

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.713 OF 1996

1. Sham Hariba Bhalerao, Age. 39 Yrs.
 2. Muktabai Hariba Bhalerao, Age 64 Yrs.,
 3. Hariba Nagnath Bhalerao, Age.66 Yrs.,
R/o.Habbuvasti, Degaon Road, Solapur.
At present in Yeroda Central Prison,
Yeroda, Pune.
- ... **Appellants**

V/s.

The State of Maharashtra ... **Respondent**

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Mrs.Indrayani M.Koparkar, Advocate for the Appellants.
Mr.Deepak Thakre, APP for the Respondent/State.

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CORAM : ABHAY M. THIPSAY J.

DATED : 1ST JULY 2015

ORAL JUDGMENT :

1. This appeal is directed against the Judgment and Order dated 29/11/1996 delivered by the learned Additional Sessions Judge, Solapur in Sessions Case No.148 of 1996 convicting the appellants, who were the accused in the said case, of offences punishable under Section 306 of the Indian Penal Code

(For short, “the IPC”) read with Section 34 of the IPC and Section 498A of the IPC read with Section 34 of the IPC. The learned Additional Sessions Judge sentenced the appellants to suffer Rigorous Imprisonment for five years and to pay fine of Rs.500/- each with respect to the offence punishable under Section 306 of the IPC read with Section 34 of the IPC, and to suffer Rigorous Imprisonment for three years and to pay fine of Rs.500/- each with respect to the offence punishable under Section 498A of the IPC read with Section 34 of the IPC. The learned Judge directed that the substantive sentences would run concurrently.

2. I have heard Mrs.Indrayani M.Koparkar the learned counsel for the appellants. I have heard Mr.Deepak Thakre the learned Additional Public Prosecutor for the respondent/State.

3. Apart from the appellants, one more person – Kishor Hariba Bhalerao – was also prosecuted in the said Sessions Court (accused no.4) but the learned Judge found him not guilty and acquitted him.

4. The appellant No.1 is the son of the appellant Nos.2 and 3, who are his mother and father, respectively. Lalita - wife of the appellant No.1 – died an unnatural death on account of burn injuries. After her death, her brother Shahuraj Kamble (PW1) lodged a report with the police, alleging that Lalita was being

treated with cruelty by the appellants and the fourth accused Kishor - younger brother of appellant No.1. It was also alleged that Lalita took the step of putting an end to her life on account of cruelty meted out by the appellants and fourth accused and that, the appellants and the accused no.4 had abetted the commission of suicide by Lalita.

5. The prosecution examined six witnesses during the trial. The first witness, as aforesaid, is Shahuraj Kamble - the First Informant. P.W.No.2 Nilabai is the neighbour of the appellants. P.W.No.3 Sopan Kamble is a panch in respect of spot panchanama. P.W.No.4 Krishnakumar Vhatkar - Head constable of police – is the one, who had recorded the report made by the Shahuraj (PW1) which report was treated as the First Information Report. P.W.No.5 Bhalchandra Rakhelkar is the Investigating Officer. P.W.No.6 Dr.Achyut Deshpande, who was attached to the Civil Hospital, Solapur, at the material time, is the one who had examined Lalita when she was brought to the hospital on 26/07/1996.

6. It must be mentioned here that the appellant No.1 i.e. the husband of Lalita has passed away during the pendency of the present appeal.

7. The learned counsel for the appellants contended that the order of conviction as recorded by the learned Judge is not in

accordance with law. According to her, there were two dying declarations of Lalita, one recorded by the Investigating Officer and the other recorded by a Special Executive Magistrate. It is pointed out to me that in both the dying declarations, Lalita attributed the catching of fire to an accident. It is submitted that in spite of these two dying declarations which were on record, the learned Judge disbelieved the version of Lalita and held her death to be suicidal.

8. It would be appropriate first to examine whether the death of Lalita was proved to be suicidal.

9. Mr.Thakre the learned Additional Public Prosecutor submitted that the reasoning by which the learned Judge has come to the conclusion that the death of Lalita was suicidal is proper and legal. He has taken me through the relevant part of the impugned judgment.

10. I find that apart from two dying declarations, there was one more declaration said to have been made by Lalita while narrating the history of the incident to Dr.Deshpande (PW6). It appears that this history was noted down by Dr.Deshpande in the case papers. According to Dr.Deshpande (PW6), the history given by Lalita was to the effect that 'she had committed suicide due to the harassment of mother-in-law.' The case papers in which the

history, given by Lalita, was noted, were tendered in the evidence and were marked as Exh.30. The dying declaration of Lalita recorded by the police was also tendered in evidence and marked as Exh.26A. The dying declaration of Lalita recorded by the Special Executive Magistrate was also tendered in evidence through the Investigating Officer and though it appears that no exhibit number was given to it, the learned Judge has taken the same into consideration.

