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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1018 OF 2011

Mr. Mangal Keshav Jadhav
Aged about 34 years, Occ: Helper
residing at Bhamiy Mandir, Opp.
Plot No. 151, Bhagirty,
Kherwadi, Bandra (E),
Mumbai.

.. Appellant

Versus

State of Maharashtra
(At the instance of Nirmal Nagar
Police Station vide C.R.
No. 118/2004)

.. Respondent

Ms. Sarojini Upadhyay (Appointed Advocate) for appellant.
Mrs. Sanjeeta D. Shinde, APP for State.

CORAM: B. P. DHARMADHIKARI &
A. S. GADKARI, JJ.

JULY 31, 2015.

ORAL JUDGMENT [Per B. P. Dharmadhikari, J.] :

1. By this appeal, appellant-original accused questions the Judgment and Order dated 21/8/2010 delivered by Additional Sessions Judge, Greater Mumbai, in Sessions Case No. 623 of 2004, finding him guilty of an offence under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs.2000/-

or in default thereof to suffer further RI for three months. He has been acquitted of offence punishable under Section 498-A of the Indian Penal Code.

2. Prosecution case in brief is, deceased Usha, wife of present appellant, originally resided in Mahur Tahsil of Nanded District, while appellant resided at Pawnala, Tahsil Mahur, District – Nanded. They were married about five years before death of Usha and it was a love marriage. They have a daughter by name Pragati. Appellant-accused used to come to Mumbai intermittently for work. One month prior to the incidence, family came to Mumbai and was residing at Plot No. 151, Kherwadi, Bandra, Mumbai. Vilas, elder brother of accused, resides in Mumbai and used to visit house of accused. Accused is addicted to liquor and used to raise quarrels with deceased Usha and some times used to assault her.

3. On 13/5/2004, at about 9.30 p.m, Vilas came to house of deceased to see his brother – appellant. Deceased had prepared food for them. At that time appellant-accused was under influence of liquor and constantly asking her to prepare food. She told him that it was being prepared. This annoyed him and he assaulted her by hands. Then Vilas and

accused went out of the house. Appellant-accused returned at around 11 p.m. In the meanwhile, deceased had gone to STD Booth to make telephone call to her parents. As Booth was closed, she came back. Accused asked her, why she had gone out. He poured kerosene on her person from the stove and ignited her by matchstick and set her on fire. Her clothes caught fire and she started shouting for help. Appellant-accused ran away.

4. Usha then came out of the house shouting for help and pointing out that her husband had set her on fire. She removed burning clothes from her person and neighbours put a maxi on her person. Many persons had gathered there. Her maternal brother Vijay Chavan, with the help of other neighbours, shifted her to Bhaba Hospital at Bandra, where after primary treatment, she was shifted to V.N.Desai Hospital. She was shifted there to burnt ward. She disclosed history of incidence to the doctor and hospital informed it to Nirmal Nagar Police Station. Thereafter, PSI Maruti Sawant (PW 7) along with PI Ramkrishna Survase (PW 8) came to hospital and recorded statement of Usha. PSI Sawant then registered crime vide C. R. No. 118 of 2004 on the basis of that statement.

5. Further investigation was then taken up and after conducting spot inspection, recording of dying declaration through Special Executive Officer Smt. Shobha Awhade (PW 1), ultimately, the charge-sheet came to be filed in the court of 32nd Metropolitan Magistrate, Bandra, Mumbai, who in due course made it over to the Sessions Court.

6. It needs to be noted that Usha was alive till 24/6/2004 and her husband (appellant) was arrested on 29/6/2004 from his native place.

7. It is in this background that we have heard Advocate Ms. Sarojini Upadhyay (Appointed) for appellant and Mrs. Sangeeta Shinde, learned APP for State.

8. Advocate Ms. Upadhyay has submitted that PW 7, Police Officer, states that he has recoded dying declaration in presence of relatives of deceased and as such that statement was influenced by instructions given to deceased by her relatives. She submits that in-laws of appellant have a grudge against him as he married Usha against their wish. She further points out that before recording said statement or even thereafter, PW 7 did not obtain any certificate of doctor after doctor has examined the patient.

PW 7 completed recording statement and then went to PW 4 – Doctor, who gave certificate at Exh. 35 mechanically. On the basis of this statement recorded by PW 7 – Maruti Sawant on 14/5/2004, an FIR was registered and this statement has been treated as part and parcel thereof.

9. Later statement was recorded by PW 1 – Shobha Awhade on 14/5/2004 itself vide Exh. 27. This Special Executive Officer did not obtain any endorsement from Medical Officer attending the deceased and hence that dying declaration is also unreliable.

