

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO. 547 OF 2012

- 1] Nagesh s/o Babu Barkamkar,
age 23 years, occ. Agril.,
R/o Pandurna, Tq. Bhokar,
District Nanded,
- 2] Babu s/o Dhondiba Barkamkar,
age 47 years, occ. Agril.,
R/o Pandurna, Tq. Bhokar,
District Nanded,
- 3] Sau. Dhurpatbai w/o Baburao Barkamkar,
age 41 years, occ. Household,
R/o Pandurna, Tq. Bhokar,
District Nanded

...APPELLANTS
[Orig. Accused]

VERSUS

The State of Maharashtra,
through the Police Station Officer,
Police Station, Bhokar

...RESPONDENT

Mr. S.S.Choudhary, advocate for the Appellants
Mr. A.S.Shinde, APP for Respondent/State

**CORAM : A.B.CHAUDHARI &
INDIRA K. JAIN, JJ.**
DATED : 14th October, 2015

ORAL JUDGMENT [Per Indira K.Jain, J.]

This appeal is preferred by the original accused against the judgment and order, dated 9.8.2012, passed by the learned Additional Sessions Judge, Bhokar, District Nanded, in Sessions Case No. 2 of 2012. By the said judgment and order, the learned Additional Sessions Judge convicted the appellants under Section 302 r/w 34 of the Indian Penal Code and sentenced to imprisonment for life and fine of Rs.1,000/-, in default rigorous imprisonment for one month, each. Accused were also convicted under Section 498-A r/w 34 of the Indian Penal Code and sentenced to rigorous imprisonment for one year and fine of Rs.500/-, in default rigorous imprisonment for one month, each. The trial court directed that both the substantive sentences to run concurrently.

2] For the sake of convenience, we shall refer the appellants in their original status as accused nos. 1 to 3 as they were referred before the trial court.

3] The gist of the prosecution case is as under :-

- (i) PW 1 Ramji Gaikwad was resident of Beldara in Taluka Umri. Chandrakala was his daughter. She was

married to accused no.1 Nagesh 2½ years before her death. After marriage, she went to cohabit with the accused at Pandhurna.

(ii) Accused no.2 Babu is father-in-law and accused no.3 Dhurpatbai is mother-in-law of Chandrakala. For about 2 years after marriage, Chandrakala was treated well in the family of accused. Since before six months of the incident she was being harassed on the ground that she was of black complexion and having a short height. Her father-in-law and others in family used to taunt her saying that she was not the proper match for accused no.1 Nagesh. Chandrakala did not disclose about the harassment to her father to avoid tension.

(iii) Before 15 days of the incident, Chandrakala was taken to her parents house. On 11.10.2011 accused no.1 asked her on phone to come back. Chandrakala along with her father came to her house at about 4-5 p.m. on the same day. She cooked food. At about 7.00 p.m. her father-in-law came and asked Nagesh why he had called one who is black and of short height. It is alleged that mother-in-law and

husband of Chandrakala caught her and poured kerosene on her person and her father-in-law set her on fire. She sustained burn injuries. Murli Barkamkar, cousin father-in-law, mother-in-law and some other persons of village took her to Government Hospital, Nanded.

(iv) On 14.10.2011 at around 4.30 p.m. PW 2 Head Constable Sahebrao Dawane, attached to Bhokar police station, visited the Civil Hospital for recording statement of Chandrakala. Head Constable Dawane met the doctor and inquired about her condition to give statement.

(v) PW 5 Dr. Vaibhav Patil was the Medical Officer on duty. He examined the patient and certified that she was conscious, oriented and mentally fit to give statement. Head Constable Dawane then recorded statement of Chandrakala. In her statement she disclosed that she was being harassed by the accused as she was of black complexion and of short height. She also disclosed that on her return to the house of accused at about 4-5 p.m. from the house of her parents, she cooked food and at 7 p.m. her father-in-law

came to the house and asked her husband why was she brought to the house. Then her husband and mother-in-law caught hold her, poured kerosene on her person and her father-in-law set her ablaze by igniting a match stick.

(vi) On the basis of statement of Chandrakala, Crime No. 155 of 2011 came to be registered at Bhokar police station for the offences punishable under Sections 307, 498-A and 34 of the Indian Penal Code against the accused.

(vii) Investigation was handed over to PW 9 P.S.I. Mirkale. Accused were arrested. Spot panchanama was drawn in the presence of panch witnesses. From the spot, match box, simple earth, earth mixed with kerosene oil, kerosene bottle, burnt pieces of petticoat and saree of Chandrakala and polyester dhotar, half banian were seized. Investigating officer recorded statements of around ten witnesses on 15.10.2011.

