

JPP

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

CRIMINAL APPEAL NO. 546 OF 2007

Anil Alias Manick Ramchandra Sathe,
Age : 27 years, Driver,
R/a. Gosavi Vasti, Hadapsar, Pune.
(At present lodged in Yerawda Central
Jail, Pune).

... Appellant.
(Orig.Accused)

V/s.

The State of Maharashtra
(At the instance of Sr. Police Inspector,
Hadapsar Police Station, Pune).

... Respondent.

Mr. Kuldeep S. Patil for the Appellant.
Smt. V.R. Bhosale, APP for the State.

**CORAM : P.V. HARDAS &
A.S. GADKARI, JJ.**

JULY 2, 2015.

ORAL JUDGMENT (PER P.V. HARDAS,J.) :-

The Appellant, who stands convicted for an offence punishable under Section 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs.500/- in default of which to undergo further imprisonment for one

month, by the Additional Sessions Judge, Pune, by Judgment dated 27.4.2007, in Sessions Case No. 227 of 2004, by this Appeal challenges his conviction and sentence.

2. Facts in brief as are necessary for the decision of this Appeal may be stated thus.

PW-8 PSI Sangita Yadav, who was attached to Hadapsar Police Station and was in-charge of the Mundhawa Police Chowky was present in the Police Chowky on 20.4.2014. On that day she received a telephone call about admission of injured Geeta with burns in the hospital. She accordingly proceeded to the Sassoon Hospital and recorded her statement. Injured Geeta had been admitted in Ward No.25. PW-8 PSI Yadav requested the Medical Officer to ascertain if injured Geeta was in a fit condition to give her statement. On the Medical Officer certifying that Geeta is in a fit condition to give her statement, PW-8 PSI Yadav recorded the statement of injured Geeta at Exhibit 40. She thereafter proceeded to the Hadapsar Police Station and lodged a report at Exhibit 41. On 21.4.2004, PW-8 PSI Yadav arrested the Appellant and noticed

that the Appellant had sustained burn injury on his right elbow and the Appellant was arrested under arrest panchnama at Exhibit 37. The Appellant was sent for medical examination under requisition at Exhibit 42. Thereafter, the scene of the incident panchnama was drawn at Exhibit 38. From the scene of the incident, a kerosene can, burnt match stick, match box, burnt pieces of saree, pair of chappals, white handkerchief and other half burnt clothes were seized. Statements of witnesses were recorded. The statement of PW-5 Neelima, daughter of deceased Geeta was recorded. Injured Geeta had succumbed to her injuries and therefore, Section 302 of the Indian Penal Code was added. The inquest panchnama of injured Geeta was drawn. The seized property was referred to the Chemical Analyzer under requisition at Exhibit 44. Further to the completion of investigation, a charge-sheet against the Appellant was filed.

3. Postmortem on the dead body of deceased Geeta was performed by PW-2 Dr. Shrikant Chandekar. PW-2 Dr. Chandekar noticed that Geeta had sustained 67% superficial to deep burns. According to PW-2 Dr. Chandekar, Geeta had

died due to shock due to burns. The postmortem report is at Exhibit 25.

4. On the case being committed to Court of Sessions, Trial Court vide Exhibit 15 framed charge against the Appellant for offence punishable under Section 302 of the Indian Penal Code. The Appellant vide Exhibit 3 denied his guilt and claimed to be tried. Prosecution in support of its case examined 8 witnesses. The defence of the Appellant was of denial. The prosecution principally relied upon the dying declaration of Geeta recorded by PW-8 PSI Yadav as well as the eye-witness account of PW-5 Neelima. The Trial Court accepted the evidence and convicted and sentenced the Appellant as aforestated.

5. We have heard Mr. Kuldeep Patil, learned Counsel for the Appellant and the learned APP and in order to effectively deal with the submissions advanced before us, it would be useful to refer to the evidence of the prosecution witnesses.

6. PW-8 PSI Yadav, deposes about recording of the dying declaration of injured Geeta at Exhibit 40. However, PW-8 PSI Yadav makes no reference to reading over of the dying declaration to Geeta and Geeta admitting the contents to have been correctly recorded. In the absence of such evidence, in our opinion, the dying declaration at Exhibit 40 will have to be left out of consideration. A reference in this behalf may usefully be made to the Judgment of the Division Bench of this Court in **Abdul Riyaz Abdul Rashid v/s. State of Maharashtra [(2012) All MR (Cri.) 2188]** and the Judgment of the **Supreme Court in Shaikh Bakshu and Ors. v/s. State of Maharashtra [2008 (1) SCC (Cri.) 679]**.

Since there is no evidence that the dying declaration had been read over to injured Geeta and Geeta had admitted the contents to have been correctly recorded, the dying declaration will have to be left out of consideration. Even the dying declaration at Exhibit 40 does not contain any endorsement that the dying declaration had been read over to injured Geeta.