10. She has then invited our attention to oral dying declarations to submit that the relatives who have pointed out said dying declarations, namely, PW 5 – Vijay or PW 3 – Sunil are interested and hence their statement cannot be relied upon. She submits that prosecution examined one neighbour – Mohini as PW 6, but she has not supported prosecution at all. History allegedly taken by PW 4 is also not proved as required by law. She contends that, therefore, there are no oral dying declarations also on record.

11. Inviting attention to evidence of PW 3 – Sunil, she states that

Sunil is real brother of deceased and his evidence demonstrates that his sister was unconscious for a period of three days. As such, deceased Usha regained consciousness only on or about 16/5/2004 and hence story of either oral dying declarations or her written dying declarations is false and fabricated. She invites attention to the fact that independent witnesses like Pratap Rathod, who accompanied PW 7, has not been examined and hence the material brought on record against accused needs to be viewed with circumspection.

12. In the alternate and without prejudice, she submits that appellant – accused was under influence of liquor, had a quarrel with deceased and in heat of moment, he poured kerosene on her. Thus burning took place suddenly and hence appellant-accused must be given benefit and at the most he can be punished under Section 304 (Part II) of the Indian Penal Code.

13. Learned APP, on the other hand, has supported the judgment of the trial court. She has taken us through very same material to which our attention has been invited by Advocate Ms. Upadhyay, chronologically. According to her there are two written dying declarations and four oral

dying declarations in the matter. First oral dying declaration is proved by PW 6 – Mohini, while second oral dying declaration is proved by PW 5 – Vijay. Third dying declaration made orally is to PW 4 – Doctor while narrating history, which finds mention in medical papers.

14. In the light of disclosure by patient, hospital found burning homicidal and, therefore, reported the same to police. PW 7 – PSI Maruti Sawant recorded her statement on 14/5/2004 in the morning and that has been treated as FIR. Thereafter, after receipt of requisition, PW 1 – Special Executive Officer again recorded second dying declaration.

15. The story of oral dying declarations and events declared therein are consistent with written dying declarations. Hence, even though relatives were present when PW 7 recorded statement of Usha, that by itself is not fatal. She invites attention to history given by Usha in said statement to urge that, that history is not in dispute and, therefore, the fact that deceased Usha was fully conscious and well oriented has automatically come on record. She submits that PW 4 – Doctor has, however, given a certificate at Exh. 35 bringing on record this fact. In this background, when PW 1 – Special Executive Officer visited the hospital, that officer has

herself put relevant questions and after getting herself satisfied that deceased was well oriented, proceeded to record her statement. She contends that hence absence of certification by doctor cannot be viewed as a fatal defect in present matter.

16. She has invited our attention to evidence of PW 2 – Dr. Shinde to show that patient had suffered burn injuries to the extent of 60 % and died due to septicemia in case of superficial to deep trauma burns and death was unnatural. Usha was under treatment of doctors from 13/5/2004 for about 40 days and expired on 24/6/2004. PW 3 – Sunil has not deposed that she was unconscious from 13/5/2004 for a period of three days. According to learned APP, oral dying declaration to PW 3 – Sunil by deceased is after Sunil had come to hospital and about three days thereafter.

17. Learned APP has placed reliance upon judgment of Division Bench of this court in the case of Babasaheb Shankar Waghmare and anr. vs. The State of Maharashtra reported in **2014 ALL MR (Cri) 251** to submit that as there is no contradiction in any of the dying declarations, the conviction needs to be sustained.

18. We find that dying declarations on record need to be considered in the backdrop of spot panchanama. Spot Panchanama at Exh. 44 is proved by PW 7 and it is not in dispute. Perusal of said spot panchanama shows that in the room occupied by appellant and deceased, which was admeasuring 8 ft. x 8 ft, there was smell of kerosene. One plastic mug of violet colour was also found there and it was smelling of kerosene. A metal stove, pink in colour was also found in that room. The lid of kerosene tank of that stove (cork) was seen missing. It was found lying in north-east corner of the room. At a distance of about 1 ft. from stove, a match-box, which had smell of kerosene was also found. Then there is reference to burnt pieces of clothes of Usha which were smelling of kerosene found in the room. One partially burnt matchstick was also seen in door of the room. A violet saree, which had melted, was also seen and it was smelling of kerosene. All these articles were seized by authorities.

19. The appellant-accused has not disputed that deceased had died homicidal death and she got burnt in the room occupied by the couple.

