

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.9 OF 2014

Nitin s/o. Narayan Sawant,
Age 23 years,
R/o. Dhavalgaon, Tq. Shrigonda,
Dist.Ahmednagar ..Appellant

Versus

The State of Maharashtra ..Respondent

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Mr.V.R.Dhorde, advocate for appellant

Mr.V.P.Kadam, APP for respondent - State

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CORAM : M.T. JOSHI, J.

DATE : APRIL 08, 2015

ORAL JUDGMENT :

Heard both sides.

2] Aggrieved by recording of conviction by the learned Addl. Sessions Judge-4, Ahmednagar vide judgment and order dated 22nd November, 2013 passed in Sessions Case No.101 of 2013, for the offences

punishable under Section 306 and 498-A of the Indian Penal Code and consequent sentences to suffer rigorous imprisonment for seven years and three years, respectively, with a direction to pay fine of Rs.5,000/- and Rs.3,000/-, respectively, present appeal is preferred by the appellant, who was original accused no.1 in the trial Court. His mother – accused no.2 was acquitted of these offences by the learned Addl. Sessions Judge-4, Ahmednagar.

3] The prosecution case, in nutshell, is as under:-

. That, deceased – Radhabai was married to present appellant – Nitin about six months prior to her suffering burn injuries on 7th December, 2012, due to which, she died on 11th December, 2012. As per the FIR (Exhibit 23) filed by PW 1 – Dada (cousin of the deceased), the deceased was

treated well by all her in-laws for a period of two months from the marriage. Thereafter, however, they started sending the deceased to collect scrap from the city. Since the deceased, was educated, she opposed the same. The appellant Nitin did not use to carry gainful work. In the circumstances, the deceased was required to collect scrap, however, despite this, the appellant as well as his mother - Chandrabai always used to abuse and beat her.

. When the deceased Radhabai came to the house of the complainant i.e. her cousin Dada (PW 1) for Diwali festival, at that time, she narrated the said issue to him. She reported the same to his wife as well as mother of deceased i.e. P.W.3- Chandrabhaga. After Diwali festival when the deceased returned to her matrimonial home, the appellant started making demand for Rs.10,000/- for purchase of a motorcycle at that time the

complainant himself has paid an amount of Rs.10,000/- to the appellant by going to the matrimonial home of the deceased. He also gave understanding to the appellant and his mother. In the situation on 7th December, 2012, in the night, at 11.00 p.m., the complainant received an information that the deceased had suffered burn injuries and she was taken to Manikchand Hospital, Shirur. However, as she was not admitted there, she was taken to Dhakrai fata. The deceased Radhabai was accompanied by her mother-in-law and two sisters-in-law. Upon reaching at the said fata, complainant boarded the vehicle. At that time the deceased made oral dying declaration to the effect that, in the night at about 10.00 p.m., present appellant started beating her as she had reported her uncle behind his back, about the compulsion by the appellant to go out for collection of scrap. In the quarrel, the deceased told that she would commit suicide by pouring

kerosene on her person as she was fed-up with the continuous ill-treatment, upon which, the appellant challenged her to do so. Thereafter, the deceased was taken to the hospital of Dr.Lonkar at Daund, but on his advise, she was shifted to Sasoon Hospital, Pune at about 2:00 am. in the midnight. However, ultimately, she died on 11th December, 2012. In the circumstances, the FIR with above statements came to be lodged on 18th December, 2012 with the Police Station.

4] In the meantime, while the deceased was admitted in Sasoon Hospital, at Pune her dying declaration was recorded by PW 10 – Eknath Bhoomkar, PSI on 8th December, 2012 at Exhibit 49. PW 5 – Dr. Lalit Rajpal had examined the deceased. At that time, upon examination, he certified that the deceased was conscious and was able to give valid statement. The dying declaration is somewhat on the similar lines, except the making of demand

of Rs.10,000/- and fulfillment of the same by the complainant PW 1 – Dada. The said statement along with the report as well as the inquest panchnama was sent by PW 7 – Subhash Waghmare, PSI, Bandgarden Police Station, Pune, in whose jurisdiction, the dying declaration was recorded, to Belwandi Police Station. The post mortem notes were collected. The statements of the relevant witnesses were recorded and the chargesheet came to be filed.

