat of the appellant Sanjay Kumar Upadhyay for the safety of the life of Rakhi and for such reason the informant visited her matrimonial home regularly but the appellants did not allow him ever to meet his sister. On 3.2.96 the informant learnt while he was in the cricket ground at Maheshpur from someone that his sister had been burnt in her Sasural and that she was admitted in Bokaro General Hospital. On such information the informant with other witnesses rushed to Bokaro General Hospital where he came across Rakhi who disclosed that her husband Sanjay Upadhyay along with her father-in-law and mother-in-law, Nanad and other in-laws doused on her body, set her ablaze and confined her in the bathroom (latrine). Rakhi succumbed her burn injuries on 4.2.96 in the said Hospital. The informant Rajiv Ranjan Trivedi presented a written report (ext. 1) giving rise to Katras P.S. Case No. 43/1996 registered on 6.2.96 (ext. 3).

3. The charges against the appellants and two others Manish Upadhyay and Rubi Upadhyay @ Binita Upadhyay were framed u/s 304B/34 I.P.C. and they were put on trial. As many as 6 witnesses were produced and examined on behalf of the prosecution whereas sole defence witness Dr. Tripti Prasad Singh was produced and his statement was recorded in the Trial Court on behalf of the appellants.

4. Mr. Bajaj, learned Counsel submitted that the conviction of the appellants and conviction thereto are misdirected based upon without proper appreciation of the materials on the record. The learned Trial Court failed to take into consideration that the victim Rakhi soon after the occurrence was immediately removed to Choudhary Nursing Home at Katras and for her better and specialized treatment at Bokaro General Hospital, Bokaro where she succumbed her burn injuries.

5. Advancing his argument Mr. Bajaj submitted that the Trial Court perhaps lost sight of the fact that the Investigating Officer of the case P.W. 5 Rang Bahadur Singh in his statement before the Trial Court as contained in paragraph No. 14 under cross-examination stated that entry was made in the station diary of Katras Police Station on 3.2.96 by the Assistant Sub-Inspector of Police R.P. Ram pursuant to the telephonic message received from Choudhary Nursing Home, Katras who visited there and found a woman in a burnt condition but he could not record her statement since she was found unconscious. The fact was recorded in station diary No. 59 with the endorsement that the burnt woman belonged to the Railway Colony Quarter No. 41B, Katras and her name was Rakhi Upadhyay. It was further scribed in the station diary that she was removed to Bokaro for her treatment. Mr. Bajaj submitted that, it can well be inferred from the facts stated that as soon as Rakhi Upadhyay sustained burn injury on account of accidental fire in the bathroom she was first removed to Choudhary Nursing Home, Katras and from there she was further removed by the appellants to the Bokaro General Hospital for the better management and treatment of her burn injuries and no lapse was found on the part

of the appellants in providing medicine aid.

5. Mr. Bajaj further submitted that the important aspect of the case is that the informant P.W. 4 was unfavourable to the prosecution and he was declared hostile though on his statement the law was set in motion and a case u/s 304B/34 was instituted against the appellants and two others. The informant P.W. 4 Rajiv Ranjan Trivedi has deposed in clear words that the accused (appellants) had not demanded dowry after the marriage of his cousin (sister) Rakhi and that Rakhi did not convey when he visited Bokaro Hospital that her in-laws had been demanding dowry or that she was set ablaze by the accused for not giving adequate dowry. He simply proved his signature on the written report (Ext.1) with the explanation that he had put his signature on the written paper on which something was scribed by a police man. The statement of this witness was important for two reasons i.e. he was the first witness to visit Bokaro General Hospital on the informant that his cousin sister Rakhi was brought there in precarious condition in a state of burnt and second that the prosecution projected him as such witness who had last conversation with the victim Rakhi. The informant admitted the first part but denied the second part clarifying that Rakhi had not disclosed cause of her burn injuries and that he had not narrated (before the police) that Rakhi had conveyed him that she was burnt by the accused persons for not giving dowry to them. There is no other evidence on the record to show that the victim Rakhi had narrated the cause of her injuries and the involvement of the appellant therein so as to put her such statement in the category of dying declaration.