20. PW 6 – Mohini Baswana is the neighbout of said couple. She identified accused and was not knowing name of deceased – wife. She

pointed out that wife of accused was no more. She stated that incidence took place in night hours of 14/5/2004. She saw persons lifting one female and carrying her to hospital. She claimed that she was not knowing what happened with her. She was declared hostile and APP cross-examined her. She stated that she did not tell police that Usha used to talk with her and complain that her husband always remained under influence of alcohol and quarrel with her, doubting her character. She also stated that she did not narrate to police while her statement was recorded that she heard the call of a female as “save save” and she went near the house of deceased, she was in front of her house caught with fire and she was stating that her husband poured kerosene on her person and set her on fire. As her clothes were burnt, she (witness) brought maxi and laid said maxi on her person. Other persons were present at that time. Maternal brother – Vijay of Usha came there and he took her in taxi to hospital. She stated that all these averments marked as portion “B” were not narrated by her to police.

21. The other witness to oral dying declaration is PW 5 – Vijay. Said Vijay is maternal brother of Usha. In his examination-in-chief, he has stated that Usha disclosed to him that her husband Mangal poured kerosene on her person and set her on fire. His cross-examination shows that he has

denied suggestion that Usha was unconscious due to burn injuries. He has pointed out that one Pratap Rathod accompanied him to hospital. He has denied that deceased Usha had not performed marriage with accused Mangal. He volunteered that both of them ran away and married with each other.

22. The third oral dying declaration is to PW 4 – Dr. Vivekanand Katti, who was working as Senior Registrar in V. N. Desai Hospital, Santacruz. He stated that at about 3.30 a.m. on 14/5/2004 female by name Usha Mangal Jadhav was brought by her cousin brother. Said patient was conscious and oriented. She gave her history and narrated that her husband burnt her in the night hours at about 1 a.m. He stated that he then treated her. Medico legal papers proved by him have been collectively exhibited at Exh. 34. FIR which carried his endorsement in his hand writing was also shown to him and he accepted that endorsement on Exh. 35. He has deposed that at that time Usha was conscious and well oriented. His cross-examination does not bring any material on record to enable a court of law to discredit him.

23. The last oral dying declaration is spoken of by real brother of deceased PW 3 – Sunil. He received telephone from PW 5 – Vijay in the night hours on 13/5/2004 that his sister was set on fire by appellant-accused, hence he and his mother came to Mumbai and came to V. N. Desai Hospital at Santacruz. At that time his sister was unconscious. He has deposed that sister was admitted in the hospital for about 45 days and she regained consciousness after three days in hospital. She told him that her husband (accused present before trial court) beat her and thereafter poured kerosene and set her on fire. He has denied that his sister was not married with accused persons and she was not a legally wedded wife. Again his cross-examination does not bring on record any adverse material.

24. PW 7 – PSI Maruti Sawant went to V. N. Desai Hospital. He has recorded her statement on which she has signed. He has also placed his signature on it and below it there is endorsement of PW 4, which has been proved as Exh. 35. This witness got intimation at about 2.30 hrs. in the morning of 14/5/2004 that Usha was admitted in burnt condition. After informing his superiors, he came to hospital, he met concerned doctor and enquired about the condition of patient. After PW 4 replied in affirmative, he approached patient and enquired whether she was in a position to speak.

She answered in affirmative. Then he has recorded her statement. He has deposed that she told him that she was beaten by her husband in the night of 13th as she had not cooked food in time. Her husband and her brother-in-law left the house. Thereafter her husband returned at about 11 p.m. when she had just come after making a telephone call. Her act of making telephone call to her parents was not liked by accused and in a fit of rage, he poured kerosene on her person and set her on fire. He has stated that he recorded everything as narrated by her and also obtained her signature. Then he obtained certificate of Medical Officer (PW 4). He proved Exh. 43 to be that statement. He informed these developments to police station telephonically and his telephone was received by PSI Shelar. Offence was then registered vide Crime No. 118 of 2004 under Section 307 of the IPC. His cross-examination shows that when he came to hospital, cousin of Usha by name Vijay Chavan (PW 5) and other relatives were present. He recorded statement of Usha in the presence of those relatives. After recording that statement, he went to doctor and obtained his signature. He denied that matchstick found on the spot was not seized by him or that it was ignited by him. His cross-examination also does not bring on record any material in favour of appellant-accused.

