

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.332 OF 2012

Kalawatibai w/o Shankar Phad,
Age-75 years, Occu:Household,
R/o-Deokare, Tq-Ahmedpuar,
District-Latur.

...APPELLANT
(Orig. Accused)

VERSUS

The State of Maharashtra,
Through Police Station, Kingaon

...RESPONDENT

...
Mr.S.P. Chapalgaonkar Advocate for Appellant.
Mr.B.L. Dhus, A.P.P. for Respondent.
...

CORAM: A.B. CHAUDHARI AND
INDIRA K. JAIN, JJ.

DATE : 1ST SEPTEMBER, 2015

ORAL JUDGMENT [PER A.B. CHAUDHARI, J.] :

1. Being aggrieved by Judgment and order

dated 21st April, 2012 in Sessions Case No.20 of 2011 (New) [Sessions Case No.47 of 2007(old)] passed by Additional Sessions Judge, Ahmedpur, convicting the Appellant - Kalawatibai w/o Shankar Phad for an offence punishable under Section 302 of the Indian Penal Code and sentencing her to undergo rigorous imprisonment for life and to pay fine of Rs.1,000/-, in default of payment of fine, to undergo further rigorous imprisonment for one month, the present Appeal has been filed by her.

2. In support of the Appeal, Mr. Chapalgaonkar, learned counsel vehemently argued that there is no direct evidence against the Appellant. The only evidence against the Appellant is of father and sister of deceased Sivnanda, who are said to have heard the oral dying declaration. According to the counsel, these are interested witnesses and have come in picture at later point of time and thereafter oral dying declaration has been given to them.

3. The learned counsel further submits that the written dying declaration Exhibit-23 is equally tainted, in as much as the same was recorded by the police officer at the first place and was recorded eight hours after the incident, that too after arrival of father and sister of deceased. He submitted that dying declaration Exhibit-23 is liable to be rejected and consequently the Appeal deserves to be allowed.

4. In the alternative, the counsel submitted that prosecution case if taken into consideration that the deceased was second wife and there always used to be quarrel between the first wife and second wife and further story is that the second wife was pregnant and therefore the first wife i.e. Appellant-accused got enraged and therefore in the fit of anger, without any intention the offence appears to have been committed and the same is certainly not the murder, but falls in the

category of Section 304 Part-II of the Indian Penal Code at the most and therefore impugned Judgment deserves modification.

5. Per contra, the learned A.P.P. submitted that the impugned Judgment is legal and proper. Though the second wife died after 23 days of the incident that does not mean that the required intention to commit her murder was not existing. On the contrary, it is proved that the Appellant had poured kerosene on the person of Sivnanda and set her on fire with full intention to get rid of the second wife of her husband. The A.P.P., therefore prayed for dismissal of the Appeal.

6. We have perused the impugned Judgment and Order, so also the reasons recorded therein. We have also perused written dying declaration Exhibit-23. We have perused the evidence of father and sister of the deceased who have heard oral dying declaration of the deceased.

7. Upon conspectus of the entire oral evidence and written dying declaration Exhibit-23, we are of the firm opinion that the dying declarations have not been shaken and are consistent, trustworthy and the trial Court did not make any mistake in believing the same. The dying declaration that was recorded by the police officer immediately eight hours after the incident has been believed by the trial Court and in our opinion, rightly, because burn injuries are only up to 50%. The deceased was alive for about 23 days, which shows that she must have been conscious and well oriented while giving dying declarations.

8. The submission made by Mr. Chapalgaonkar Advocate that as doctor was not examined to prove that while giving dying declaration at Exhibit-23 the patient was physically and mentally fit and well oriented, the said dying declaration cannot

be believed, is faint and we do not accept the same in view of the Constitution Bench Judgment of the Supreme Court in the case of **Laxman vs. State of Maharashtra, reported in (2002) 6 Supreme Court Cases 710**, the dictum of which squarely applies in the present case. We, therefore, hold that Judgment and Order recording the conviction of the Appellant will have to be maintained.

9. The next question is, what offence is made out from the evidence and prosecution story that is proved on record. From the perusal of the dying declarations, we clearly find absence of intention on the part of the Appellant to commit murder as such of the second wife of her husband, namely, deceased Shivnanda, to finish her. On the contrary, the description of the incident in the dying declaration clearly shows the rage or anger due to her illegal entry in the matrimonial life of the Appellant with which the Appellant accosted the deceased and poured kerosene on her person and

set her on fire and thereafter ran away. Looking to the background of the prosecution case and nature of the evidence brought on record including the written dying declaration, we are fully convinced that this is not a case of murder, but is the one of culpable homicide not amounting to murder, in the absence of intention. We are convinced to hold that Appellant must be convicted for offence punishable under Section 304 Part-II of the Indian Penal Code, rather than Section 302 of the Indian Penal Code. We are, therefore, inclined to modify the Judgment of conviction and sentence as above.

10. The next question is about sentence. We have heard learned counsel Mr. Chapalgaonkar on the point of sentence. We find that Appellant has three daughters and therefore, in our opinion, it would be appropriate to impose the sentence of four years of rigorous imprisonment to the Appellant without any separate sentence of fine.

In that view of the matter, we make the following order:-

O R D E R

(I) Criminal Appeal No.332 of 2012 is partly allowed.

(II) The Judgment and Order dated 21st April, 2012 in Sessions Case No.20 of 2011 (New) passed by Additional Sessions Judge, Ahmedpur, convicting the Appellant - Kalawatibai w/o Shankar Phad for an offence punishable under Section 302 of the Indian Penal Code and sentencing her to undergo rigorous imprisonment for life and to pay fine of Rs.1,000/-, in default of payment of fine, to undergo further rigorous imprisonment for one month, is set aside and modified. The Appellant - Kalawatibai w/o Shankar Phad is convicted for an

offence punishable under Section 304 Part-II of the Indian Penal Code and she is sentenced to undergo rigorous imprisonment for four years only.

(III) The Appellant shall be granted benefit of set off under Section 428 of the Code of Criminal Procedure.

[INDIRA K. JAIN, J.]

[A.B CHAUDHARI, J.]