6. In the instant case, P.W. 1 Ajay Kumar Dubey is the brother of the foster mother Sudha Devi (P.W. 2) of the deceased Rakhi. He deposed that on information he went to Bokaro General Hospital, Bokaro and found Rakhi unconscious she gained consciousness at about 6.30 p.m. on 3.3.96 and thereafter she apparised him that the appellants and Manish Upadhyay as well as ruby doused kerosene oil and after setting her ablaze confined her in the latrine (lavatory) she succumbed her burn injuries on 4.2.96 at about 6 p.m. He further deposed that a sum of Rs. 50,000/- and a motorcycle were due to be given on the eve of her marriage, which could not be and for such her in-laws had been ill treating her.

When the attention of this witness was attracted in his cross examination, he denied having not stated before the police that Rakhi had apparised him that she was confined in a latrine after setting her ablaze. The witness admitted having not asked any responsible person including the doctor of the Bokaro General Hospital to inform the police or to ask, the victim Rakhi as to how she sustained fire. The witness is a practicing lawyer at the Dhanbad civil court and he admitted having visited Rakhi on 3.2.96 as well as on 4.2.96 before her death and if the fact was true that Rakhi was set ablaze after dousing kerosene oil by the appellants and two others, this witness did not take any step for recording of her dying declaration by a competent person under law keeping in view of 100 per cent burn injuries on her

body and there was imminent apprehension of her death on account of such injury. The defence took the plea that his witness demanded Rs. 3 lakhs from the appellants, by putting suggestion in his cross examination to which this witness denied such suggestion.

7. P.W. 2 Sudha Devi was the foster mother of the deceased and an important witness produced on behalf of the prosecution. Her statement before the trial court may be divided into two parts. In the first part she admitted having visited Bokaro General Hospital on 4.2.96 where she was appraised by Rakhi as to the cause of her burn injuries that the appellants with two others set her ablaze pursuant to their demand of Rs. 50,000/- in cash and a motorcycle as dowry. But in the second part of her evidence under cross examination she admitted that when she arrived at Bokaro General Hospital, Bokaro on 4.2.96 at about 12.30 p.m. with other witnesses she found injured Rakhi being treated by doctor and nurse. Her voice was not clear and indistinct. Rakhi could never gain consciousness in the presence of this witness and she could gather from her indistinct voice that she was burnt by her in-laws. The witness further admitted that Rakhi during her life time had never complaint against her in-laws and that they had never put any demand of any kind before her. The witness though in her first part of evidence deposed the complicity of the appellants in getting Rakhi ablaze for dowry but in her cross examination she was unfavourable to the prosecution and clearly deposed that no demand of dowry of any kind was ever raised by the appellants. Rakhi did not implicate the appellant in clear, audible or comprehensive words for her burn injuries. The witness being the foster mother and being the sole guardian in absence of her husband was expected to be firm in her evidence revealing the truth but she could not be and hence her evidence does not inspire confidence to place reliance.

8. Much has been argued on behalf of the appellant that the informant P.W. 4 Rajiv Ranjan Trivedi, did not support the prosecution much less the complicity of the appellant for the alleged charge u/s 304B/34 I.P.C. and that he was unfavourable to the prosecution. Similarly, P.W. 3 Upendra Kumar Vishwakarma was declared hostile by the prosecution. However, in his cross examination, the witness admitted that when he visited Rakhi he found that her voice was not clear and indistinct.

9. P.W. 5 Rang Bahadur Singh was the Investigating Officer of the case. He deposed that the case was registered on 6.2.96 on the written report being presented by the informant Rajiv Ranjan Trivedi at the Katras Police Station. The charge of investigation was made over to him and he visited the place of occurrence being the Railway Quarter No. 41B allotted to the appellant Vishnukant Upadhyay. In the objective finding of the place of occurrence the witness deposed that the said quarter was facing towards east with three rooms in the western side facing east with doors a courtyard and a latrine facing south with the eastern wall of the courtyard with a door therein. He was appraised that Rakhi had caught fire in the latrine. The internal roof of the latrine was found charred with smoke with

surrounding walls and he found burnt pieces of Sari. He further found a small bottle lying there with the smell of kerosene oil coming out from the bottle. He prepared the seizure list in presence of the witness of that bottle and proved Ext. 4. He further found a chhitkilli (a hook like device) in the door to close the latrine from inside which was found bend with the explanation of the people present there that the internal Chhitkilli of the door bend push on account of made from outside. The area of the latrine was about $2^{1/2}$ cubits x $2^{1/2}$ cubits. Ext. 4 which is the seizure list of the said bottle depicts, a small bottle (c.c.) of chocolate colour, having hole in its lid with lace of cloth inserted in the hole used as lamp and smell of kerosene oil coming out from it."