25. Perusal of statement of Usha recorded by him on 14/5/2004 in hospital vide Exh. 43 shows that she has given her address and mentioned that she was staying there with her husband since last one year. She has also given name of her daughter and her age, name of landlord and rent amount. Then she has pointed out her native place, name of her mother, father, number of brothers and sisters and their names. She stated that she was educated upto 10th standard. In paragraph thereafter, she has given native place of her husband. She pointed out that her husband was earlier doing labour work with her parents and that is how she got acquainted with appellant. Sister Rukmini of appellant was married in her village and he was staying with Rukmini. Hence, there were frequent visits. Accused-appellant was married earlier, but due to love developed between them, she got married with him with consent of her parents. Appellant had deserted his first wife. Even prior to marriage, her husband used to come to Mumbai for work and they had been staying at the address stated by her since one month.

26. Her statement shows that in vicinity, elder brother of her husband, namely, Vilas had come to reside and he used to visit their house occasionally. Her husband is addicted to liquor and used to quarrel on

trivial issues. He did not like her to leave house and used to beat her with hands on that account. As she had a daughter, she used to keep quiet. Thereafter she has spoken about the incidence dated 13/5/2004. She has pointed out that at about 9.30 in the night Vilas came to meet her husband and her husband asked her to prepare food. Her husband was under influence of alcohol and was constantly nagging to cook the food fast. She informed him that food was being prepared. In front of Vilas, he beat her. Thereafter her husband and Vilas went outside. At about 11 O' clock in the night her husband returned. As she was beaten by her husband, she had gone out to inform her parents on telephone. As STD Booth was closed, she returned back. (It needs to be noted here that PW 7 – Sawant has erroneously mentioned in his deposition that Usha told him that she returned after making a phone call). Her husband enquired as to why she had gone out. He lifted stove and poured kerosene in it on her person and then lighted matchstick and set her on fire. Then she pointed out that she started shouting and her husband ran away. Her daughter who was asleep awoke and started crying. As nobody came to help her, she came out of house and started shouting loudly to help her and that her husband had set her on fire. She was required to remove clothes on her person and a neighbour by name Alka then brought a maxi and gave it to her for

wearing. People had gathered and were enquiring what happened. She informed them that her husband poured kerosene, set her on fire and ran away. Some people brought a taxi and in it she was made to sit. Her maternal brother Vijay (PW 5) and other two persons were then present. She has also stated that when she was brought to V. N. Desai Hospital, Medical Officers there enquired from her and she narrated the history accordingly to them.

27. After recording the statement, in last paragraph again very same episode has been mentioned in 3 to 4 sentences and thereafter her signature has been obtained. In front of her signature, PW 7 has put his signature in token of fact that statement has been made in his presence. Below it is a certificate at Exh. 35 issued by PW 4 – Doctor. In that certificate PW 4 has mentioned that patient was brought to the casualty by her cousin brother and it was alleged to be case of homicidal burns by patient's husband as per history given by patient. He has further stated that patient was conscious and oriented at the time of giving history. He has then placed his signature below it. This statement given by deceased has been treated as written complaint and part of FIR which is also at Exh. 43.

28. Other dying declaration is recorded by PW 1 – Smt. Shobha Awhade, Special Executive Officer. She got requisition on 14/5/2004 and accordingly she went to police station and thereafter in police vehicle came to V. N. Desai Hospital where police officer showed her injured Usha. Relatives of patient were there and police officer told them to go elsewhere as PW 1 had to record the statement of Usha. Relatives accordingly went away and police officer was present at some distance. She then asked patient about the incidence. The further examination-in-chief shows details communicated to her by patient. Usha has told PW 1 that her husband took kerosene from stove in a jug and then poured it on her person and set her on fire. She has stated that she then recorded her statement as per her say, read it over to her and then obtained her signature upon it and at the end placed her own signature. She identified signature of injured and her own signature. That dying declaration has been exhibited at Exh. 27. In her cross-examination, it has been brought on record that injured patient was kept in a net (dome jali). She enquired from Medical Officer about condition of patient and whether she should record her statement. Medical Officer permitted her to record the same. She did not obtain endorsement of Medical Officer about condition of patient before beginning to record

the statement. Similarly, she did not obtain that endorsement after completing the recording. She denied that both the hands of patient were fully burnt and volunteered that some burn injuries were there on her hands. She denied that her thumbs and palms were burnt. She also accepted that in her statement as recorded, she has not mentioned that it was read over to Usha and thereafter Usha signed upon it. In her further cross-examination by learned APP, due to court question, she has answered that as police party had recorded statement of injured by obtaining endorsement of doctor, she did not find it necessary to obtain medical certificate again.

