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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.159 OF 2009
WITH
CRIMINAL APPLICATION NO.763 OF 2015

Dr. Ajit Vishwanath Borade

Age: 30 years, resident of Shivkripa
Bungalow, Omkar Nagar,
Peth Road, Panchavati,
Nashik.
(Presently lodged in Nashik Central Jail)

..Appellant
(Orig. Accused)

Versus

The State of Maharashtra

Through the P.I., Panchavati
Police Station, Nashik.

..Respondent.
(Original Complainant).

Mr. Uday P. Warunjikar for Appellant.
Mr. H.J. Dedhia, APP for Respondent-State.

**CORAM: Smt. V.K. Tahilramani, Acting C.J. &
A.S. Gadkari, J.**

Reserved On: 4th September 2015
Pronounced On: 28th September 2015.

JUDGMENT (Per A.S. Gadkari, J.):

1 The appellant, the original accused no.1, has questioned the correctness of the judgment and order dated 16th January 2009 passed by

the Adhoc Additional Sessions Judge-1, Nashik in Sessions Case No.205 of 2007 thereby convicting him under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life. The appellant has also been sentenced to pay fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for one year.

By the impugned judgment and order dated 16th January 2009, the Trial Court was pleased to acquit the appellant under Sections 498(A), 120-B read with Section 34 of Indian Penal Code. The original accused no.2 Smt. Sangita P. Suryavanshi has been acquitted from all the charges framed against her.

2 The facts which can be enumerated from the record and are necessary to decide the present appeal can briefly be stated thus:

(i) The deceased Smt. Usha alias Vrushali was the wife of the appellant. The deceased Smt. Usha was a nurse by profession and was serving at Namco Cancer Hospital at Nashik. The appellant was also serving as a Medical Officer in the said hospital. The appellant was also having his own clinic at Nashik. The deceased Smt. Usha and the appellant were from different castes. As the appellant and the deceased Smt. Usha were working in the same establishment, intimacy developed between them and they decided to get married. The family members of the deceased Smt.

Usha were against the said marriage. However, the appellant and Smt. Usha married on 24.5.2005. Out of the said wedlock, Smt. Usha and the appellant had a son, who died subsequently. The original accused no.2 Smt. Sangita P. Suryavanshi was also nurse by profession and was serving in the hospital where the appellant was serving. The appellant and the original accused no.2 Smt. Sangita had a love affair and they exchanged love letters between themselves. The original accused no.2 Smt. Sangita had also maintained a diary in her own hand-writing and had written letters to the appellant.

(ii) When Smt. Usha learnt about the love affair between the appellant and the original accused no.2 Smt. Sangita, she questioned about the same and directed the appellant to keep distance from the original accused no.2 Smt. Sangita. A quarrel took place between the appellant and deceased Smt. Usha on that count. The deceased Smt. Usha made complaint to the police in that behalf. Prior to her death, Smt. Usha had been to her parents' house at Vaijapur, District-Aurangabad where her sisters had gathered at the house of brother of Smt. Usha. On 30.5.2007 when Smt. Usha was at Vaijapur, she received a phone call from the appellant and accordingly she returned to Nashik from Vaijapur. After Smt. Usha reached Nashik, quarrel took place between Smt. Usha and the

appellant on account of relations between the appellant and the original accused no.2 Smt. Sangita.

(iii) It is the further case of the prosecution that on 1.6.2007 at about 10.30 p.m. Smt. Usha sustained burn injuries in the house of the appellant and the said injuries were caused to her by the appellant by pouring kerosene on her and igniting the fire. Smt. Usha sustained 100% burn injuries. She was immediately shifted to the Civil Hospital at Nashik. A woman Police Sub-Inspector Smt. Vandana Shirgire of Panchavati police station recorded her dying declaration. Smt. Usha died in the Civil Hospital at Nashik on 2.6.2007 between 2.00 a.m. to 2.15 a.m. On the basis of the said dying declaration recorded by P.S.I. Smt. Vandana Shirgire, the first information report came to be registered bearing no.207 of 2007 dated 2.6.2007 under Sections 302, 307 and 498(A) of the Indian Penal Code. PW-5 Dr. Arun Pawar conducted postmortem on the dead body of Smt. Usha and gave his opinion as to the cause of probable death as “shock due to 100% superficial to deep burn”.

