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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.50/2013

- 1] Gajanan s/o Rajaram Avchar,
age 27 yrs., occu.labour work,
- 2] Santosh s/o Rajaram Avchar,
age 30 yrs., occu.labour work,
- 3] Jabai @ Jayashri Kalnu Ambhore,

All r/o village Nighoj,
Tq.Parner Dist.Ahmednagar.

...Appellants..

Versus

The State of Maharashtra,
through the Police Inspector,
Parner. Dist.Ahmednagar.

...Respondent...

.....

Smt.Preeti R. Wankhede, Advocate for appellants.
Smt.V.A. Shinde, APP for respondent.

.....

**CORAM: P.V. HARDAS &
N.W. SAMBRE, JJ.**

DATE: 17.06.2015

ORAL JUDGMENT (Per P.V. Hardas, J.) :

1] The appellants, who stand convicted for offence punishable u/s 302 r/w 34 and 498-A r/w 34 of the Indian Penal Code and sentenced under these sections respectively to imprisonment for life and each accused to

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pay fine of Rs.2,000/-, in default of which to undergo further rigorous imprisonment for six months; and rigorous imprisonment for three years and each accused to pay fine of Rs.2,000/-, in default of which to undergo further rigorous imprisonment for six months, with a direction that the substantive sentences shall run concurrently by the Additional Sessions Judge-8, Ahmednagar, by judgment dated 31.3.2012 in Sessions Case No.158/2011, by this appeal challenge their conviction and sentence.

2] Facts as are necessary for the decision of this appeal may briefly be stated thus:

PW8 Sanjay Nanaware, who was attached to Parner Police Station, was entrusted with the investigation in Crime No.58/2011. On 30.3.2011, he was entrusted with the case papers and thereafter went to the scene of the incident and drew scene of the incident – panchanama in the presence of panchas and from the scene of the incident, seized pieces of burnt saree, a container containing kerosene, match-box and burnt pieces of bed-sheet, one burnt shirt and partly burnt scarf of white colour. He also seized burnt pieces of curtain. The

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scene of the incident – panchanama is at Exhibit 35. While drawing the scene of the incident – panchanama, he made inquiries with the neighbours and had recorded their statements. He thereafter went to the Civil Hospital, Ahmednagar, where injured Pramila was admitted. He accordingly recorded the statement at about 2-15 a.m. Before recording the statement, he had solicited the opinion of the Medical Officer regarding the fitness of injured Pramila to give her statement. The Medical Officer opined that Pramila was in a fit condition to give her statement. Accordingly, the statement of Pramila was recorded in which Pramila had disclosed that she was set ablaze by the appellants. The statement of Pramila is at Exhibit 36.

Statement of one Kalnu, who was also admitted in the hospital, was recorded. The accused were arrested under arrest panchanamas at Exhibits 37 and 38. Clothes on the persons of the accused were also seized under seizure memorandums at Exhibits 39 and 40. Thereafter, statements of father of deceased i.e. PW2 Sukhadeo and brother of deceased PW3 Jagdeo, were recorded. On 22.4.2011, original accused no.3 – Jabai was arrested

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under arrest panchanama at Exhibit 41.

On 9.5.2011, the seized property was referred to the Chemical Analyser under requisition at Exhibit 43. Further to the completion of investigation, a charge-sheet against the appellants and the other accused was submitted.

Post mortem on the dead body of deceased Pramila was performed by PW5 Dr.Gade, who found that Pramila had sustained 98% burns. He, therefore, opined that deceased Pramila had died due to cardio respiratory arrest due to hypovolemic shock due to the burns. The *post mortem* report is at Exhibit 20. In a curious turn of events, even Kalnu, a paramour of Pramila, also succumbed to the injuries and *post-mortem* on the dead body of deceased Kalnu was performed by PW6 Dr.Gurvale, who noticed that Kalnu had sustained 54% burns. He opined that Kalnu had died due to septicemic shock due to 54% burns. The *post mortem* report of Pramila is at Exhibit 20 while the *post-mortem* report is at Exhibit 26.

On the case being committed to Court of Sessions, trial Court vide Exhibit 4 framed charge against the appellants for the offences punishable u/s 498-A r/w 34

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and 302 r/w 34 of the Indian Penal Code. Prosecution in support of its case examined eight witnesses as the accused had abhorred their guilt. The trial Court accepted the evidence of the prosecution and convicted and sentenced the appellants as afore-stated. The entire prosecution case revolves around the dying declarations at Exhibits 18 and 36 as well as the alleged disclosure of history by Pramila to PW7 Dr.Ghule.

3] We have heard the learned counsel for the appellants and the learned APP for the respondent and in order to appreciate the submissions which have been advanced before us, it would be useful to refer to the evidence of the prosecution witnesses.

4] Prosecution has examined PW1 Sapna d/o deceased Kalnu as well as daughter of accused no.3 - Jabai. PW1 Sapna deposes that the appellants i.e. Gajanan and Santosh were her maternal uncles. Incidentally, accused Gajanan was the husband of deceased Pramila. According to Sapna, about one and half months prior to the incident, Kalnu and deceased Pramila had eloped to Pune as they were having illicit relations. According to PW1

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Sapna, even the appellants were aware that Kalnu and Pramila had illicit relations. Both the deceased i.e. Kalnu and Pramila had returned to the village on the day of the incident itself and after taking their dinner, all the inmates of the house returned to sleep. At about 3-30 to 3-45 in the morning, Sapna was awakened on hearing the cry for help. She noticed her father deceased Kalnu attempting to extinguish flames, which had engulfed Pramila. According to Sapna, she noticed the accused no.3 Jabai in the said room where Pramila had sustained the burns. A very categorical statement is made by Sapna, which we reproduce below:-

“That time, other accused were not present there.”

