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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.419/2012

Digambar s/o Karbhari Kadu,
age 25 yrs., occu.agri.,
r/o Khupti Tq.Newasa
Dist.Ahmednagar.

...Appellant..
(Org.accused)

Versus

The State of Maharashtra.

...Respondent...

.....

Shri S.D.Kotkar, Advocate h/f Shri Sandeep Jaigude,
Advocate for appellant.

Shri B.L. Dhas, APP for respondent.

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**CORAM: A.B. CHAUDHARI &
INDIRA K. JAIN, JJ.**

DATE: 30.09.2015

ORAL JUDGMENT (Per A.B. Chaudhari, J.) :

1] Being aggrieved by the judgment and order dated 30.5.2012 passed by the District Judge-2 and Additional Sessions Judge, Shrirampur, in Sessions Case No.32/2010 by which the appellant – accused no.1 – Digambar Karbhari

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Kadu was convicted for the offence punishable u/s 302 of the Indian Penal Code and was sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- in default to suffer simple imprisonment for two months, the present appeal was preferred by the appellant in this Court.

2] In brief, the case of the prosecution is that wife of the appellant – Digambar by name Shital was married with him and had a daughter. On 21.4.2010 at about 9-00 p.m., quarrel had taken place between the deceased Shital and the accused no.3 – Shobha i.e. wife of his brother by name Dattatraya and Dattatraya abused Shital under the influence of alcohol. Dattatraya and his wife threatened the appellant – accused no.1 to control Shital, otherwise they would make arrangement for Shital. The appellant no.1 got annoyed and in an anger took the can of kerosene and poured kerosene on the person of Shital and set her on fire by live match-stick. She shouted loudly, her family members and neighbours rushed and immediately took her to the hospital at Newasa. The Police Station Officer was informed about the Medico Legal Case and the FIR was registered at Crime No.98/2010. Mr.Sanap, the

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Tahsildar, Newasa, came to record the dying declaration of Shital and recorded the dying declaration (Exh.48). Then Shital was referred to Civil Hospital at Ahmednagar, but she expired on 28.4.2010. Thereafter, the offence of murder was registered. Spot panchanama was drawn. Seizures were made. Statements of witnesses were recorded. Charge-sheet was filed. The learned trial Judge recorded the evidence and the trial was held. The learned trial Judge acquitted the accused nos.2 and 3 i.e. brother of the appellant and his wife, but convicted the appellant for pouring kerosene on the person of Shital and for setting her on fire. Hence, this appeal.

3] In support of the appeal, the learned counsel for the appellant vehemently argued that there is no direct evidence in this case to hold the appellant guilty of the offence of murder of Shital and the evidence in the form of dying declarations – written as well as oral is untrustworthy. He submitted that the dying declarations were tutored and the fact that Shital was burnt to 92% indicated that she was not in a position to give any dying declaration. He, therefore, submitted that the trial Court ought to have rejected the dying declarations

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- written as well as oral. The mental fitness of the patient to give dying declaration was not proved by the prosecution. He then submitted that the appellant deserves to be acquitted since the prosecution did not prove the case satisfactorily and benefit of doubt should be extended to the appellant. In the alternative, the learned counsel for the appellant made a submission that the prosecution case itself shows the sudden anger with which the appellant is said to have acted because of the threat imparted by his brother and his wife and, therefore, no offence of murder could be said to have been constituted.

4] Per contra, the learned APP supported the impugned judgment and order and submitted that the evidence tendered by the prosecution is fully trustworthy in the form of dying declaration, which was immediately recorded and thereafter the patient was shifted to Ahmednagar. There is then the evidence of oral dying declaration before the Court, which is fully satisfactory and has been rightly believed by the learned trial Judge. The doctor certified the mental as well as physical fitness of the patient to give the dying declaration and,

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therefore, there is no reason why the dying declaration should be discarded. He, therefore, prayed for dismissal of the appeal.

5] We have heard the learned counsel for the rival parties at length. We have perused the entire evidence with the assistance of learned counsel for the parties. We have perused the reasons given by the learned trial Judge while recording the order of conviction.