(iv) PW-12 Shri Nandkishor Kulkarni, Police Inspector, took over the investigation of the said crime. He recorded the statements of the witnesses, conducted spot panchanama i.e. scene of offence panchanama which is at Exhibit 46. He thereafter arrested the appellant, seized clothes

of the appellant. He seized some incriminating articles from the clinic of the appellant by effecting panchanama which is at Exhibit 47. He thereafter seized other incriminating articles such as chits written by the appellant and the original accused no.2 Smt. Sangita. During the course of investigation he made enquiry with the persons from the adjoining houses of the appellant. He also recorded statements of the persons from the fire brigade, who had extinguished the fire which had taken place at the Bungalow of the appellant on the fateful night. He referred clothes of the appellant to the Chemical Analyzer. During the course of investigation, it was further revealed to him that when Smt. Usha died, she was pregnant of 28 weeks. After completion of the investigation, PW-12 Police Inspector Shri Nandkishor Kulkarni submitted chargesheet against the appellant in the Court of Judicial Magistrate First Class, Nashik. In due course of time the case was committed to the Court of Sessions as the offence under Section 302 of IPC was exclusively triable by the said Court.

(v) After committal of the case, the Trial Court framed charge below Exhibit-7. The said charge was read over and explained to the appellant. The appellant denied the charge and claimed to be tried. The defence of the appellant is that, he has been falsely implicated in the present case. That there was opposition to the marriage of the appellant

with deceased Smt. Usha from the family members of Smt. Usha and therefore he has been falsely implicated in the case. He has further stated that at the time of incident, deceased Smt. Usha was collecting the clothes and all of a sudden there was short circuit and therefore the incident of burning took place.

(vi) The learned Trial Court after recording the evidence of the witnesses and after hearing the parties to the said case was pleased to convict the appellant by the impugned judgment and order dated 16th January 2009 as stated hereinabove.

3 Heard Mr. Uday Warunjikar, the learned Counsel appearing for the appellant and Mr. H.J. Dedhia, the learned APP for the State and with their assistance we have perused the entire record pertaining to the present case.

4 The learned Counsel for the appellant submitted that a minute perusal of the entire evidence on record shows that there is no material to prove the charge under Section 302 of the Indian Penal Code. He submitted that except Investigating Officer and PW-8 panch to the seizure of articles, no independent witness either has supported the case of the prosecution or has been examined by the prosecution in support of its contention. He submitted that that as a matter of fact the appellant suffered

17% burn injuries while trying to save the deceased Smt. Usha. That the Investigating Officer has suppressed the said fact while filing the chargesheet. He has further submitted that the Chemical Analyzer's report of the clothes of the appellant has not been brought on record by the Investigating Officer. He submitted that as a matter of fact while saving the deceased Smt. Usha the clothes of the appellant were also burned and the said fact can be discerned from the panchanama which is at Exhibit 43. He lastly contended that after taking into consideration the evidence of PW-4 i.e. officer from the fire brigade who extinguished the fire from the bungalow, it can be clearly seen that it is a case of accident and not murder. He submitted that the Investigating Officer has not investigated the said aspect of short-circuit during the course of investigation and therefore charge of murder is unsustainable. He therefore urged before us that the present appeal may be allowed and the appellant may be acquitted from all the charges levelled against him.

Per contra, the learned APP for the State submitted that at the time of recording of scene of offence panchanama, a burnt can of kerosene was found in the bedroom. He further contended that on the fateful night, the appellant and the deceased Smt. Usha only were present in the said house and in view of Section 106 of Evidence Act, it was in the exclusive

knowledge of the appellant about the incident which took place on the fateful night. He further submitted that though there are certain lacunas in the investigation of the police officer, the benefit of faulty investigation should not be given to the appellant. He lastly submitted that the conviction and sentence awarded by the Trial Court may be sustained by dismissing the present appeal.

5 In order to effectively deal with the submissions advanced by the learned Counsel for the appellant and the learned APP for the State, it would be useful to advert to, in brief, the evidence of the prosecution witnesses. The prosecution in support of its case examined in all 13 witnesses.

6 PW-1 is Shri Bhushan B. Ahire, the brother of deceased Smt. Usha. PW-1 has deposed that his sister Smt. Usha married with appellant on 24.5.2005 at Nashik. Prior to marriage, Smt. Usha was working as nurse at Namco Cancer Hospital at Nashik. The appellant and deceased Smt. Usha were in love of each other and thereafter they married. That after marriage his sister and the appellant were residing at Shivkripa Bungalow. That the appellant started his own clinic by name Anjali Clinic at Phule Nagar, Peth Road, Nashik. He has further deposed that after the marriage his sister and appellant were happy. His sister was working at Prasana

