

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.747 OF 2005

Bapu Ramchandra Shinde	]	
Age : 26 Yrs.,	]	
R/o. Jagan Nivas Chawl,	]	
Poona Link Road, Katemanivali,	]	
Kalyan (East), Dist. Thane	]	 Appellant

Versus

1. State of Maharashtra	]	
	]	
2. Smt. Rukmanibai Gorakh Kanse,	]	
Age : 40 Yrs.,	]	
R/at Kumbhargaoon, Tal. Karmala,	]	
Dist. Solapur	]	 Respondent

Mr. K.P. Shah, i/by Mr. P.B. Shah, for the Appellant.

Mrs. U.V. Kejriwal, A.P.P., for Respondent No.1/State.

CORAM : P.V.HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 15TH JANUARY, 2015.

ORAL JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :

1. The Appellant, who stands convicted for the offence punishable under Section 302 of the IPC and sentenced to suffer imprisonment for life with fine of Rs.2,000/-, in default to suffer S.I. for three months, by the Court of IInd Ad-Hoc Additional Sessions Judge, Kalyan by Judgment dated 16th July, 2005 in Sessions Case No.228 of 2004, has challenged his conviction and sentence.

2. Facts, as are necessary, for decision of this Appeal may be stated thus :-

On the night, intervening between 19th April, 2004 and 20th April, 2004, while PW-11 PSI Bhimrao Jadhav was on P.S.O. duty at Kolsewadi Police Station, at about 1:25 a.m. a phone call was received informing that one burned lady was admitted in the Central Hospital at Ulhasnagar. Therefore, he went there and found that Jayabai was admitted there in burned condition. On enquiries with her, she informed him about the quarrel between her and her husband and that her husband has beaten her and thereafter some time he has poured kerosene on her and set her ablaze. Her statement (Exhibit-32) was accordingly recorded by him. As her husband/Appellant herein, was present there in the hospital, PW-11

PSI Jadhav brought him to the Police Station and registered C.R. No.65 of 2004 against the Appellant for the offences punishable under Sections 498-A and 307 of the IPC vide F.I.R. (Exhibit-33). He arrested the Appellant under Panchanama (Exhibit 28) and seized the clothes on his person.

3. Thereafter PW-11 PSI Jadhav went to the spot at Katemanivali, at Jagan Niwas Chawl in Room No.2, which was taken on rent by the Appellant and the deceased. He found the burned pieces of saree and clothes, the kerosene can, the half burned match-sticks. He seized these articles under the Spot Panchanama (Exhibit-27).

4. On 21st April, 2004, he arranged to record the statement of burned Jayabai through Special Executive Magistrate PW-1 Jyoti Gadave. In the said statement (Exhibit-13), Jayabai reiterated the fact of Appellant setting her ablaze after pouring kerosene on her and further stated that he has done so at the instance of Rukmanibai, the Original Accused No.2 in the Trial Court.

5. In the course of investigation, he recorded the statements of the neighbours and the mother of the deceased. On 9th May, 2004, Jayabai

succumbed to the burn injuries while undergoing treatment in Sion Hospital. The Post Mortem Notes (Exhibit-30) were collected from the hospital. PI Mhatre then prepared Inquest Panchanama (Exhibit-25). Post Mortem Report disclosed the cause of the death as “*septicemic shock due to 92% burns*”. The offence was then converted to Section 302 of the IPC. Seized muddamal articles were already sent to C.A. The C.A. Report (Exhibit-35) revealed the residues of the kerosene on the clothes of the Appellant. After completion of due investigation, the Charge-Sheet came to be filed in the Court.

6. On the case being committed to the Court of Sessions, the Trial Court framed charge against the Appellant and the Original Accused No.2- Rukmanibai vide Exhibit-5 for the offences punishable under Sections 498-A and 302 r/w. 34 of the IPC. The Appellant pleaded not guilty raising a specific plea that Jayabai committed suicide and has falsely implicated him at the instance of her relatives.