7. The other circumstance against the Appellant is the evidence of PW-5 Neelima. PW-5 Neelima, a child witness and the daughter of deceased Geeta deposes that she was residing at Keshavnagar alongwith her parents i.e. deceased Geeta and PW-6 Ravi, her father. According to her, on the day of the incident, she was present alongwith her mother deceased Geeta, mother of one Chintu and her brother Anil. At the time of the incident, her mother was cleaning utensils. The Appellant came to the house in an inebriated condition and started quarreling with deceased Geeta. At that time, mother of Chintu i.e. PW-4 Vaishali scolded the Appellant. The Appellant however abused deceased Geeta and pushed Vaishali and brother of Neelima out of the house. The Appellant then assaulted deceased Geeta and poured kerosene and set Geeta ablaze. After setting Geeta ablaze, the Appellant fled from the scene of the incident. Injured Geeta rushed out of the house and raised an alarm. The other neighbours extinguished the fire and Geeta was taken to the Sassoon Hospital.

8. In cross-examination PW-5 Neelima was confronted with portion marked 'A' from her statement wherein she had stated that she alongwith others had been pushed out of the house by the Appellant. Neelima had denied to have stated so. Prosecution has examined PW-1 Arjun, a neighbour of deceased Geeta who had initially noticed smoke and thereafter, had noticed deceased Geeta rushing out of the house engulfed with flames. He has deposed that the other neighbours had extinguished the fire. Evidence of PW-6 Ravi, husband of deceased Geeta and father of PW-5 Neelima is to the effect that he was running a hand-cart and was informed about the incident and thereafter, had rushed to home. He has admitted that the Appellant used to frequently visit the house and meet deceased Geeta.

9. Since in our opinion the dying declaration will have to be left out of consideration, the conviction of the Appellant rests on the sole testimony of PW-5 Neelima, who is a child witness. A conviction of an accused can be based on the

testimony of a solitary eye-witness provided the testimony of the solitary witness is of sterling quality. In the present case, PW-5 Neelima is a child witness and is therefore susceptible to tutoring. The statement of PW-5 Neelima was recorded on the next day, The dying declaration at Exhibit 40 does not indicate the presence of PW-5 Neelima in the house. Even the evidence of PW-1 Arjun or the evidence of PW-6 Ravi does not refer to the presence of PW-5 Arjun in the house. PW-4 Vaishali though is alleged to be present at the scene of the incident did not support the prosecution and was declared hostile. We, thus, find that the evidence of PW-5 Neelima would not fall in the category of a witness who is found to be wholly reliable. A reference at this juncture may usefully be made to the Judgment of the Supreme Court in **Vadivelu Thevar v/s. The State of Madras [AIR (1957) SC 614]**, where the Supreme Court has held that the evidence of the witness can be classified into three categories : (1) wholly reliable; (2) wholly unreliable; and (3) neither wholly reliable nor wholly unreliable. The Supreme Court has further held that in respect of the witness failing in the first category, no corroboration was necessary. Corroboration would be

necessary in respect of a witness who is found to be neither wholly reliable nor wholly unreliable. In the present case, since there is no corroboration and there is no evidence to establish the presence of PW-5 Neelima at the scene of the incident, in our opinion, no reliance whatsoever can be placed on the testimony of PW-5 Neelima and therefore, her testimony can be classified as that of a witness who is wholly unreliable. The evidence of PW-5 Neelima certainly does not inspire the confidence of the Court for its acceptance.

10. The evidence of the Investigating Officer as well as the recitals in the arrest panchnama indicate that the Appellant had sustained some injury. The fact that the Appellant had sustained an injury is by itself not an incriminating circumstance unless the prosecution is able to establish that the Appellant had sustained the injury at the time of the incident. The Medical Officer has not been examined and there is no evidence regarding the age of the injury. The aforesaid circumstance therefore, in our opinion, cannot assist the prosecution case. The prosecution has alleged, on the basis of the dying declaration, that the

Appellant had illicit relations with deceased Geeta. Since the dying declaration has been held by us to be inadmissible in evidence, there is no other evidence in respect of motive. In cases resting on circumstantial evidence, motive assumes great importance. In the event there is no overwhelming evidence against the Appellant, failure of the prosecution to prove motive, would pale into insignificance. However, in the present case since we have held that the dying declaration cannot be relied upon, the testimony of PW-5 Neelima also does not assist the prosecution and the failure of the prosecution to prove motive would be fatal to the prosecution case.

11. We, thus, find that there is no evidence whatsoever on the basis of which an offence against the Appellant can be proved beyond reasonable doubt. The Appellant, in our opinion, therefore, would be entitled to be given the benefit of doubt.

12. Accordingly, Criminal Appeal No. 546 of 2007 is allowed and the conviction and sentence of the Appellant is

hereby quashed and set aside and the Appellant is acquitted of the offence with which he was charged and convicted. Fine if paid by the Appellant be refunded to him. Since the Appellant is in Jail, he be released forthwith, if not required in any other case.

(A.S. GADKARI, J.)

(P.V. HARDAS, J.)