Child hospital. That the appellant used to drop his sister to Prasana Child hospital and take her back. That Smt. Sangita was also working in the Prasana Child Hospital prior to his sister. The appellant used to visit the Prasana Child hospital along with his sister and therefore there was introduction of the appellant and original accused no.2 Smt. Sangita. They developed intimacy. The appellant wanted to marry with the Smt. Sangita and therefore he requested the deceased Smt. Usha to give her consent for it. The appellant used to persuade Smt. Usha for giving consent for the marriage of the appellant with Smt. Sangita, to which deceased Smt. Usha did not agree. That the appellant therefore ill-treated his sister mentally and physically. Smt. Usha after going to her parental house informed the said fact to PW-1. On 27.5.2007 the appellant had been to his house at Vaijapur. On 30.5.2007 the deceased Smt. Usha received a phone call from the appellant who called her at Nashik. Accordingly, Smt. Usha went to Nashik from Vaijapur. He has further deposed that at that time his sister Usha was in depression. On 2.6.2007 Vaijapur police informed him that his sister Smt. Usha died due to burn injuries at Civil Hospital, Nashik. When the police made enquiry with PW-1, he handed over some chits to police, which were written by the original accused no.2 Smt. Sangita to the appellant.

In the cross-examination, this witness has admitted that due to love affair between his sister and the appellant they married each other. He has admitted that the said marriage was solemnized as per the wish of Smt.Usha. That Usha was obstinate. That the appellant was famous in the area. He has admitted that even after the death of the first child of deceased Smt. Usha, the appellant and his sister were leading happy married life at Nashik. That Smt. Usha was pregnant from the appellant for the second time. He has further admitted that the husband of his elder sister is in police department. His brother-in-law who was serving in police was with them at that relevant time.

7 PW-2 Smt. Sarita N. Nikam, and PW-3 Smt. Satyabhama B. Ahire are the sister and mother of Smt. Usha respectively. These two witnesses in their testimony have also stated about the same fact as has been narrated by the PW-1 Shri Bhushan B. Ahire, the brother of deceased Smt. Usha. PW-2 Smt. Sarita N. Nikam in her cross-examination has admitted that the deceased and appellant were leading happy married life at Nashik. She has further admitted that her eldest sister Asha Gaikwad has married to Shri Sunil Gaikwad and her husband was in police department. In the cross-examination of PW-3 i.e. the mother of deceased no material has been elicited which would be useful to the appellant.

8 PW-4 Shri Jagannath L. Lahamge was then attached to the fire brigade services at Nashik. PW-4 has deposed that on 1.6.2007 at about 10.55 p.m. he received phone in his office about a fire at Omkar Nagar. He went there with fire brigade. Bedroom was set on fire. He extinguished the fire. He did not remember the name of the bungalow. One lady by name Smt. Usha Borade had also caught fire. The fire brigade personnel removed her from fire and the lady was referred to the hospital immediately. After extinguishing fire, they left the place.

In the cross-examination this witness has admitted that the entire bungalow had caught fire. He has further admitted that appellant and Smt. Usha Borade were burnt. Both were referred to the hospital. He had called the ambulance. That he was on the spot upto 1.15 to 1.30 a.m on 2.6.2007. He has further admitted that the police came there while they were extinguishing the fire. That the police were on the spot along with lady police sub inspector.

9 PW-6 is Shri Sanjay Kulkarni a neighbour of the appellant. This witness did not support the prosecution case and therefore was declared hostile at the request of APP. In the cross-examination of this witness by the learned APP, no material which is useful to the prosecution has been

brought on record.

10 PW-7 Shri Rajendra Solanki is the tailor from whom the original accused no.2 Smt. Sangita used to stitch the clothes. PW-9 is Mr. Santosh V. Ghodke, a goldsmith from whom it is alleged that the appellant had purchased foot rings. PW-11 is Shri Suresh D. Potdar, a photographer by profession. This witness has taken photographs of the scene of offence. PW-13 is Police Head Constable Shri Sakharam N. Shelke who has recorded the NC complaint of Smt. Usha. It appears to us that the evidence of PW-7, PW-9, PW-11 and PW-13 is redundant and it leads the prosecution nowhere from the point of deciding the present appeal as the alleged motive behind the crime i.e. love affair of the appellant with Smt. Sangita has been deposed by PW Nos.1, 2 and 3 in their testimony.

11 PW-8 Smt. Rukminibai D. Kardak is a panch witness. This witness is a panch to the articles seized in the hospital i.e. one Mangalsutra, pair of foot rings, blouse, saree and other remaining clothes which is at Exhibit 38. The panchanama of seizure of articles belonging to the appellant was also proved by this witness which is at Exhibit 39. PW-8 is also the panch-witness to the panchanama which is at Exhibit 40 under which the object nos.21 to 24 i.e. chits written by the appellant and the original accused no.2 have been seized by the police.