7. To bring home the guilt of the Appellant, the Prosecution examined in all 11 witnesses. The Trial Court mainly relied upon the two written Dying Declarations of Jayabai, one recorded by PW-1 Special Executive Magistrate Jyoti Gadave (Exhibit-14) and the another recorded by PW-11

PSI Jadhav (Exhibit-32). The Trial Court also placed reliance on the oral Dying Declarations made by Jayabai before her neighbours and relatives, who had gathered there immediately i.e. PW-2 Subhash, PW-3 Heerabai, PW-4 Nalini, PW-5 Jijabai, PW-6 Ravindra, and PW-8 Tatya and having regard to the extensive nature of the burn injuries sustained by Jayabai, the C.A. Report (Exhibit-35) indicating the residues of the kerosene on the clothes of the Appellant and the burn injuries sustained by him in the incident to his hands and feet, the Trial Court held the guilt of the Appellant to be proved beyond reasonable doubt for the offence punishable under Section 302 of the IPC and convicted and sentenced him as stated above. As regards original Accused No.2-Rukmanibai, the Trial Court found no sufficient material and, hence, acquitted her of both the charges. The present Appellant was also acquitted for the offence punishable under Section 498-A of the IPC. Respondent No.1/State has not challenged the said acquittal.

8. As to the cause of death, Prosecution has examined PW-10 Dr. Rajesh Dere, who has conducted the post mortem on the dead body of Jayabai on 9th May, 2004 and he has noticed the burn injuries and their percentage as under :-

1	Head, neck, face	4%
2	Upper limbs	RT. 9%
		LF. 9%
3	Lower limbs	RT. 17%
		LF. 17%
4	Anterior trunk	18%
5	Posterior trunk	18%
6	Genitals	9%
TOTAL		92%

9. According to him, all the burn injuries were ante mortem in nature. On internal examination, he found the brain and meninges were congested and oedmatous; pleura, larynx, trachea, bronchi, right and left lungs were congested. He has recorded the finding that the cause of the death was “*septicemic shock due to 92% burns*”. Accordingly, he issued Post Mortem Notes (Exhibit-30).

10. In evidence before the Court, he has further deposed that in a suicidal death, the pattern of burn injuries is homogeneous i.e. evenly distributed. In the instant case, as the injuries were not evenly distributed, they are less likely to be suicidal injuries. His evidence, thus, proves the cause of Jayabai's death to be the burn injuries, which, as opined by him, are less likely to be possible in a case of suicidal burns.

11. The main reliance of the Prosecution case is on the two written Dying Declarations of the deceased. The first Dying Declaration is recorded by PW-11 PSI Jadhav himself on the very night within about two hours from the time of incident. He has deposed that Jayabai told him that after the quarrel between her and her husband, her husband had beaten her and thereafter some time sprinkled kerosene from the kerosene can, lit the match-stick and set her on fire, which resulted into her burns. The said Dying Declaration is at Exhibit-32. According to PW-11 PSI Jadhav, it bears thumb impression of the deceased Jayabai and he has signed thereon.

12. This Dying Declaration is challenged and in our opinion rightly so as, it is not stated in evidence before the Court by PW-11 PSI Jadhav that it was read over to Jayabai and she admitted it to be correct. The law, as