5] Upon committal of the case to the Sessions Court, during trial, in all, ten witnesses were examined. Those were PW 1 – Dada – the complainant; PW 2 – Shamrao Shinde, father of PW 1; PW 3 – Chandrabhaga Shinde – mother of the deceased, who spoke about the matrimonial life of the deceased on the lines of the prosecution case. PW 4 – Sopan Shinde is the panch witness to the panchnama of spot of occurrence at Exhibit 29. PW

5 – Dr. Lalit Rajpal, who had examined the deceased, as detailed supra, at the time of recording the dying declaration. PW 6 – Dr. Ajay Taware, conducted the post mortem examination on the dead body of the deceased and passed the memorandum of examination of the post mortem examination at Exhibit 34. PW 7 – Subhash Waghmare, ASI, prepared inquest panchnama and sent the report to the concerned police station, as detailed supra. PW 8 – Nivrutti Mane is the ASI, who has conducted investigation of the case. PW 9 – Mohan Changude is Police Naik who has registered the crime on the basis of the FIR of PW 1 – Dada. As narrated earlier, PW 10 – Eknath Bhumkar, PSI, who was on duty at Police Chowky near Sasoon Hospital, recorded the dying declaration at Exhibit 49.

6] The defence of the appellant, in short, is that the deceased as well as the appellant

belonged to the same Scheduled Tribe i.e. Dauri Gosavi. Two elder sisters of the deceased had already eloped with some other persons who were not the members of the tribe. In the circumstances, the deceased was made to marry with the appellant knowing fully well that he was uneducated and handicapped by one eye. In the circumstances, the deceased did not like him, and anyhow, after the marriage, she did not want to cohabit with him as she did not like the marriage and even, to carry the necessary work for survival with the family member who were belonging the poor strata of life and therefore, she has committed suicide. However, false allegations of ill-treatment and demand were made and therefore, he sought acquittal.

7] Learned Addl. Sessions Judge, however, believed the prosecution case and held that the prosecution has proved the case beyond reasonable

doubt and accordingly, the conviction, as detailed supra, came to be recorded against the appellant.

8] Mr.Dhorde, learned counsel for the appellant, submits that learned Addl. Sessions Judge did not take into consideration that the FIR Exhibit 23, in fact, is not the first information given to the police. As per the prosecution case, the dying declaration of the deceased was recorded much prior to it i.e. on 8th December, 2012 while, the FIR was filed on 18th December, 2012 after reaching of the dying declaration to the concerned police station. He submits that the dying declaration was not in question and answer form. He further submits that not only the dying declaration does not inspire confidence, but even in the said dying declaration, though the same runs in detail i.e. two pages and was not in question and answer form, there are no allegations that an amount of Rs.10,000/- was demanded by the appellant or said

demand was fulfilled. Even said allegations made belatedly in the FIR, were proved to be false from the mouth of the relevant prosecution witnesses. He further submits that the most glaring fact is that there was no proof that the deceased was examined by PW 5 – Dr. Lalit Rajpal at the beginning of the dying declaration. Even the so called endorsement in the margin of the dying declaration, admittedly, does not bear his signature. There is no evidence to show that the necessary statement was read over to the deceased and thereafter, she accepted it to be true and correct. Further PW 10 – Eknath Bhoomkar, PSI accepted that he himself has not scribed the dying declaration and the same was not examined. He lastly submits that the post mortem notes would clearly show that the deceased had suffered 96% burn injuries and if above lacunae are looked into in the light of this fact, it would be clear that

no reliance can be placed on the dying declaration.

