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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 975 OF 2009**

Shri. Jaysing Mansing Savant	]	
Age 52 years, Occ: Labour	]	
Residing at Padmavatinagar,	]	
Jalochi, Tal. Baramati,	]	
Dist. Pune (At present detained at	]	
Yerawada Central Prison)	]	
		].. Appellant
		[Ori. Accused]
Vs.		

The State of Maharashtra	]	.. Respondent
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Ms. Tejasweeta Bhosale Advocate i/b Mr. Rahul S. Kate
Advocate for the Appellant

Mrs. S.D. Shinde A.P.P. for the State

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**CORAM : SMT.V.K.TAHILRAMANI ACTING C.J. &
SHRI.A.S.GADKARI, J.**

DATED : SEPTEMBER 10, 2015

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

1 This appeal is preferred by the appellant-original accused against the judgment and order dated 4.4.2009 passed by the learned District Judge-2 and Additional Sessions Judge, Baramati in Sessions Case No. 15 of 2008. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of IPC and sentenced him to life imprisonment and fine of Rs. 5000/- in default R.I. for six

months.

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

(i) Deceased Nandabai was the wife of the appellant.

The appellant and the deceased along with their children were residing at Jalochi in District Pune. The appellant was addicted to liquor.

(ii) The incident occurred on 11.11.2007. On that day, at about 1.00 p.m. the appellant came home in intoxicated state. Nandabai served him food. The appellant then stated that the food was not prepared properly and he started abusing Nandabai. At that time, son and daughter of the appellant and the deceased, were outside in the court-yard. As the appellant used to frequently quarrel with Nandabai, her children did not pay any attention to the quarrel. Then the appellant poured kerosene on Nandabai and set her on fire. Nandabai was taken to the hospital. In the hospital, two dying declarations of Nandabai were recorded. The first dying declaration was recorded by PW 2 Police Head Constable Bhosale. The said dying declaration is at Exh. 15. The second dying declaration is at Exh. 25. In both the dying declarations, Nandabai stated

that her husband had poured kerosene on her and set her on fire. The first dying declaration i.e. Exh. 15 was treated as F.I.R. Thereafter investigation commenced. Nandabai expired on 20.11.2007. After completion of investigation, the charge sheet came to be filed.

3 Charge came to be framed against the appellant under Section 302 of IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge convicted and sentenced the appellant as stated in para 1 above, hence, this appeal.

4 We have heard the learned counsel for the appellant and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the judgment delivered by the learned Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that the appellant poured kerosene on his wife

Nandabai and set her on fire, due to which, she died.

5 The conviction is mainly based on two dying declarations i.e. Exh. 15 and Exh. 26. Dying declaration Exh. 15 was recorded first in point of time which was recorded by PW 2 Police Head Constable Bhosale. Police Head Constable Bhosale has stated that at 2.00 p.m. he was instructed to visit the hospital and make enquiry and to get the statement of the lady who was admitted in the hospital. Accordingly, he visited the hospital at 2.05 p.m. He found that Dr. Darade (PW 1) was on duty. He asked Dr. Darade to examine the patient and to tell him whether the patient was conscious. Dr. Darade examined the patient and stated that the patient was in a fully conscious state of mind to give a statement. Dr. Darade accordingly made endorsement (Exh. 9) on the dying declaration. Police Head Constable Bhosale has stated that thereafter to get himself satisfied that the patient was fully conscious, he asked the patient some questions. The patient gave satisfactory replies to the same. Then Police Head Constable Bhosale was satisfied that the patient was fully conscious and in a position to give a statement. Thereafter

he made enquiries with the said lady and recorded the statement as per the say of that lady. After the statement was recorded, it was read over to the said lady and she admitted the contents therein to be true and correct. Police Head Constable Bhosale then obtained thumb impression of the lady on the said statement. He himself attested the said statement. Thereafter he again requested Medical Officer to re-examine the patient and state whether she was fully conscious. PW 1 Dr. Darade examined the patient and gave his endorsement thereon. This dying declaration is at Exh. 15 and the endorsement on the dying declaration is at Exhs. 9 and 10 which is found on dying declaration Exh. 15.

6 The evidence of PW 1 Dr. Darade fully supports the evidence of Police Head Constable PW 2 Bhosale. Dr. Darade has stated that he was attached to Silver Jubilee Hospital Baramati as Medical Officer at the relevant time. On 11.11.2007 at about 1.40 p.m. one patient i.e. Nandabai Jaising Savant who had sustained burn injuries, was brought to their hospital for treatment. When the patient was brought to the hospital, she was fully conscious. The case history was given

by the patient to him personally. She gave history that her husband poured kerosene on her and set her on fire. Dr. Darade noted the history given by the patient in the case papers in his own handwriting. Dr. Darade has further stated that the scalp and hair of the patient were smelling of kerosene. He took note of this fact in the case papers. Thereafter Police Head Constable Bhosale visited the hospital and made enquiry with him about the condition of the patient i.e. whether she was in a conscious state of mind or not. Upon this enquiry by Police Head Constable Bhosale, Dr. Darade examined the patient and found that she was in fully conscious state of mind. He gave endorsement to that effect on the dying declaration. Dr. Darade has further stated that in his presence, the statement of the said patient was recorded by Police Head Constable Bhosale.