According to Sapna, thereafter the injured were taken to the hospital in a Jeep and were admitted in the Civil Hospital at Ahmednagar. On the next day, Pramila succumbed to her injuries and after about 15 days of the incident, Kalnu also succumbed to his injuries.

In cross-examination, she has admitted that the appellants Gajanan and Santosh had brought and Kalnu and Pramila back to the village from Pune. She has also admitted as correct that on the day of the incident at

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about 8-00 p.m., the appellants Gajanan and Santosh had taken Pramila and Kalnu to Police Station and that she and Jabai had also accompanied them. She has further admitted that at about 10-30 p.m. on the day of the incident, Kalnu, Pramila and Jabai had returned back to the house of Jabai. Appellants Gajanan and Santosh had gone to Shirur. She then admits that she had heard the cries as "Save, Save" and then had noticed her father extinguishing flames. She admits that even her mother, who was asleep, was awakened on hearing the cries. SHE has also admitted that Sidharth was sleeping outside the house. Kalnu had also sustained injuries.

Incidentally, we may state that PW1 Sapna was not declared hostile when her examination-in-chief was being recorded or on conclusion of the cross-examination. Prosecution made no attempts whatsoever to discredit PW1 Sapna. Prosecution, therefore, is found by the evidence of PW1 Sapna, who has been examined as a prosecution witness. Prosecution just cannot simply whisk away the evidence of PW1 Sapna. The appellants are entitled to rely on the testimony of PW1 Sapna, who has not been declared hostile by the prosecution and whose testimony

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now binds the prosecution. A reference may usefully be made to the judgment of the Supreme Court in *Javed Masood & another V/s State of Rajasthan (AIR 2010 SC 979)*. The Supreme Court in the said judgment has held that if a witness is examined by the prosecution and is not declared hostile, the admissions given by the witness in favour of the accused can be relied upon by the accused. Therefore, in our opinion, the evidence of PW1 Sapna would certainly assist the accused and the prosecution just cannot simply whisk away the evidence of PW1 Sapna.

The evidence of PW1 Sapna indicates that appellants Gajanan and Santosh were not present at the scene of the incident when Pramila had sustained the burns. The evidence of Sapna further indicates that accused no.3 Jabai was asleep and was awakened on hearing the cries for help. As pointed out by us above, the aforesaid evidence has virtually gone unchallenged by the prosecution.

5] Prosecution has examined PW7 Dr.Ghule who states about recording the history of the incident as narrated by Pramila at the time of her admission. The said history no doubt implicates all the appellants before us.

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Similarly, PW8 ASI Sanjay Nanaware also claims to have recorded the statement of Pramila at Exhibit 36. Prosecution has examined PW4 Bhaskar, a Special Judicial Magistrate, who has recorded the dying declaration of Pramila at Exhibit 18. That Pramila was in a fit condition to give her statement is deposed to by PW7 Dr.Ghule, who had endorsed on the dying declaration regarding the fitness of Pramila to give her statement.

6] In the present case, we find that the prosecution evidence itself reveals two parallel versions, which are irreconcilable. The first version is unfolded through the evidence of PW1 Sapna. The aforesaid version completely exonerates all the appellants before us. As pointed out by us above, PW1 Sapna has not been declared hostile. Prosecution made no attempts at discrediting the credibility of PW1 Sapna. As pointed out by us also, prosecution just cannot whisk away the evidence of PW1 Sapna and is bound by the evidence of PW1 Sapna. The other version, which is unfolded through the dying declarations at Exhibits 18, 26 and the history disclosed to PW7 Dr.Ghule. Both the versions are incompatible and irreconcilable. Acceptance of any one

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version would obviously falsify the other version. Both the versions are equally possible and in the absence of any other evidence which would in any manner discredit any one version, in our opinion, it would be wholly improper to pick and choose any one version for sustaining the conviction without having valid grounds for discarding the other version. In any event, there are two versions of the prosecution evidence, the one favouring the accused has to be accepted. As pointed out by us above, in the absence of any other evidence to discredit either of the versions, both the versions are rendered probable and it would not be permissible for a Court to pick and choose any one version for sustaining the conviction. In the face of this evidence, therefore, in our opinion, the appellants are entitled to be given the benefit of doubt.

7] As far as the evidence against the appellants is concerned for an offence punishable u/s 498-A of the Indian Penal Code, we find that the evidence of PW2 Sukhadeo - father and PW3 Jagdeo - brother of deceased Pramila is wholly discrepant. Material improvements have been made which discredit the witnesses. We thus find

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that there is no reliable and satisfactory evidence regarding the ill-treatment and the accused, therefore, cannot be convicted on the basis of vague and omnibus allegations. The accused are entitled to be acquitted in respect of the offence punishable u/s 498-A of the Indian Penal Code.

8] Accordingly, the criminal appeal is allowed. The conviction and sentence of the appellants is quashed and set aside and the appellants are acquitted of the offence with which they were charged and convicted. Fine if paid by the appellants be refunded to them. Since the appellants are in jail, they be released forthwith if not required in any other case.

(N.W. SAMBRE, J.)

(P.V. HARDAS, J.)