. He alternatively submits that even if the dying declaration is believed, it would go to show that the deceased was asked to carry the work of collecting the scrap and the same, according to her, was an ill-treatment and in those circumstances, during the quarrel between the couple, the deceased challenged the appellant saying that she would commit suicide by pouring kerosene on her person and in the heat of rage, when the appellant asked her to do so, she set herself on fire. In the circumstances, according to him, the same cannot be termed as 'cruelty' as defined under Section 498-A of the Indian Penal Code. Further, the challenge by the present appellant in the heat of rage during quarrel, to allow the deceased to commit the suicide, cannot be termed as abetment to commit suicide and

therefore, he submits that learned Addl. Sessions Judge has committed mistake in arriving at the conclusion, that the offences against the present appellant are proved beyond reasonable doubt.

9] On the other hand, learned APP submits that the evidence on record would clearly show that though PW 5 – Dr. Lalit Rajpal inadvertently forgot to put his signature below the endorsement, it is proved that the endorsement is made in his own handwriting in the margin of the dying declaration. His oral evidence would show that the deceased was conscious, well oriented and was able to make statement at the time of making the same. He further submits that the said dying declaration would show that the deceased had admitted the contents of the same to be true and correct and the evidence on record would show that as the deceased was educated, there was no reason to read over the contents of the dying declaration to her

and therefore, no lacuna in this regard would remain there.

10] Learned APP further pointed towards the observations of learned Addl. Sessions Judge by which, he has relied on the statement of witness regarding demand of amount of Rs.10,000/-. He further submits that even otherwise, the contents of the dying declaration would show that there was continuous ill-treatment to the deceased at the hands of present appellant. He further submits that the dying declaration would further show that present appellant not only had challenged the deceased to commit suicide, but when the deceased had set herself on fire, he did not, in any way, attempt to douse the fire and went away from his own house and therefore, relying on the ratio laid down in the case of **Manohar Bhau Dubale Vs. The State of Maharashtra, 2014 All M.R. (Cri.) 3793,**

he submits that no interference in the findings of the learned Addl. Sessions is warranted.

11] On the basis of this material, following points arise for my determination :-

i] Whether the prosecution has proved that for a period of six months, during cohabitation, the appellant has treated the deceased cruelly to such an extent, that the deceased would attempt to commit suicide ?

ii] Whether the prosecution has proved that on 7th December, 2012 at about 10:00 pm. at village Dhavalgaon, Taluka Shrigonda, Dist. Ahmednagar, the appellant has abetted commission of suicide by the deceased, due to which, she has died on 11th December, 2012 ?

. My findings to these points are in the affirmative and the appeal is, therefore, dismissed for the reasons to follow.

R E A S O N S

12] There is no dispute that the deceased has died due to burn injuries while residing with the appellant in her matrimonial home. It is no doubt true that the complaint Exhibit 23 filed by PW 1 - Dada cannot be termed as FIR, as the earlier dying declaration of the deceased discloses commission of a cognizable offence which, according to the prosecution, was made by deceased at Sasoon Hospital, Pune.

13] The statement of PW 7 - Subhash Waghmare, PSI, would show that he had sent the dying declaration to the concerned Police Station at Belwandi. The

evidence of PW 1 – Dada, PW 2 – Shamrao and PW 3 – Chandrabhaga would show that they had additionally made statements about the demand of Rs.10,000/- by the present appellant, which is absent in the dying declaration.

14] Mr.Dhorde, learned counsel for the appellant, minutely took me through the cross-examination of the above witnesses to show that these allegations were not proved. PW 1 – Dada admitted that he has not paid said amount, as against the statement made by him in the FIR, that he himself went to village of the appellant and paid the amount.

15] The dying declaration is confined only to the issue of compelling the deceased to go out for collection of scrap, which she did not like; ill-treatment over the same; and the particular incident in the night on 7th December 2012. It is therefore clear that the allegations regarding the

demand of money made by PW 1 to PW 3 are an afterthought, as is found in the complaint at Exhibit 23. However, for these reasons, the entire prosecution case cannot be disbelieved.

16] Now it is to be seen whether the dying declaration inspire confidence and upon appreciation of evidence in this regard, if this Court comes to the conclusion that the dying declaration is a reliable piece of evidence then, on the basis of said sole evidence, the Court can come to the conclusion regarding cruelty and if necessary, in the facts and circumstances of the case, that the present appellant has abetted commission of suicide.