7 The second dying declaration of Nandabai was recorded by PW 8 Special Executive Magistrate Shri. Sabnis. This dying declaration was recorded on 12.11.2007 at 2.40 p.m. P.W. 8 Shri. Sabnis has stated that on 11.11.2007 he received letter (Exh. 24) from Baramati Police Station. Exh. 24

shows that Special Executive Magistrate Shri. Sabnis was requested to record statement of a lady who had sustained burn injuries and the lady was in Silver Jubilee Hospital in Baramati. Shri. Sabnis stated that in view of the letter, he went to Silver Jubilee Hospital Baramati on 12.11.2007 at about 2.30 p.m. On visiting the hospital, he met Dr. Kokane (PW 10). He requested Dr. Kokane to examine the patient and to certify whether the patient was physically and mentally fit to give a statement. Accordingly Doctor examined the patient in his presence and certified that the patient was in a fit condition to give a statement. Shri. Sabnis recorded dying declaration of that lady. After recording the dying declaration, he read over the statement recorded by him to the victim lady. She replied that the statement was correctly recorded. Thereafter Shri. Sabnis again requested Dr. Kokane to examine the patient and to get satisfied that she was in a fully conscious state of mind. Dr. Kokane then again examined the patient and was satisfied that she was fully conscious and Dr. Kokane put his endorsement to that effect on the dying declaration Exh. 26.

8 The evidence of PW 10 Dr. Kokane fully supports the

evidence of P.W. 8 Special Executive Magistrate Shri. Sabnis. The evidence of Dr. Kokane shows that he examined the patient before and after recording the dying declaration and on both the occasions, he found that the patient was mentally fit and he gave his endorsement to that effect on the dying declaration.

9 It is the prosecution case that the appellant poured kerosene on his wife Nandabai and set her on fire. This is borne out by the medical evidence. PW 1 Dr. Darade has stated that when patient Nandabai was brought to the hospital, her hair was smelling of kerosene. The spot panchnama Exh. 19 shows that the house was smelling of kerosene. The evidence of PW 11 Police Inspector Ramugude shows that the clothes of the deceased were seized. These clothes were sent to the C.A. As per C.A. report Exh. 42 the partially burnt sari and petticoat of the deceased tested positive for kerosene residue. PW 1 Dr. Darade conducted the post-mortem on the dead body of Nandabai. He has stated that Nandabai expired due to hypoxia due to burn injuries.

10 Mrs. Tejasweeta Bhosale, the learned advocate for the appellant submitted that even if it is accepted that the act of the appellant of setting his wife Nandabai on fire resulted in her death, the case would not fall under Section 302 of IPC but it would fall under Section 304 Part-II of IPC or at the most, it would fall under Section 304 Part-I of IPC. She pointed out that the evidence on record shows that when the incident occurred a quarrel was going on between the appellant and his wife Nandabai which is clear from the dying declaration Exh. 15. She drew our attention to the contents of the dying declaration Exh. 15 wherein Nandabai has stated that at about 1.00 p.m. her husband came home in intoxicated state. He told her that food was not properly prepared and he started abusing her. At that time, her son and daughter were outside in the court-yard. They did not pay any attention to the quarrel between the appellant and Nandabai because it was a frequent affair. Thereafter her husband poured kerosene on her and set her on fire. Ms. Bhosale submitted that the act was not premeditated or preplanned but it happened on the spur of moment in a fit of anger. Ms. Bhosale reiterated that the fact that the incident occurred during the course of a sudden quarrel, would bring

the case under Exception 4 to Section 300 of IPC and would thus, be covered by Section 304 Part-II of IPC.

11 To bring a case within Exception 4 to Section 300 of IPC, all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 of IPC is not defined in the IPC. It takes two to make a 'fight'. Heat of passion requires that there must be no time for passion to cool down. In this case, the evidence shows that both the parties had worked themselves into a fury on account of verbal altercation going on between them. The appellant did not come to the spot armed with a weapon but he poured kerosene which was available at the spot on his wife Nandabai and set her on fire. However, we are not inclined to accede to the submission of Ms. Bhosale that the case would fall under Section 304 Part-II of IPC. In our view, the case would fall under Section 304 Part-I of IPC because, we are of the opinion that the appellant did not just have the knowledge that his act is likely to cause death as contended by Ms. Bhosale, but in fact, the appellant intended to cause death of Nandabai. We say so on the basis of the extent of burn injuries sustained by

Nandabai. The evidence of PW 1 Dr. Darade shows that Nandabai had sustained 91% burn injuries. Looking to all these facts, we are of the considered opinion that the case cannot fall under Section 304 Part-II of IPC.

12 Considering the evidence on record, we are of the view that Exception 4 to Section 300 of IPC applies to the facts of the case and the appropriate conviction would be under Section 304 Part-I of IPC. Hence, the following order is passed:

ORDER

(1) The conviction and sentence under Section 302 of IPC imposed vide judgment and order dated 4.4.2009 in Sessions Case No. 15 of 2008 passed by the learned District Judge-2 and Additional Sessions Judge Baramati, is set aside. Instead the appellant is convicted under Section 304-I IPC and sentenced to R.I. for eight years and fine of Rs.2000/- in default S.I. for one month.

(2) Appeal is partly allowed to the aforesaid extent.

A.S.GADKARI, J.

ACTING CHIEF JUSTICE

CERTIFICATE

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