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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 110 OF 2013

1. Maqsood Makbool Shaikh

Age 24 Years, Occ. : Service,
residing at Husenbi Chawl,
Sanglewadi, Kalyan, Dist. Thane.

2. Mrs. Jamila Makbool Shaikh

Age 51 Years, Occ. : Household,
residing at Husenbi Chawl,
Sanglewadi, Kalyan, Dist. Thane.

Appellants are lodged in Adharwadi
Central Jail, Kalyan.

.. Appellants
(Org. Accused Nos. 1 & 2)

Versus

The State of Maharashtra

.. Respondent

Appearances:-

<i>Mr. Mohammed Umar Kazi</i>	<i>Advocate for the Appellants</i>
<i>Mrs. A.S. Pai</i>	<i>APP for the State</i>

**CORAM : SMT. V.K. TAHILRAMANI &
SMT. I. K. JAIN, JJ**

DATE : JANUARY 5, 2015.

ORAL JUDGMENT [PER SMT. V.K. TAHILRAMANI, J.] :

1. This appeal is preferred by the appellants - original
accused Nos. 1 & 2 against the judgment and order dated

31.10.2012 passed by the learned Adhoc Additional Sessions Judge-1, Kalyan in Sessions Case No. 183 of 2009. By the said judgment and order, the learned Session Judge convicted and sentenced both the appellants as under:-

Convicted u/S.	Sentenced to
302 r/w 34 IPC	Life Imprisonment and fine of Rs. 5000/-, in default, Simple Imprisonment for 3 months.
498-A r/w 34 IPC	Rigorous imprisonment for 3 Years and fine of Rs. 2000/- in default Simple Imprisonment for 2 months.

The learned Sessions Judge directed that both the sentences of imprisonment shall run concurrently.

2. The prosecution case briefly stated, is as under:

- (a) Deceased Sabahin was the daughter of PW 1 Fakrunissa and the sister of PW 3 Shahid. Fakrunissa and Shahid were residing at Jalna. About 5 months prior to the incident, marriage of Sabahin took place with appellant No. 1 Maqsood. Appellant No. 2 Jamila is the mother of Maqsood.

After the marriage, Sabahin went to reside along with the appellant at Kalyan. Three months after the marriage, appellant No. 1 Maqsood started demanding Rs. 50,000/- for opening a factory. Sabahin refused to accede to the demand, hence, on 26.5.2009 at about 4 p.m., appellant No. 2 Jamila caught hold of hands of Sabahin and appellant No. 1 Maqsood poured kerosene on Sabahin and set her on fire. Sabahin was taken to Rukminibai Hospital. In the hospital, two dying declarations were recorded. The first dying declaration was recorded by PW 10 API Patil. The said dying declaration Exh. 22 was treated as FIR. Thereafter, PW 4 SEM Rekha Sonawane recorded the dying declaration of Sabahin. The said dying declaration is at Exh. 27. Sabahin was thereafter shifted to Civil Hospital where she died six days later. After completion of investigation, the charge sheet came to be filed. In due course, the

case was committed to the Court of Sessions.

3. Charge came to be framed against both the appellants as well as original accused No. 3 Rajiya and accused No. 4 Majbar. Rajiya was the aunt of appellant No. 1 Maqsood and Majbar was the brother of Maqsood. Charge came to be framed against all the accused under Section 498-A r/w 34 of IPC and under Sections 3 and 4 of the Dowry Prohibition Act. In addition, charge came to be framed against both the appellants under Sections 302 and 304-B of IPC. All the accused pleaded not guilty to the said charge and claimed to be tried. Their defence was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge acquitted accused Nos. 3 and 4 of the offences charged, however, the learned Sessions Judge convicted and sentenced both the appellants as stated in paragraph 1 above, hence, this appeal.

4. We have heard the learned Advocate for the appellant

and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that the prosecution has not proved beyond reasonable doubt that the appellants set Sabahin on fire and caused her death.