17] The evidence on record would show that the deceased has suffered burn injuries on 7th December, 2012 at about 11 p.m. in the night at her matrimonial home. The statement of witnesses

would show that the deceased was firstly taken to a private hospital at Shirur but her admission thereat was refused. Even, the driver of vehicle had brought the vehicle at certain place (Dhakrai phata) and thereafter, he was not ready to take the deceased further.

. In the circumstances, PW 1 – Dada was contacted at about 2:00 am. in the midnight and she was taken to Sasoon Hospital, Pune, whereat, her dying declaration was recorded by PW 10 – Eknath Bhoomkar, PSI at Exhibit 49 on 8th December, 2012 i.e. on the very same day.

18] PW 10 – Eknath Bhoomkar, PSI has deposed that during the relevant period, he was attached to Bandgarden Police Station, Pune and on the particular night, he was posted at Police Chowky near Sasoon Hospital, Pune. One Head Constable had reported about admission of Radhabai in the

ward of burnt patients. Therefore, he received order from Police Station for recording her (Radhabai) statement. He, therefore, went to the said ward. He met the Doctor on the duty and requested him to examine the patient i.e. deceased – Radhabai and to communicate, as to whether, the patient was able to give statement. Accordingly, PW 5 – Dr. Lalit Rajpal examined the deceased in his presence and on his positive report, he recorded statement of the deceased. This witness further deposed that after recording the statement of the deceased as per her narration, he obtained thumb impression of the deceased in presence of the Doctor and thereafter, he handed over the same to the Doctor for his endorsement at the bottom of the statement. In fact, the endorsement was found in the margin of the statement.

19] PW 5 – Dr. Lalit Rajpal deposed that on the request of PW 10 – Eknath Bhoomkar, PSI, he

examined Radhabai and accordingly, passed the endorsement, finding that she was able to make the statement. He further deposed that while the PSI was recording the statement, he was standing by the side of the patient and after recording of the statement was over, he passed endorsement that Radhabai was conscious and gave a valid statement. He made an endorsement in his handwriting with date and time. Said statement was shown to him and accordingly, he proved the same at Exhibit 32.

20] The cross-examination of PW 10 – Eknath Bhoomkar, PSI, would show that he himself has not scribed the dying declaration, but one Dhombire (Writer) has scribed the same. Further, according to him, at the time of recording the statement, PW 1 – Dada was not present. He denied that statement of Radhabai was recorded in the usual manner as per the police practice. He further denied that the statement of deceased – Radhabai

was recorded in Police Chowky as per the version of PW 1 – Dada and the same is false. Admittedly, there was no signature of PW 5 – Dr. Lalit Rajpal over the endorsement and therefore, it was suggested that, as the statement was false, PW 5 – Dr. Rajpal refused to sign over the same, which was, however, denied by him.

21] PW 5 – Dr. Rajpal, in his cross-examination, admitted that he has not put his signature above his name. He deposed that deceased – Radhabai had suffered 100% burn injuries and she had suffered hypo-tensive shock due to dehydration. The Medical Officer was unable to make any comment as to whether, the internal organs of the patient were extensively damaged or congested. He denied that due to said shock, Radhabai was unconscious. He, however, denied that Radhabai was unable to talk or make any statement.

22] From the submissions of both the sides and the material on record, it can be gathered that the statement of the deceased was not recorded in question and answer form. Though the endorsement was made in the handwriting of PW 5 – Dr. Rajpal, he failed to sign the same immediately at the end of the statement. Though, there is recital that the deceased has admitted the contents to be true and correct but, there is no recital that the statement was read over to the deceased.

23] Mr.Dhorde relies on the ratio in the case of ***Shri Raju Kachru Adangale Vs. The State of Maharashtra, 2014 ALL MR (Cri) 4085.*** In that case, there was no evidence that the dying declaration was read over to the declarant or she admitted the contents to have been recorded correctly. Besides this the oral dying declaration was found to be a fragile piece of evidence.