10. P.W. 6 Ratneshwar Prasad Verma had held postmortem examination on the body of Rakhi Devi aged about 18 years, female on 5.2.96 at about 4.30 p.m. brought from Bokaro General Hospital. He found her body was covered with bandage, rigor mortis in all her four limbs, tongue protruded and clinched between upper and lower teeth. Serous bloodish discharge was evident from her left nostril, black soots were present at places all over her body. Except only a small area of private part and external genitalia, almost all the parts of her body were found burnt and blisters were found at few places on her organs. About 100 per cent of the body surface area was found to be affected by dermal and dermo epidermal burn injuries caused by dry flame with kerosene oil like odour. In his opinion it was a case of ante-mortem epidermal, dermo epidermal dry flame burn injuries and the death was caused due to cardio respiratory failure on account of hypovolaemic shock and extensive burn injuries. Time elapsed since death till her postmortem was assessed within 24 hours. He proved the postmortem report in his pen and signature Ext. 5. From the statement of this witness, I observe that no question was put to him as to whether under such situation of 100 percent burn injuries whether a patient could be able to speak or to explain the cause of her such burn injuries. The defence produced the sole witness Dr. Tripti Prasad Singh, Assistant Director, Casually Section of Bokaro General Hospital of Bokaro who deposed that on 3.3.96 at about 11.15 a.m. he examined Smt. Rakhi Devi aged about 22 years and she was admitted in the Hospital at 11.33 a.m. She had sustained burn injuries and he narrated the case history in the Trial Court on oath, as follows:
She sustained burn injuries over her whole body today i.e. on 3.2.96 due to over turning of Debia of k.oil on her head while she was sitting in latrine, as stated by her father-in-law as well as by the patient.

11. He further deposed that the age of the injuries was assessed within 24 hours, grievous in nature and he had sent a call to the specialist surgeon on duty Dr. R.K. Mishra and also informed the local police. The patient died in course of her treatment at the Hospital on 4.2.96 at 5.45 p.m. He proved the case history in his pen as also the writing of Dr. R.K. Mishra and the signature of Mr. Mishra on the case history, marked as Ext. (c). The witness admitted that when he put questions to

her she was conscious and was in a position to make statement. Her condition went on deteriorating casually and later on she became unconscious till her death. He proved the treatment chart in his pen and signature Ext. (D). In paragraph No. 9, under cross-examination, he admitted that she made statement before him in Hindi which he recorded the same in English (in case history). She was restless and in agony but was in a position to make statement before him when he had examined her. I observed that nothing material could be obtained from the statement of this defence witness on behalf of the prosecution in his cross-examination to disbelieve his version who had attended Rakhi Devi first point in time in the casualty ward at the Bokaro General Hospital, Bokaro. He has clearly stated that he had prepared the case history on the basis of the statement of the victim Rakhi Devi as well as the statement of her father-in-law that she sustained burn injuries all over her body on 3.2.96 due to over turning of Debia of K.oil on her head while she was sitting in latrine. This fact has been corroborated by the evidence of the Investigating Officer in his objective finding during visit of the place of occurrence, in course of investigating that he spotted a small bottle, which was used as Debia with a hole in its lid and the lace inserted therein, commonly and temporarily used as lamp, in case of power failure. Admittedly, there is neither eye witness of the occurrence nor dying declaration of the victim except her statement recorded by D.W. 1 Dr. Tripti Prasad Singh as to cause of her burn injuries while preparing case history. The informant as well as the foster mother of the deceased are consistent that no demand of dowry was made by the appellants and that the victim Rakhi Devi prior to her death could not express as to the cause of burn injuries on her body and that her voice was indistinct as discussed in the foregoing paragraphs.

12. Admittedly, Rakhi Devi died within 7 years of her marriage but the prosecution failed to discharge the burden of proof that demand of dowry was made by the appellants after her marriage to the nearest proximity of her death and that it were the appellants who set her ablaze after dousing kerosene oil on her. I find and hold therefore, that the prosecution failed to bring home the charge u/s 304B/34 I.P.C. against the appellants and the learned trial court below on erroneous consideration and findings, held them guilty of the charge and accordingly convicted them for the offence u/s 304B/34 I.P.C. with substantial sentence which is unsustainable under law.

13. In the result, the impugned judgment and order passed by the 2nd Assistant Sessions Judge, Dhanbad in Sessions Trial No. 247/1996 on 22.7.98 is set aside and this appeal is allowed. The appellants herein are acquitted and their bail bonds stand discharged.