laid down by the Division Bench of this High Court, is well crystallized in the case of ***Abdul Riyaz Abdul Bashir Vs. State of Maharashtra, 2012 (3) Bom. C.R. (Cri.) 329***. In this authority Column No.8 in the form of Dying Declaration pertaining to the fact that the statement, as recorded, was read over to the Deponent and proved to be correct as per the say of the Deponent was left blank. Hence, relying on the decision of the Hon'ble Supreme Court in the case of ***Shaikh Bakshu and Ors. Vs. State of Maharashtra, (2008) 1 SCC (Cri.) 679***, and Division Bench of our own High Court in the case of ***Shivaji Tukaram Potdukhe Vs. State of Maharashtra, 2004 ALL MR (Cri.) 3220***, it was held that *“to rule out any remote infirmity, it is necessary that there has to be an endorsement that the contents were read over and admitted to be true and correct. The said column cannot be treated as an empty formality since the Deponent is not available for cross-examination. Hence, it is a material inherent infirmity in the Dying Declaration and, therefore, such Dying Declaration cannot inspire confidence of the Court. When the Dying Declaration was not read over to the Deponent and hence not admitted by the Deponent to be correct and recorded according to her say, then such a Dying Declaration cannot be a foundation for sustaining the conviction.”*

13. In the case of Shaikh Bakshu (supra) referred above, there was no mention in the Dying Declaration that it was read over and explained to

the deceased. The Trial Court and High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained to the deceased. The Apex Court held that the said view is unacceptable.

14. In the present case, PW-11 PSI Jadhav has, in his evidence before the Court, not stated that the Dying Declaration was read over to Jayabai and she admitted it to be correct. Therefore, mere endorsement in the Dying Declaration (Exhibit-32) that it was read over and admitted to be correct is not sufficient. This Dying Declaration, therefore, has to be excluded from consideration.

15. The second Dying Declaration (Exhibit-14) is recorded by PW-1 Special Executive Magistrate Jyoti. She was taken to the Sion Hospital on 20th April, 2004 by PW-11 PSI Jadhav. There she made enquiries with Jayabai and she told her that her husband has set her on fire by pouring kerosene on her and lightening the match-stick. Then he went outside the house. In this Dying Declaration (Exhibit-14), Jayabai has further stated that the persons residing nearby took her to the Central Hospital at Ulhasnagar.

16. This Dying Declaration (Exhibit-14) again is required to be excluded from consideration in view of the fact that this Dying Declaration is not in the handwriting of PW-1 Special Executive Magistrate Jyoti. As deposed by her, it was written by the Police person. The said Police person, who has actually scribed the Dying Declaration, is not examined by the Prosecution. Hence, as held by the Hon'ble Supreme Court in the case of **Muralidhar alias Gidda and Anr. V/s. State of Karnataka, (2014) 5 SCC 730**, *"if the Dying Declaration is recorded not directly from the actual words of the maker, but dictated by somebody else, then this fact by itself creates a lot of suspicion about the credibility of such statement and the Prosecution has to clear the same to the satisfaction of the Court."* In the present case, the Prosecution has failed to clear this suspicion and, therefore, in our opinion, this Dying Declaration is also required to be ignored.

17. Even if these two written Dying Declarations are excluded from consideration, in our considered opinion, it does not make difference to the veracity of the Prosecution case as there is other overwhelming evidence on record in the form of oral Dying Declarations. There are five witnesses examined by the Prosecution on this aspect. The first of them is PW-2 Subhash, who is the maternal uncle of deceased Jayabai. He was

residing in the same area. He has deposed that on the day of incident, the Appellant has come to his house and demanded money. He refused to give the money. After some time he sent his daughter PW-7 Rani to the house of Jayabai. PW-7 Rani returned home and told him that Appellant was beating Jayabai. He did not go there; it being the affair between the husband and wife. In the night, however, at about 12:30 a.m., the Appellant came to his house and woke him up and ran towards Naka after informing him that Jayabai is burned. It is his evidence that he himself and his brother Dilip tried to extinguish the fire. Jayabai told him that her husband poured kerosene on her and set her on fire. There is nothing in his cross-examination except for the suggestion that he did not approve Appellant as husband of Jayabai. Assuming it to be so, it does not appeal to reason that he will implicate the Appellant falsely if Jayabai has not told him that the Appellant has set her on fire.