11. The first point that needs determination is whether the learned Judge was right in ignoring the two dying declarations made by Lalita wherein she had stated that fire was caught by her accidentally and relying on her alleged statement made before Dr.Deshpande to the effect that 'she had committed suicide due to the harassment caused to her by her mother-in-law.'

12. The dying declaration at Exh.26A has been recorded by the Bhalchandra Rakhelkar (PW5). In his evidence, he has stated that he recorded the statement of Lalita in the presence of the Medical Officer. He categorically stated that the statement has been recorded as per the say of Lalita. The statement which was, as aforesaid, marked as Exh.26A shows that it bears an endorsement of Doctor certifying the patient, - i.e. Lalita, to be conscious. According to Rakhelkar, he had also sent a message to the Executive Magistrate for recording a dying declaration and

that a dying declaration of Lalita was recorded by the Special Executive Magistrate also. Though certain questions were put to this witness by the Court, no questions tending to ascertain the correctness of his evidence with respect to Lalita indeed having made the dying declaration before him were put to him. Also, that the dying declaration at Exh.26A does not contain an accurate record of what Lalita said, is nobody's case.

13. Though the Special Executive Magistrate was not examined, as aforesaid, the statement of Lalita recorded by him has been taken into consideration by the learned Judge – and rightly so. As a matter of fact, the prosecution ought to have examined the said Special Executive Magistrate, as the statement of Lalita was recorded in the course of investigation and it formed a part of prosecution case. It was not appropriate on the part of the prosecution to have withheld the evidence of such significant nature just because it was not favourable to the prosecution. In any case, since this dying declaration has been taken into consideration by the learned Judge its contents need to be seen. This dying declaration has been recorded in question and answer form. It shows that Lalita caught fire accidentally and that, thereafter, her sister-in-law and mother-in-law i.e. appellant No.2 extinguished the fire. The statement categorically shows that she was not set on fire by anyone and that, the fire was caught accidentally.

14 The learned Judge disbelieved the dying declaration made by Lalita to the Investigating Officer and Special Executive Magistrate primarily because he found that there was no evidence to show that there had been a bursting of the stove. According to him, since there was nothing to show that stove had burst, it was not possible to hold that Lalita had accidentally caught fire. *The learned Judge had resorted to elaborate reasoning and has come to the conclusion that the statement supposedly made by her to Dr.Deshpande was true and statements made by her to the Investigating Officer and Special Executive Magistrate were not true.* In coming to this conclusion, the learned Judge has also taken into consideration the evidence of Head constable Vhatkar (PW4), who stated that *he had received information to the effect that Lalita had caught fire by pouring kerosene on herself.* The learned Judge observed that this evidence was not challenged on behalf of the accused. However, this evidence appears to be plainly inadmissible, in as much as, the said statement by Lalita was not made before Vhatkar. What Vhatkar said is that 'he had received information on phone from police constable Waghmare' to that effect. Waghmare was not examined as a witness. It was, therefore, wrong on the part of the learned Judge to have relied upon such inadmissible evidence, which appears to have influenced his conclusion.

15 Even assuming that a statement was indeed made by Lalita before Dr.Deshpande that she had poured kerosene over her person and set herself on fire on account of harassment caused to her by her mother-in-law, it was not safe to rely on this version when a conflicting version of Lalita was also on record. In case of multiple dying declarations where the version is not uniform it would be ordinarily difficult to accept the version in a particular dying declaration and to reject the version reflected in the other. When inconsistent statements are made before the Court by a witness, there are means of judging as to which one of them - if at all - is true as the witness is available for cross-examination and further questioning. In case of dying declaration the declarant being not available for further questioning, the attempt to decide that a particular statement made by the deceased is true and the other is untrue, would be improper.

16 All said and done, it would be extremely hazardous to place reliance on the statement allegedly made by Lalita to Dr.Deshpande when it was contradictory to her version reflected in the aforesaid two dying declarations. As aforesaid, it is not the finding of the learned Judge that Lalita did not make these statements, but what he held is that these statements were not likely to be true.

17 In my opinion, it was, unsafe to hold that Lalita's death was suicidal. The degree of satisfaction that was required to come to such a conclusion was not available in the instant case, in view of the other conflicting evidence.

18 There, however, appears to be satisfactory evidence to show that Lalita was being treated with cruelty by the appellant, or - at any rate - by her husband – the appellant No.1 and her mother-in-law – appellant No.2. The evidence in that regard is primarily of the First Informant Shahuraj. According to him, Lalita used to tell him often about the ill-treatment at the hands of her husband appellant No.1 - Sham. Shahuraj has produced three letters sent to him by Lalita by post. These three letters were tendered in evidence, marked and exhibited. There was no cross-examination with respect to the claim that Lalita had written these letters and had sent them by post to her parents house, except giving a feeble suggestion that Lalita was unable to write. The learned Judge has placed reliance on these letters by observing that they contained the postal marks. I have examined these letters from the original record and proceedings, and indeed the letters contain postal marks. No challenge to the genuineness of the postal marks on these letters was given before the trial Court. The statements made in the letter, therefore, can be said to be statements made by Lalita before her death.