5. The conviction of the appellants is based on two dying declarations Exh. 22 and Exh. 27 and two oral dying declarations. The oral dying declarations were made to PW 1 Fakrunissa and PW 3 Shahid. PW 1 Fakrunissa was the mother and PW 3 Shahid was the brother of Sabahin. As far as two dying declarations Exh. 22 and Exh. 27 are concerned, dying declaration Exh. 22 was recorded by PW 10 API Patil and dying declaration Exh. 27 was recorded by PW 4 SEM Rekha Sonawane. On going through the two written dying declarations and two oral dying declarations, we find

that four different versions have come on record in relation to the incident. As far as PW 1 Fakrunissa who is the mother of Sabahin is concerned, she has stated that Sabahin was her daughter. She was married to Maqsood. After the marriage, Sabahin went to reside with the accused. After about three months of the marriage, appellant No. 1 Maqsood started demanding Rs. 50,000/- for opening a factory. Her daughter Sabahin had informed her about this. On the day of the incident, her sister in law Begum Jani telephoned her and informed that the accused had set Sabahin on fire after pouring kerosene on her and that she was admitted in the hospital at Thane. Hence, she came to Kalyan with her son Shahid. They went to the hospital and found that Sabahin had sustained serious burn injuries, however, she was conscious. Sabahin told her that her husband Maqsood had poured kerosene on her and set her on fire with a matchstick. This was because he wanted Sabahin to bring money from her parents. Thus, the version of Fakrunissa is that only the appellant Maqsood poured kerosene on Sabahin

and set her on fire on account of demand of Rs. 50,000/-. As far as the aspect of demand of money is concerned, Fakrunissa has admitted in her cross-examination that it is correct that after hearing about the incident, they were angry and they all decided at the house of Khaja that they should file complaint against the accused. Fakrunissa has further admitted that it is correct that after deciding to lodge the complaint, she stated that the accused had demanded money from her. It has also been elicited in cross-examination of Fakrunissa that there was no telephone in matrimonial house of Sabahin and Sabahin had never telephoned her after the marriage. Fakrunissa has further admitted that it is correct that she was not aware of what was happening in the matrimonial home of Sabahin. Thus, even as far as the aspect of demand of money is concerned, we find that the evidence on this aspect is not reliable.

6. As stated earlier, the version of PW 1 Fakrunissa who is the mother of Sabahin is that appellant No. 1 Maqsood

poured kerosene on Sabahin and set her on fire, however, the evidence of PW 3 Shahid is totally contrary to the evidence of PW 1 Fakrunissa. Both Fakrunissa and Shahid on learning that Sabahin sustained burn injuries went to the hospital and met Sabahin, however, Shahid has stated that Sabahin told him that accused No. 2 i.e Jamila had mixed something intoxicating in her food when she was having dinner. After having dinner, Sabahin became unconscious. Thereafter, the accused poured kerosene on her and set her on fire with matchstick. This was because the accused was demanding Rs. 50,000/- from her. Thus, entirely new story has been stated by Shahid. If as per this version, Sabahin had become unconscious, then it would not have been possible for her to know who poured kerosene on her and set her on fire.

7. As far as the offence under Section 498-A is concerned, Shahid has stated that after the marriage, Sabahin had once came to their house. When she came, she was happy but

suddenly she used to become sad. Whenever, she used to call accused No. 1 on phone, he used to cut the call. Accused No. 1 did not come to take her even after a month, hence, Shahid went to Kalyan and left Sabahin at her matrimonial home. Within 10-15 days, the accused left her at the house of PW 2 Khaja. After four days, Sabahin returned to the matrimonial house. Thereafter, the accused set her on fire. This entire piece of evidence including the fact that the accused was demanding Rs. 50,000/- from Sabahin has been proved to be an omission. Shahid has categorically admitted that Sabahin had never told anyone about demand of Rs. 50,000/- by the accused. Thus, as far as the offence under Section 498-A is concerned, no reliable evidence has been brought on record through the evidence of PW 3 Shahid or PW 1 Fakrunissa.

8. Thereafter, reliance was placed by the prosecution on dying declaration Exh. 27 recorded by PW 4 SEM Rekha Sonawane. As far as dying declaration Exh. 27 is concerned,

SEM Rekha Sonawane had not got Sabahin examined by a doctor and ascertained that Sabahin was conscious and in a fit condition to give a statement. It is not necessary that in each and every case, there has to be an endorsement of the doctor on the dying declaration that the patient is conscious and in a fit condition to give a dying declaration. However, it is necessary that the person who is recording the dying declaration has to at least ascertain himself / herself that the patient is conscious and in a condition to give a dying declaration. The evidence of PW 4 SEM Rekha Sonawane is totally silent on this aspect. The dying declaration recorded by PW 4 SEM Rekha Sonawane gives yet another version in relation to the incident. PW 4 SEM Rekha Sonawane put a question to Sabahin that she had sustained burn injuries and whether she had a complaint against anyone to which Sabahin replied that she had complaint against her husband Maqsood, her mother in law, her elder brother in law Mazhar and her husband's aunt Rajiya. Thus, in this dying declaration, Sabahin has implicated four persons. As far as