29. Perusal of Exh. 27 shows that she has recorded it in question and answer form. Initial questions show enquiry about name, address, date and place of marriage, number of children, place where patient resided, place where she stayed before coming to Mumbai, occupation of her husband. Thereafter question whether her husband harassed her after marriage has been put and she has answered that her husband was addicted to liquor and upon being asked to give it up, he used to beat her. Because of harassment, she stayed with her parents and still he used to come to her to stay. Whenever he troubled her excessively, she did not like it. About 10

months back she had lodged her report with Mahur Police Station and police had detained him for a day. Then she was asked about the incidence dated 13/5/2004 and her answer is again on same lines. She has stated that her husband poured kerosene from stove in jug and then threw it on her person. Then took out a match-box from his pocket, ignited matchstick and burnt her and thereafter he ran away. She has then pointed out shouting, giving of a maxi by Alka and her maternal brother bringing her to hospital. This statement is again signed by her at the end. It also bears signature of PW 1.

30. It is true that this dying declaration at Exh. 27 does not carry any endorsement of doctor about fitness of patient to give dying declaration. Similarly, the dying declaration at Exh. 43 does not show that before recording it, PW 7 had enquired from doctor about fitness of the patient. Exh. 43 at the end carries certificate of doctor at Exh. 35 which points out condition of patient and also shows an oral dying declaration to him by patient – Usha.

31. PW 2 – Dr. Shinde has carried out postmortem. He has deposed that Usha had suffered 56% burns. She was admitted in the night

between 13/5/2004 and 14/5/2004 and expired on 24/6/2004. She was thus alive for about 40 days.

32. Even if we doubt oral dying declaration allegedly given by Usha to her maternal brother Vijay or then to her real brother Sunil, there is absolutely no reason for doctor – PW 4 to lie. Fact that she was burnt by her husband was disclosed by Usha while giving history and it finds support in certificate Exh. 35 issued by said doctor. Because of this knowledge only incidence was informed to police authorities. PW 7 – PSI Sawant then visited that hospital and recorded statement of Usha. His deposition shows that he first contacted doctor and found out whether patient was in a position to give answers to his questions. After doctor gave affirmative answer, he went to patient. It is no doubt true that he has recorded statement of patient Usha in presence of her relatives, but in this situation that by itself cannot be held to be fatal. The details recorded in statement of Usha by this officer show that Usha was fully conscious and well oriented. Fact that appellant-accused was absconding immediately after the incidence till his arrest on 29/6/2004 is not in dispute. He had even absconded during trial. Fact that Usha was brought to hospital by her maternal brother PW 5 – Vijay is also corroborated by medical history

papers and by Usha herself. In this situation, when her husband had ran away, her conduct of coming out and shouting or telling everybody that her husband had burnt her cannot be doubted. In the light of this material, we find that deposition of PW 5 about oral dying declaration to him also needs to be believed and accepted.

33. When oral dying declarations made by deceased to PW 5 – Vijay and PW 4 – Dr. Katti are proved by prosecution, it is apparent that written dying declarations at Exh. 43 and Exh. 27 which are in consonance therewith on all material aspects also cannot be disbelieved. As mentioned supra, Exh. 43 brings on record the fitness and orientation of Usha on 14/5/2004 when it was recorded.

34. Exh. 27 has been recorded by an independent lady, Special Executive Officer. Said lady officer has put certain questions to Usha and it is apparent that as Usha gave proper and relevant answers to those questions, she has proceeded further to record her version about the events in the night of 13/5/2004. When we find that PW 4 – Doctor had found Usha well oriented and conscious when she gave history for treatment and when he gave certificate at Exh. 35 on Exh. 43, there is nothing on record

to doubt her fitness and consciousness or orientation at the time when Exh. 27 came to be recorded. Usha had suffered 56% burns and was alive thereafter for about 40 days. In this situation, merely because there is no certification on dying declaration Exh. 27 by doctor either before its recording or after its recording, that by itself cannot be said to be fatal.

35. The narration by deceased Usha that she came out of house shouting and crying for help and also pointed out to everybody that her husband burnt her and then ran away needs to be accepted. The facts on record show that PW 6 Mohini has given incorrect answers before the trial court.

36. In this situation, we find that prosecution has proved homicidal death of Usha at the hands of her husband-appellant by pouring kerosene on her person and by igniting her. The judgment and order of conviction delivered by Additional Sessions Judge, Greater Mumbai, in Sessions Case No. 623 of 2004 is liable to be upheld by dismissing the appeal.

37. The conviction of the Appellant is upheld. The appeal is

accordingly dismissed.

Muddemal property be destroyed after the appeal period is over.

The fees of counsel appointed for the appellant to assist the court are quantified at Rs. 5000/-.

(A. S. GADKARI,J.)

(B. P. DHARMADHIKARI,J.)