In the cross-examination of this witness, she had admitted that the articles shown to her in the Court are easily available in the market. She admitted that the premises where the appellant was running his clinic was owned by her relative.

12 PW-10 is Shri Nivrutti P. Aher the panch witness to the seizure of the clothes of the appellant under a panchanama at Exhibit-47. This witness did not support the prosecution and was declared as hostile. The said Exhibit 47 has been proved by PW-12- Police Inspector Shri Nandkishor Kulkarni. It is to be noted here that in the said panchanama of seizure of clothes of the appellant the description of shirt of the appellant has been mentioned. It has been mentioned that the front side of the shirt of the appellant was burnt and was reduced into a cloth ball.

In the cross-examination of this witness at the instance of the learned APP, no material has been brought on record which would help the prosecution.

13 PW-12 is Police Inspector Shri Nandkishor M. Kulkarni. He was then attached to Panchavati Police station on 2.6.2007. PW-12 has deposed that he took over the investigation of C.R. No.207 of 2007 of Panchavati police station on 2.6.2007. That PSI Smt. Shirgire had recorded the dying declaration of Smt. Usha Ajit Borade. He then went to the scene of offence

and prepared a detailed panchanama which is at Exhibit 46. He seized the articles which were found on the scene of offence including one can which was having smell of kerosene. He has further deposed that two women from Women Organisation came from Vaijapur. Thereafter he arrested the appellant. He seized the clothes of the appellant under a panchanama which is at Exhibit 47. In his examination-in-chief this witness has stated about various steps adopted by him during the course of investigation. That it was revealed during the investigation that when Smt. Usha died she was pregnant of 28 weeks. That after completion of investigation, he submitted chargesheet in the Court of Judicial Magistrate First Class, Nashik.

In the cross-examination this witness has admitted that the appellant was admitted in the Civil Hospital as he had received burn injuries in the said incident. The face and hands of the appellant were burnt. The appellant had sustained 17% burn injuries. PW-12 has admitted that he did not prepare panchanama of the condition of the appellant while arresting him. It is to be noted here that though this witness has denied the suggestion that he did not prepare the arrest panchanama purposefully, this witness has not produced the said arrest panchanama of the appellant on record. This witness has admitted that house of the appellant was burnt. He has admitted that the fire was extinguished by the fire brigade persons.

That he has not mentioned in the panchanama about the fact from where he took the key for opening the house where the incident took place. That that whatever was needed for him he has seized from the scene of offence. That the muddemal articles were in police station from 2.6.2007 till 16.7.2007. He has further admitted that he did not record the statement of any person who allegedly brought the kerosene at the house of the appellant and deceased. That the articles seized and produced in the Court are easily available in the market. That he did not record the statement of the owner of the house where the incident took place. That it is not mentioned in the panchanama by whom the clinic was open. This witness has further admitted that he did not ascertain from the electrician the reason of the fire in the said house. This witness has proved the Exhibit 46 which is scene of offence panchanama along with other documents. This witness has further admitted that there was a kitchen platform having gas stove and gas cylinder. That he did not check the gas cylinder.

14 Thus after taking into consideration the entire evidence available on record, it appears to us that PW Nos.1,2 and 3 i.e. brother, sister and mother of the deceased Smt. Usha respectively have stated about the affair of the appellant with the original accused no.2 Smt. Sangita. The prosecution has come up with the case that as the appellant was having love

affair with Smt. Sangita and he was insisting the deceased Smt. Usha for giving consent for his marriage with Smt. Sangita, the appellant caused death of Smt. Usha by burning her with kerosene. This is the motive alleged by the prosecution behind the crime.

The evidence of PW Nos.4,5 and 12 is important while deciding the present appeal. PW-4 the person from fire brigade department has admitted that the entire bungalow had caught fire. That the appellant and Smt. Usha were burnt and both were referred to the hospital. The alleged dying declaration recorded by the woman P.S.I. Smt. Vandana Shirgire on the basis of which the first information report has been registered by her on 2.6.2007 in the Civil Hospital at Nashik has not been examined by the prosecution. It is further to be noted here that PW-5 Dr. Arun Pawar, the Medical Officer, who alleged to have put his endorsement on the said dying declaration has also not been shown the said dying declaration with a view to prove it during the course of the trial. No question is put to PW-5 Dr. Arun Pawar with regard to the said dying declaration recorded by P.S.I. Smt. Vandana Shirgire and as such the said alleged dying declaration has not been proved at all by the prosecution and therefore we have no other option but to keep it out from consideration while analyzing the evidence on record.