this dying declaration is concerned, it does not bear time, nor does it bear any endorsement of any Doctor. It also does not bear endorsement that it was read over to Sabahin and she admitted the same to be true. SEM Rekha Sonawane has admitted that she has not spoken to any doctor or nurse before recording the dying declaration. In the present case, it was necessary for SEM Rekha Sonawane to get it ascertained that the patient was in a fit condition to give a statement because the evidence of PW 1 Fakrunissa shows that Sabahin used to slip into unconsciousness on and off. Looking to these facts and looking to the three different versions stated by Sabahin to PW 1 Fakrunissa, PW 3 Shahid and PW 4 SEM Rekha Sonawane, we are not inclined to place any reliance on these dying declarations.

9. Heavy reliance was placed by the prosecution on the dying declaration Exh. 22 recorded by PW 10 API Patil. He has stated that he called the SEO and went to the hospital with him, however, SEM Rekha Sonawane states that PSI

Waghmare telephoned her that one lady had sustained burn injuries and was admitted in Rukminibai Hospital and her statement was to be recorded; accordingly she reached the hospital and thereafter, recorded the dying declaration. However, API Patil states that he called the SEO and went to the hospital with "him". In the present case, SEM is a lady i.e. Rekha Sonawane. Thereafter, API Patil has stated that he met the doctor and asked the doctor whether the patient was in a fit condition to make a statement and the doctor answered in the affirmative. API Patil then recorded the dying declaration of Sabahin in presence of SEO. However, though SEO Rekha Sonawane was present when the dying declaration was being recorded and in fact, she had reached the hospital and was taken to the patient by API Pail, Rekha Sonawane makes no mention at all about the doctor being asked whether the patient was in a fit condition to give a statement and the doctor answering in the affirmative. In fact Rekha Sonawane has specifically stated that there was no talk with any doctor or nurse before recording the

statement / dying declaration. In the dying declaration recorded by API Patil, Sabahin has stated that her mother in law caught hold of her and her husband poured kerosene on her and set her on fire. This version is totally contrary to the earlier three dying declarations. Moreover, it is to be noted that PW 1 Fakrunissa has stated that the police recorded the dying declaration of Sabahin in her presence. This totally renders the dying declaration Exh. 22 recorded by PW 10 API Patil unreliable. This is so because when the dying declaration is recorded, only the person recording the dying declaration should be present with the patient and no relatives of the patient should be present when the dying declaration is recorded. Presence of relatives at the time of recording of dying declaration renders the dying declaration untrustworthy and unreliable. On going through the record, it is seen that PW 1 Fakrunissa, the mother of Sabahin has stated that only accused No. 1 Maqsood poured kerosene on Sabahin and set her on fire. PW 3 Shahid who is the brother of Sabahin has stated that accused No. 2 Jamila had mixed

something intoxicating in the food of Sabahin when she was having dinner. After having dinner, Sabahin became unconscious. Thereafter, the accused poured kerosene on her and set her on fire with matchstick. The third version which has come on record is that four persons were involved in setting Sabahin on fire i.e her husband Maqsood, her mother in law, her elder brother in law Mazhar and her husband's aunt Rajiya and the forth version which is given to PW 10 API Patil is that accused No. 2 Jamila caught hold of Sabahin and accused No. 1 Maqsood poured kerosene on her and set her on fire. Looking to the fact that different versions have come on record, we find it difficult to rely on any of the dying declarations.

10. On going through the evidence, we find that the prosecution has not proved beyond reasonable doubt that the appellant committed the murder of Sabahin by pouring kerosene on her and setting her on fire. There is also no reliable evidence to prove the offence under Section 498-A of

IPC. Thus, in view of above, the following order is passed:-

ORDER

- i. The appeal is allowed.
- ii. The conviction and sentence of the appellants under Sections 302 and 498-A r/w 34 of IPC imposed by the learned Ad-hoc Additional Sessions Judge -1, Kalyan vide Judgment & Order dated 31.10.2012 in Sessions Case No. 183 of 2009 is hereby set aside.
- iii. The appellants be set at liberty if not required in any other case.

[SMT. I. K. JAIN, J]

[SMT. V.K. TAHILRAMANI, J]

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