Therefore, the conviction recorded by the Sessions Court was set aside.

24] In the present case, we find that admittedly the deceased was an educated woman. The statement of PW 3 – Chandrabhaga would show that she was an intelligent student. In the circumstances, when the dying declaration would show that she had admitted its contents to be correct, reading over of the dying declaration to her, would have been a mere formality, as she admitted its contents to be correct. In that view of the matter, the ratio laid down in the case of **Raju Adangale** (cited supra) would not be applicable to the facts of the present case.

25] As recorded supra, the statement of the deceased was not recorded in question and answer form. It is no doubt true that it would be better to have the dying declaration recorded in the

question and answer form, but absence of the same would not directly take us to disbelieve the same.

. PW 5 – Dr. Rajpal has deposed that after examining the deceased, he found her to be able to make statement and also he was present at the time of recording the dying declaration of the deceased. If these facts are taken into consideration, despite of the lacunae, as highlighted by Mr. Dhorde, the dying declaration, cannot be said to be an unreliable piece of evidence.

26] This takes us to find out as to whether, the deceased was treated cruelly during her cohabitation with the appellant and in case, we come to the conclusion that the allegations of cruelty during cohabitation are proved beyond reasonable doubt, then the last episode, as has been proved by the dying declaration, would amount

to cruelty of such a nature that it abetted commission of suicide by the deceased.

27] We have already found that the statement of relatives i.e. PW 1 – Dada, PW 2 – Shamrao Shinde and PW 3 – Chandrabhaga Shinde regarding demand of Rs.10,000/-, cannot be believed for the reasons already forwarded. Their cross-examination would however show that the two elder sisters of the deceased had already eloped with strangers. Deceased – Radhabai was the youngest girl in the family. She was, however, unwilling to marry with the present appellant who is somewhat handicapped as being blind by one eye. The evidence also shows that he was not literate. In this scenario, the statements made in the dying declaration are necessary to be taken into consideration.

28] The marriage of the deceased and the appellant took place prior to six month from the death of

the deceased. According to the dying declaration, since beginning, present appellant along with his mother always used to direct the deceased to go out for collection of scrap in the city. The deceased, however, did not like the said work. The present appellant was not carrying any gainful work. In the situation, the incident has occurred on 7th December, 2012, in which, due to continuous ill-treatment, the deceased told the appellant that, she would commit suicide by pouring kerosene on her person to which, a challenge was thrown by the appellant, to the deceased.

29] The provisions of Section 498-A of the Indian Penal Code read as under :-

"498-A. Husband or relative of husband of a woman subjecting her to cruelty. –
Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with

imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation. — For the purpose of this section, "cruelty" means—

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand".

. The provisions, thus, would show that mere harassment would amount to cruelty, if there is demand of money. However, other conduct would

also amount to cruelty, if the same is likely to cause physical or mental injury to the victim.

30] If the facts on record are seen, it would be clear that the deceased was an educated lady, however, she was made to marry with the present appellant. She even tried to adjust with the family of the appellant after marriage. However, the appellant and his mother had insisted the deceased to do a job of collecting the scrap by roaming in the city. Over that issue, quarrel always used to take place between the appellant and the deceased. Above that, the appellant did not use to carry any gainful work.

31] In this background, we have to take into consideration the incident that has occurred in the night of 7th December, 2012, as depicted in the dying declaration at Exhibit 49. It would show that about 10:00 p.m. in the night, the deceased

came to home. Upon entering the home, he started questioning the deceased as to why, she told her uncle – Shamrao, that the appellant used to force her to go for collection of scrap and beat her. The deceased told him that she does not like said job, however, as the appellant did not use to pay heed to the complaints of the deceased in that regard, she narrated the incident to her uncle. Upon that, the appellant started beating her with fists and kicks. In the heat of rage, therefore, the deceased told the appellant that due to said continuous ill-treatment, she would pour kerosene on her person and commit suicide. Upon that, the appellant challenged her by saying that she may commit suicide and after her death, he would be free to marry for second time. Upon this, the deceased poured kerosene on her person and set herself on fire in the presence of the appellant. However, the appellant did not make any attempt to douse the fire and went away from the house.