19 The learned counsel for the appellants submitted that though ill-treatment had been given to Lalita by the appellants for a period of more than 10 years, all these letters are written just within one and half month before Lalita's death. She, therefore, attempted to suggest that letters are suspicious and may not be relied upon. However, as already observed, there has been no challenge to the genuineness of the postal marks on these letters during the trial. As such, the contention advanced by the leaned counsel for the appellants that the genuineness of these letters is open to doubt, cannot be accepted.

20 Considering the evidence of Shahuraj and that that of Nilabai (PW2), together with the contents of the letters Exh.15,16 and 17, it can be concluded that the Lalita was indeed being treated with cruelty. However, it appears that the allegations of cruelty have been levelled only against the appellant No.1 and the appellant No.2. There is no evidence that the appellant No.3 treated Lalita with cruelty. It cannot be forgotten that cruelty as contemplated under Section 498A of the IPC is of a high degree and different from the concept of cruelty that is accepted in matrimonial proceedings. In my opinion, the conviction of the appellant No.3, that is recorded by the learned trial Judge with respect to the offence punishable under Section 498A of the IPC, was not proper or legal.

21 As a result of the aforesaid discussion, I conclude that the charge of an offence punishable under Section 306 of the IPC was not satisfactorily established and that, the appellants were entitled to be acquitted of the said offence. They ought to have been given the benefit of the doubt, which indeed arose out of the evidence that was adduced during the trial. However, that the appellant Nos.1 and 2 had treated Lalita with cruelty, was satisfactorily established. That the appellant No.3 had treated Lalita with cruelty, was not satisfactorily established.

22 In view of this, it follows that the appeal needs to be partly allowed by acquitting the appellants of the offence punishable under Section 306 of the IPC read with Section 34 of the IPC. The appellant no.3 should be acquitted of the offence punishable under Section 498A of the IPC read with Section 34 of the IPC also.

 Though the appellant No.1 had died during the pendency of the appeal, since the sentence imposed upon him is also of fine, the appeal even so far as the appellant no.1 is concerned, does not abate. Since, however, he is dead, I am not inclined to interfere with the sentence that was imposed with respect to the offence punishable under Section 498A of the IPC, as in any case, the appellant No.1 is not available for undergoing the sentence.

23 The question that remains is about the sentence that has been awarded to the appellant No.2 with respect to the offence punishable under Section 498A of the IPC read with Section 34 of the IPC. The learned trial Judge had imposed a sentence of Rigorous Imprisonment of three years for the said offence.

24 The learned counsel for the appellants submitted that appellant No.2 is more than 80 years of age. It is submitted that after the death of Lalita, the children of Lalita and the appellant No.1 had been residing with the appellants only and that after the death of the appellant No.1, the responsibility of those children has been only on the appellant Nos.2 and 3. It is submitted that the appellant No.2 has already undergone a sentence of more than one month and one week during the trial, and that it would be proper to reduce the sentence imposed upon him by the trial Court to the period already undergone.

25 The learned Additional Public Prosecutor, however, submitted that cruelty meted out to the Lalita by the appellant No. 2 appears to be of a high degree and that the conduct of the appellant No.2 as reflected from the evidence of the Nilabai does not deserve any leniency to be shown to her in the matter of sentence.

26 After taking into consideration all the relevant aspects of the matter including that a period of 20 years has passed since the date of the offence and that the age of the appellant No.2 is today more than 80 years, the fact of death of appellant No.1 and the fact that the children of deceased Lalita have been looked after by the appellant No.2, I am of the opinion that ends of justice would be met by reducing the sentence of imprisonment imposed upon the appellant no.2 to the period already undergone.

27 In the result, the appeal is partly allowed.

28 The conviction of the appellant nos.1 and 2 with respect to the offence punishable under Section 306 of the IPC read with Section 34 of the IPC is set aside. The appellants are acquitted of the said offence.

29 The conviction of appellant Nos.1 and 2 with respect to the offence punishable under Section 498A of the IPC read with Section 34 of the IPC is maintained.

30 No interference with the sentence awarded to the appellant No.1 is made as he is already dead and is not, any way, available for undergoing the sentence.

31 The substantive sentence imposed upon the appellant No.2 Muktabai with respect to the offence punishable under Section 498A of the IPC read with Section 34 of the IPC is reduced to the period already undergone.

32 The appellant No.3 Hariba Nagnath Bhalerao is acquitted also of the offence punishable under Section 498A of the IPC read with Section 34 of the IPC.

33 His bail bonds stand discharged.

34 The appeal is disposed of in the aforesaid terms.

(ABHAY M. THIPSAY J.)