6] We find that the prosecution case itself is based on the story that brother of the appellant and his wife had a quarrel with deceased Shital and after the quarrel, both of them threatened the appellant – Digambar that he should control Shital, otherwise they would make arrangement for Shital. Suddenly the appellant – accused got annoyed, took a kerosene can and poured kerosene on the person of Shital and set her on fire. It is pertinent to note that Exhibit 31 – dying declaration was recorded at 23-45 hours as against the incident having taken place between 21-00 to 21-30 p.m. This clearly shows that the dying declaration was immediately recorded at Primary Health Centre, Newasa and, therefore, there was no scope for any manipulation or false implication of

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the appellant. Perusal of the dying declaration (Exh.31), to our mind, shows that the same is consistent, natural, immediately recorded and is fully truthful. The dying declaration must be believed and has rightly been believed by the learned trial Judge. Apart from the said dying declaration, there is other evidence tendered by the prosecution, which has been accepted by the learned trial Judge, namely the other dying declaration (Exh.48) recorded by PW8 Amit Sanap, Tahsildar, Newasa. We have perused the second dying declaration (Exh.48) recorded by the Tahsildar and after comparing both the dying declarations, we find that they are fully consistent and without any infirmity. Both the dying declarations were, therefore, rightly believed by the learned trial Judge.

7] We then find that in both the dying declarations, Shital clearly stated that Dattatraya – the brother of the appellant and his wife used to usually quarrel with her and used to abuse her and in the fateful night, they threatened her husband – appellant to stop the deceased Shital from quarreling and, therefore, her husband got totally annoyed and under the anger, took a kerosene can and put kerosene on the person of Shital and set her on

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fire. We thus come to the conclusion that both the dying declarations have been duly proved by the prosecution and there is no slightest doubt about the appellant committing the offence by pouring kerosene on the person of Shital and setting her on fire. The spot panchanama (Exh.22) so also the C.A. Report also corroborated the happening of the incident. The oral dying declarations are given to PW1 Babasaheb Mahadu Dhawal and PW4 Kantabai Dilip Kadu. PW1 Babasaheb is her brother while PW2 Dilip Kadu is another brother who enquired from her about the incident and she had made oral dying declarations to them. The evidence of both these witnesses is consistent. To conclude, we have no doubt in our mind from the two dying declarations (Exhs.31 and 48) as well as the oral dying declarations to the aforesaid three witnesses that it was the appellant who poured kerosene on the person of the deceased and set her on fire.

8] On the basis of the evidence tendered before the Court, the offence is proved by the prosecution. As earlier discussed, the dying declarations (Exhs.31 & 48) given by the deceased Shital themselves indicated that after the threats by the appellant's brother Dattatraya

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and his wife to him about the deceased Shital, he went in sudden anger and suddenly took kerosene can and poured kerosene on the person of Shital and set her on fire. In these set of facts admittedly disclosed by the prosecution itself through the written dying declarations, it is clear that the appellant had absolutely no intention to commit murder of Shital. That is more so because there is no reason like demand of money etc. as a motive for him to commit her murder. There is absolutely no evidence to that effect. We are, therefore, fully convinced that the offence committed by the appellant would not be one of murder but would amount to culpable homicide not amounting to murder. We, therefore, find that the appellant could be convicted u/s 304 Part I of the Indian Penal Code since he had full knowledge as to the consequences of pouring kerosene and setting Shital on fire due to his sudden anger. That being so, we hold him guilty of the offence u/s 304 Part I of the Indian Penal Code and we think the sentence of seven years plus fine would meet the ends of justice. In the result, we pass the following order.

O R D E R

(I) Criminal Appeal No.419 of 2012 is partly allowed.

(II) The Judgment and Order dated 30th May 2012 passed by the District Judge-2 and Additional Sessions Judge, Shrirampur in Sessions Case No.32 of 2010 convicting the Appellant/ Accused No.1 - Digambar Karbhari Kadu for offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer Imprisonment for life and also to pay fine of Rs.1000/- (Rupees One Thousand) and in default to suffer further S.I. for two months, is set aside and modified. The Appellant - Digambar Karbhari Kadu is held guilty of the offence punishable under Section 304 Part I of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for seven years and also to pay a fine of Rs.1000/- (Rupees One Thousand), in default to suffer further

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Rigorous Imprisonment for one month.

(III) The benefit of provisions under Section 428 of the Code of Criminal Procedure be given to the Appellant - Digambar Karbhari Kadu.

(INDIRA K. JAIN, J.)

(A.B. CHAUDHARI, J.)