32] The compulsion made to the deceased to go away for collecting the scrap in the city, without the appellant carrying any gainful work and the ill-treatment to her over the same, would definitely cause a mental cruelty to the deceased. In the circumstances, the ingredients of the offence punishable under Section 498-A of the Indian Penal Code are clearly made out.

33] The issue, now, which is required to be considered is, whether, there was abetment by the appellant to commit suicide by the deceased.

. Mr.Dhorde further relies on the ratio laid down in the case of ***Shivaji Shitole and ors. Vs. State of Maharashtra and anr., 2012 ALL M.R. (Cri.) 2383***, wherein, though the facts were different, reliance has been placed on the ratio that has been referred to by this Court in the

case (Paragraph 15), decided by the Hon'ble Supreme Court, in the case of ***Sanju alias Sanjay Singh Senger Vs. State of Madhya Pradesh, 2002 Criminal Law Journal 2796.***

. In the case of ***Sanju*** (cited supra), the Supreme Court has observed that even if the prosecution story is that the accused told the deceased 'to go and die', that itself would not cause ingredients of instigation and therefore, the offence punishable under Section 306 of Indian Penal Code would not be made out.

. As against this, reliance placed on the case of ***Manohar Dubale*** (cited supra) wherein, in somewhat similar set of facts i.e. during quarrel between the husband and wife on the count of drinking liquor, though the accused husband was present on the spot, he did not help the wife to extinguish the fire. Therefore, intention of the

accused, was held that, the deceased should die. Further, the conduct of the accused/respondent that he did not inform father of the deceased regarding burn injuries to his wife, was also taken into consideration.

34] In the present case, during quarrel, present appellant beat the deceased with fists and kicks. Due to continuous ill-treatment, when she told that she would commit suicide, the appellant challenged her to do so. Accordingly, when the deceased set herself on fire, the appellant, though was present, did not make attempt to douse the fire and went away from the home. Further, as per the evidence, he did not even accompany her when she was taken to the hospital. In that view of the matter, abetment to the commission of suicide is proved beyond reasonable doubt.

35] We have two defence witnesses examined by the appellant. The story forwarded by them in their examination-in-chief that in their community, in fact, dowry is paid to the bride and there was a meeting for making said payment with PW 1 to PW 3 i.e. relatives of the deceased, was not put to these prosecution witnesses. In that view of the matter, the defence version as put in their mouth, needs no consideration.

36] Mr.Dhorde further submits that though the evidence on record would show that the neighbors had gathered immediately after the incident, none of them was examined to show that the deceased has made any oral dying declaration. He also relied upon the ratio the case of **Arjun s/o. Babarao Parche and ors. Vs. State of Maharashtra, 2012 ALL MR (Cri.) 2932** wherein, finding that there was no evidence about time or the date, when cruelty was meted and finding that the FIR was not lodged

promptly, conviction was set aside.

37] It should be noted in the present case that the sole reliance is placed by this Court on the dying declaration of the deceased recorded by PW 10 – Eknath Bhoomkar in the presence of PW 5 – Dr. Rajpal. The quality and not the quantity of the evidence would matter.

38] As regards the details about time and date when the cruelty was meted and non lodging of the FIR promptly, as observed supra, the complaint in the present case is not, in fact, the FIR and we have the immediate statement made by the deceased after the admission in the hospital to which, the reliance has been placed by the prosecution. As regards the date and time of the cruelty, it depends on the facts of each case, as to whether, time and date of each cruelty is necessary.

39] In the circumstances, the following order :-

(i) The appeal is hereby dismissed.

(ii) The impugned judgment and order dated 22nd November, 2013 passed by the learned Addl. Sessions Judge-4, Ahmednagar in Sessions Case No.101 of 2013 convicting the present appellant for the offences punishable under Section 306 and 498-A of Indian Penal Code and the consequent sentences, are hereby confirmed.

[M.T. JOSHI, J.]

kbp