15 It is further to be noted here that the alleged dying declaration recorded by woman P.S.I. Smt. Vandana Shirgire has not been proved either by PW-12 Police Inspector Shri Nandkishor Kulkarni or by PW-5 Dr. Arun Pawar who alleged to have endorsed the said dying declaration after its recording. PW-5 Dr. Arun Pawar who treated and subsequently conducted the postmortem of Smt. Usha, in his evidence nowhere mentioned about the alleged dying declaration recorded by a woman Police Sub-inspector Smt. Vandana Shirgire. PW-12 the Police Officer who investigated the present crime has admitted that in the cross-examination that the appellant was admitted in the Civil Hospital as he had received burn injuries in the said incident. The face and hands of the appellant were burnt. The appellant had sustained 17% burn injuries. PW-12 has admitted that he did not prepare panchanama of the condition of the appellant while arresting him. It is to be noted here that though this witness has denied the suggestion that he did not prepare the arrest panchanama purposefully, this witness has not produced the said arrest panchanama of the appellant on record. This witness has further admitted that the house of the appellant had burnt. That the fire was extinguished by the fire brigade persons. That the muddemal articles were in police station from 2.6.2007 till 16.7.2007. He has further admitted that he did not record the statement of any person

who brought the kerosene at the house of the appellant and deceased. That the articles seized and produced in the Court are easily available in the market. This witness has further admitted that he did not ascertain from the electrician the reason of the fire in the said house. This witness has proved the Exhibit 46 which is scene of offence panchanama along with other documents. This witness has further admitted that there was a kitchen platform having gas stove and gas cylinder. That he did not check the gas cylinder.

16 At this stage it is necessary to consider about the scene of offence panchanama/spot panchanama which is at Exhibit 46. The scene of offence panchanama discloses that the electric meter in the said bungalow was switched off and was turned black because of the fire. That the electric wiring in the living room, staircase and bedroom was melted, totally blackened and was hanging at the spot. That most of the articles in the house were turned black because of the fire and heat at the said place. The articles from the kitchen were also burnt because of the heat from the fire. It has also been mentioned that the household articles were found to be totally charred at various places in the house. The four walls of the kitchen were blackened. It is further mentioned in the said panchanama that living room and bedroom including articles therein were found to be totally burnt

and turned black because of the smoke.

17 As stated above, PW-12 did not ascertain the fact from the electrician or expert in the field that whether there was possibility of fire in the bungalow because of short-circuit or not. The Investigating Officer has also suppressed from the Court the vital document such as arrest panchanama of the appellant and the medical certificate of the appellant. However, the Investigating Officer has also admitted that the appellant had also suffered 17% burn injuries on his face and arms. This creates doubt about the incident in the mind of this Court. Though, a plastic can having smell of kerosene was found at the scene of offence, the Investigating Officer has failed to bring evidence on record pertaining to its purchase and/or its existence on the spot. The Investigating Officer has nowhere mentioned that the articles which were seized by him were sealed at the spot. It has further come on record that the articles were lying in the police station upto 16.7.2007 and therefore the possibility of tampering with the said articles cannot ruled out.

18 After taking into consideration the various aspects of the evidence available on record, we are of the opinion that the prosecution has failed to prove beyond reasonable doubt that the fire was ignited by the appellant. The appellant since beginning has taken a specific defence that

his house caught fire because of short-circuit which took place at about 10.30 p.m. on the day of incident. The evidence of the close relatives of the deceased Smt. Usha discloses that the deceased and the appellant were leading a happy married life and therefore the motive as suggested by prosecution gets diluted. In such circumstances, we find that the possibility of short-circuit cannot be ruled out in the present case. The Investigating Officer has utterly failed to examine this vital aspect in the matter. We are therefore of the considered opinion that the appellant is entitled for benefit of doubt.

19 In view of the aforesaid discussion, we hereby give the benefit of doubt to the appellant. We therefore quash and set aside the impugned judgment and order dated 16th January 2009 in SC No.205 of 2007. The appellant is acquitted from all the charges framed against him. The fine, if any, paid by the appellant be refunded to him. The appellant be set at liberty, if not required in any other case.

20 In view of the above, Criminal Application No.763 of 2015 does not survive and the same is disposed of.

(A.S. GADKARI,J.)

(ACTING CHIEF JUSTICE)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment.**