18. PW-4 Nalini is the neighbor of the deceased. She has heard the shouts in the night. Hence, came out. Her husband PW-6 Ravindra opened the door and found that shouts were coming from the house of Jayabai. He went there. Many people were gathered there. Jayabai was shouting that her husband has killed her by setting her ablaze.

19. This evidence of PW-4 Nalini is in the nature of oral Dying Declaration of Jayabai, it being the immediate disclosure of the involvement of the Appellant in the incident.

20. PW-6 Ravindra has deposed that on hearing the shouts of "*bachav bachav*" (save save), he opened the door and saw that Jayabai was burning. He rushed there and along with other persons gathered there, he tried to extinguish the fire. At that time Jayabai was saying that her husband has poured kerosene on her and set her ablaze.

21. PW-8 Tatya has deposed on the same point that at about 2 a.m. in the night, the Appellant and PW-2 Subhash came to his house, woke him up and told him that Jayabai was burned. He then along with them went to the hospital by rickshaw. On the way, Jayabai told that her husband poured kerosene on her and set her on fire.

22. Lastly, there is evidence of PW-5 Jijabai, mother of the deceased, before whom also Jayabai told that Appellant beat her and thereafter some time, the Appellant has poured kerosene on her and burned her.

23. There is absolutely nothing in the cross-examination of any of these witnesses to disbelieve them. They are the most natural witnesses being the neighbours. Their presence at that time also is natural, it being night time. They have remained truthful to whatever they have seen or heard from Jayabai. The evidence relating to these oral Dying Declarations of five to six witnesses being thus thoroughly consistent, in our considered opinion, the trial Court has rightly placed reliance thereon and it is sufficient to implicate the Appellant.

24. Lastly, there is also the evidence of PW-7 Rani, who has been to the house of Jayabai prior to the incident, as her father PW-2 Subhash told her to do so. There she saw through window the Appellant catching hold of Jayabai's hair and hitting her head on the wall. The Appellant was also abusing Jayabai. Jayabai was weeping. As per her evidence, Jayabai then came to her house and again went back. Thereafter some time Appellant came and informed that Jayabai was burned.

25. The evidence of PW-7 Rani is of significance, in view of the plea tried to be raised by the learned counsel for the Appellant in the course of argument before this Court that as her evidence shows that there was quarrel prior to the actual incident, the case of the Appellant can fall under

Exception IV to Section 300 of the IPC. However, this argument is stated just to be rejected because the evidence of PW-7 Rani nowhere proves the quarrel or fight. On the contrary, it shows the Appellant hitting head of the deceased on wall, catching hold of her hair and Jayabai weeping. It is also significant to note that thereafter some time Jayabai came to house of PW-2 Subhash, then again went and thereafter the incident of Appellant setting her ablaze has taken place. Therefore, in no way it can be called as incident occurring in a sudden fight.

26. The last plea raised by the Appellant is that the burns of Jayabai might be suicidal in nature. However, this plea also cannot be accepted having regard to the C.A. Report (Exhibit-35), which proves the presence of kerosene residues on his shirt and the evidence brought in the cross-examination of PW-11 PSI Jadhav that the Appellant has also sustained burns in the said incident on his hands and feet. The Appellant has not explained these burns, nor has he explained the findings of kerosene residues on his shirt. In answer to Question No.46 put up to him by the Trial Court, in his statement under Section 313 of the Cr.P.C., he has not explained how he sustained the burns especially to his feet. Moreover, if it was a case of suicidal burns, he would have tried to extinguish her fire but instead of doing so, as deposed by PW-2 Subhash, he ran towards Naka.

Further, the extensive nature of 92% burns on all over body including the head, hair, face and back, in our opinion, rules out the case of suicidal burns.

27. Consequently, we find that the Trial Court has rightly held the guilt of the Appellant to be proved beyond reasonable doubt for the offence punishable under Section 302 of the IPC. This Appeal, therefore, holds no merit and, hence, stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]