(viii) PW 3 Pundlik Zhunjare was working as Special Judicial Magistrate at the relevant time. On 15.10.2011 he received letter from Vajirabad police station for recording dying declaration of Chandrakala. He went to

Civil Hospital, Nanded at around 8.15 p.m. Mr. Zhunjare made inquiry from Dr. Patil regarding condition of Chandrakala to give her statement. Dr. Patil examined the patient and certified that she was conscious, oriented and able to give her statement. Then Mr. Zhunjare introduced himself to Chandrakala. He also ensured that she was fit to give her statement and recorded her dying declaration. The dying declaration given to the Special Judicial Magistrate by Chandrakala is on the same line as was given before Head Constable Dawane.

(ix) On 16.10.2011 accused no.1 Nagesh while in police custody had shown his willingness to discover the clothes concealed by him. His memorandum was recorded and at the instance of accused Nagesh shirt and pant were recovered from his house. Seizure panchanama was accordingly drawn.

(x) On 17.10.2011 clothes of accused no.3 were seized under seizure panchanama.

(xi) Chandrakala succumbed to burn injuries on 18.10.2011. Inquest panchanama was recorded. The dead body was sent for postmortem. PW 4 Dr. Maroti

Dake performed postmortem. He noticed that deceased sustained 67 per cent burns. On performing postmortem, Dr. Dake opined cause of death due to septicemia due to burns.

(xii) During investigation supplementary statements of witnesses came to be recorded. Seized muddemal was sent to the Chemical Analyser. On completing investigation, charge sheet was submitted to the Judicial Magistrate, First Class, Bhokar, who in turn committed the case for trial to the Court of Sessions.

4] On committal of the case, trial court framed the charge against accused at Exh.4. They pleaded not guilty and claimed to be tried. According to the accused, Chandrakala sustained burns accidentally while cooking food and they were falsely implicated.

5] To bring home guilt of the accused, prosecution examined in all nine witnesses. After going through the evidence adduced by the prosecution, learned Judge convicted and sentenced the appellants as stated here-in-above. Hence, this appeal.

6] We have heard the learned counsel for the parties. On careful consideration of the facts and circumstances of the case, arguments advanced by the learned counsel for the appellants and the learned A.P.P. for the State, reasonings recorded by the trial court and evaluation of evidence on record, for the below mentioned reasons, we are of the opinion that prosecution could not prove the guilt of accused beyond reasonable doubt and the trial court ought to have acquitted the accused.

7] At the threshold we may mention here that PW 1 Ramji Gaikwad, father of Chandrakala was declared hostile and he has not supported the prosecution case.

8] Prosecution case is mainly based on two dying declarations, recorded by PW 2 Head Constable Dawane and PW 3 Special Judicial Magistrate Pundlik Zhunjare.

9] Needless to state that in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny keeping in view the fact that statement has been made in the absence of accused who had no opportunity of testing the veracity of the statement by cross-examination. It is the settled law

that once the court comes to a conclusion that dying declaration was the truthful version as to the circumstances of death and the assailant of victim, no further corroboration is required to such a dying declaration.

10] Keeping in view these legal parameters, we now advert to the evidence of star witnesses PW 2 Head Constable Dawane, PW 3 Special Judicial Magistrate Zhunjare and PW 5 Dr. Vaibhav Patil.

11] PW 2 Head Constable Dawane was attached to Bhokar police station. On 14.10.2011 Police Inspector, Bhokar police station handed over M.L.C. to him to record statement of Chandrakala at Civil Hospital, Nanded. Head Constable Dawane reached the Civil Hospital at 4.00 p.m. and inquired from Dr. Patil about the condition of Chandrakala to give her statement. It is stated by Head Constable Dawane that after doctor certified that patient was conscious and able to give statement, he recorded statement of Chandrakala. Before Head Constable Dawane, Chandrakala stated that since six months her husband, father-in-law and mother-in-law were harassing her saying that she was black having short height and not suitable to the family. She further stated that before 15

days she had been to her parents house. On 11.10.2011 her husband phoned and asked her to come back. Her father reached her to the house of accused between 4-5 p.m. on the same day. She then stated that at around 7 p.m. her father-in-law asked her husband why he had brought one who was black complexion and of short height. Chandrakala disclosed that her husband and mother-in-law caught her and poured kerosene on her person and her father-in-law set her on fire by igniting match stick. She stated that her cousin father-in-law and some villagers poured water and extinguished fire. The dying declaration recorded by Head Constable Dawane is proved at Exh.39.

12] The next dying declaration was recorded by PW 3 Special Judicial Magistrate, Pundlik Zhunjare on 15.10.2011. According to Special Judicial Magistrate, on receiving letter from Vajirabad police station to record dying declaration of Chandrakala, he had been to Civil Hospital, Nanded at around 8.15 p.m. He made inquiry from Dr. Patil regarding condition of Chandrakala to give her statement. After doctor examined her and certified that she was conscious, oriented and able to give statement, Mr. Zhunjare recorded statement of Chandrakala. In the dying declaration recorded by Mr. Zhunjare, Chandrakala narrated the same facts and

manner of incident as she disclosed before PW 2 Head Constable Dawane on the previous day i.e. on 14.10.2011. The dying declaration recorded by Special Judicial Magistrate is at Exh.41.

13] To corroborate the evidence of PW 2 Head Constable Dawane and PW 3 Special Judicial Magistrate Mr. Zhunjare, prosecution has placed reliance on the evidence of PW 5 Vaibhav Patil. On 14.10.2011 and 15.10.2011 Dr. Patil was on duty as Junior Resident, Unit 2 Surgery in Civil Hospital, Nanded. He fully supported the testimony of PW 2 Head Constable Dawane and PW 3 Special Judicial Magistrate Mr. Zhunjare regarding condition of Chandrakala to give her statement on both the occasions. It is stated by Dr. Patil that she was conscious, oriented and mentally fit to give her statement when Head Constable Dawane and Special Judicial Magistrate Mr. Zhunjare had been to hospital on 14th and 15th of October, 2011 for recording statement of Chandrakala. Exhs. 54 and 55 endorsements on the statement recorded by Head Constable Dawane and Exhs. 56 and 57 endorsements on the dying declaration recorded by Special Judicial Magistrate Mr. Zhunjare have been proved by Dr. Patil.

14] True, there are no material contradictions and omissions

in the evidence of PW 2 Head Constable Dawane, PW 3 Special Judicial Magistrate Mr. Zhunjare and PW 5 Dr. Vaibhav Patil. Still the core question is whether dying declarations Exhs. 39 and 41 can be said to be beyond the pale of controversy and above suspicion. It is pertinent to note that first dying declaration Exh.39 was recorded on 14.10.2011 between 4.30 and 5.00 p.m. and the second dying declaration Exh.41 was recorded on 15.10.2011 between 2030 and 2100 hours. Incident occurred on 11.10.2011. PW 2 Head constable Dawane has admitted in cross-examination that no investigation was made between 11.10.2011 and 14.10.2011, till he recorded statement. Investigating officer PW 9 P.S.I. Mirkale did not explain delay of 3 days in recording statement of Chandrakala.

15] It is the defence of accused that Chandrakala was caught by fire accidentally. In this connection, accused have relied upon the medical case papers showing history of accidental burns. As medical case papers have not been admitted in evidence, it would be appropriate to keep the medical case record out of consideration. But that is not the end of the matter, as evidence of PW 1 father Ramji plays a vital role in ascertaining the truthfulness and reliability of both the dying declarations.

16] PW 1 Ramji Gaikwad father of Chandrakala was declared hostile. He did not support the prosecution in any way. Merely because he is a hostile witness, his testimony cannot be thrown away in entirety. In the cross-examination, he states that from 11.10.2011 to 14.10.2011 Chandrakala was repeatedly telling them in the hospital that she sustained burns accidentally while cooking food. She also disclosed to them that accused no.2 Babu sustained burns and he was admitted to the hospital for receiving burn injuries in an attempt to extinguish fire. If 3 days unexplained delay in recording dying declarations of Chandrakala and the facts elicited in cross-examination of father Ramji are taken into consideration, then we find that both the dying declarations Exhs. 39 and 41 could not cross the legal hurdles as the established circumstances throw doubt on the reliability and truthfulness of both the dying declarations.

17] With the assistance of the learned counsel for the appellants, we have perused the evidence of other material witnesses. We do not find that their evidence is sufficient to bring home the guilt of the accused beyond reasonable doubt. On the contrary, from the evidence of the witnesses, particularly, father of Chandrakala, it is clear that Chandrakala was treated well

throughout in her matrimonial house. Even according to prosecution, initially for two years there was no harassment or illtreatment to Chandrakala.

18] In this premise and in the totality of the facts and circumstances, we are of the considered view that both the dying declarations are suspicious and none of the two can be relied upon as true and voluntary statement of the deceased. If both the dying declarations are disbelieved in entirety, conclusion is inevitable that prosecution could not legally establish the guilt of accused and the accused ought to have been acquitted. We thus find conviction and sentence of the appellants unsustainable in law and accordingly pass the following order.

ORDER

- (i) Criminal Appeal No. 547 of 2012 is allowed.
- (ii) The judgment and order dated 9.8.2012 passed by the learned Additional Sessions Judge, Bhokar, in Sessions Case No.2 of 2012 convicting the appellants under Sections 302, 498-A r/w 34 of the Indian Penal Code is set aside and the appellants are held not guilty of the said offences and are acquitted of the said charge levelled against them.

(iii) The appellants be released forthwith if not required in any other crime.

(iv) Fine amount, if paid by the appellants, be refunded to them.

[INDIRA K. JAIN, J.]

[A.B.CHAUDHARI, J.]

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