

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.901 OF 2012

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| 1. Smt. Sunita Shrimant Shinde |] | |
| Age : 42 Yrs., Occ.: Household, |] | |
| |] | |
| 2. Hanuman Shrimant Shinde |] | |
| Age : 21 Yrs., Occ.: Education, |] | |
| |] | |
| Both R/of Hanuman Chawl, |] | |
| Near Hanuman Temple, |] | |
| Mahatma Phule Nagar, |] | |
| Mankhurd, Mumbai. |] | |
| |] | |
| 3. Balasaheb Jagannath Galave |] | |
| Age : 33 Yrs., Occ.: Labourer, |] | Appellants / |
| R/of Habeerwadi, Post – Pare, |] | (Org. Accused |
| Tal. Sangola, Dist. Solapur. |] | Nos.1 to 3) |

Versus

The State of Maharashtra	]	 Respondent
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Mr. Niteen Pradhan, with Ms. S.D. Khot,
Mr. Kartik Rajshekhar, Mr. Umesh Iyer
and Ms. Farista Memon, for the
Appellants.

Mr. A.S. Shitole, A.P.P., for the
Respondent-State.

CORAM : SMT. V.K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 9TH JUNE, 2015.

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

1. The Appellants, who stand convicted by the Additional Sessions Judge, Sessions Court, Sewree, Mumbai in Sessions Case No.478 of 2010, by Judgment dated 27th June, 2012 for the offences punishable under Sections 448, 302 and 504 r/w. 34 of the IPC, by this Appeal challenge their conviction and sentence. By the said Judgment, each of the Appellant is sentenced separately to suffer imprisonment of 6 months and to pay fine of Rs.1,000/-, in default to suffer S.I. for 15 days, for the offences punishable under Section 448 and Section 504 r/w. 34 of the IPC, whereas, to suffer imprisonment for life and to pay fine of Rs.2,000/-, in default to suffer S.I. for 1 month, for the offence punishable under Section 302 r/w. 34 of the IPC. All the substantive sentences of imprisonment were directed to run concurrently with the benefit of set-off for the period already undergone by them in Jail.

2. Facts, as are necessary, for deciding this Appeal may be stated as follows :-

PW-5 Shantabai Karande has acquired the property of her

brother Shrimant. The said property was a room located near Hanuman Temple, Mahatma Phule Nagar, Mankhurd, Mumbai. Appellant No.1 Sunita and deceased Survanta are the wives of Shrimant Shinde. Appellant No.2 is the son and Appellant No.3 is the brother of Appellant No.1. As per the case of PW-5 Shantabai, during his lifetime Shrimant has given the property to her and it was in her possession.

3. On the date of incident, i.e. 15th April, 2010, PW-5 Shantabai came to know that Appellants had forcibly entered into the said room at about 12^oclock in the noon. She verified the said fact by sending her son PW-1 Kishor to the said room. Hence, at about 6 pm, she came to the said room, along with her son PW-1 Kishor, and confronted the Appellants, who were present there, as to why they have committed trespass in her room. Meanwhile, deceased Survanta also came there and the quarrel ensued between PW-5 Shantabai, her son PW-1 Kishor and deceased Survanta on the one side and the Appellants on the other side. In the said quarrel, Appellant No.1 poured kerosene on Survanta and Appellant No.2 set Survanta ablaze by lighting the match-stick. Appellant No.3 gave instigation to them.

PW-5 Shantabai and her son PW-1 Kishor extinguished the fire of Survanta and took her for treatment, initially, to Shatabdi Hospital in Govandi. There as per the advise of Doctor, they took her to Joy Hospital in Govandi.

4. PW-6 API Mahadeo Shirsat, who was at the relevant time attached to Nerul Police Station, Navi Mumbai, on receipt of the message from the Joy Hospital, Govandi, that one lady by name Survanta was brought there in burnt condition, reached there at about 8:30 pm. He made arrangement for recording Dying Declaration of Survanta by calling there PW-7 Smita Mhatre, the Special Executive Officer. She reached in the hospital at about 9:45 pm and recorded the Dying Declaration of Survanta vide Exhibit-39, in which Survanta attributed the cause of her burns to the Appellants.

5. Meanwhile, on the complaint (Exhibit-30) of PW-5 Shantabai, PW-6 API Shirsat has registered C.R. No.110 of 2010 against the Appellants for the various offences punishable under Sections 307, 452 and 504 r/w. 34 of the IPC. During the course of investigation, he went to the spot and drew the Scene of Offence Panchanama (Exhibit-36) in the presence of the

Panchas. From the spot, he collected the plastic kerosene can and the burnt match-stick. The Appellants were arrested on the same day and the clothes on their person, which were smelling of kerosene, came to be seized under Panchanama (Exhibit-37).

6. Deceased Survanta, who had sustained the burns, was admitted on the next day at Sushrut Hospital, where she was assessed to be having 25% to 30% superficial to deep burn injuries. She was admitted there till 23rd April, 2010. She took discharge from the said hospital on that day, against the medical advise. Subsequent thereto, Survanta got herself admitted in the Sion Hospital, where, on 13th May, 2010, she succumbed to the complications developed on account of the burn injuries, namely, septicemia and pneumonia. The postmortem on her dead body was performed by PW-8 Dr. Dhiraj Buchade and its report is at Exhibit-43. In view of her death, the charge under Section 307 was converted to Section 302 of the IPC. The seized muddemal articles, including the clothes of the Appellants, were sent to Chemical Analyzer and on receipt of the C.A. Report (Exhibit-31), the Charge-Sheet came to be filed against the Appellants in the Sessions Court, Sewree, Mumbai.

7. The offence under Section 302 of the IPC, being exclusively triable by the Sessions Court, on committal of the case, the Trial Court framed charge against the Appellants for the aforesaid offences vide Exhibit-11. Appellants pleaded not guilty to the charge and claimed trial, raising the defence of false implication on account of the strained relations.

8. To substantiate their defence, the Appellants also examined two Defence Witnesses, namely, DW-1 Akkabai Dombale and DW-2 Asha Ghule, the neighbours.

9. To prove its case, the Prosecution examined in all eight witnesses and on appreciation of their evidence, Trial Court relied on them and convicted and sentenced the Appellants, as aforesaid.

10. This Judgment of the Trial Court is being challenged in this Appeal by the learned Counsel for the Appellants Mr. Niteen Pradhan, whereas, supported by learned A.P.P. Mr. A.S. Shitole.

11. The Prosecution case against the Appellants stands on two fold basis; (i) the Dying Declaration of deceased Survanta (Exhibit-39) recorded by PW-7 Smita Mhatre, Special Executive

Officer; and (ii) the evidence of the two eye witnesses, namely, PW-1 Kishor and his mother PW-5 Shantabai.

12. As regards the evidence of Dying Declaration, it is deposed by PW-7 SEO Smita Mhatre that on the receipt of the call, she reached Joy Hospital at about 9:45 pm. There she met the burned lady Survanta and made enquiry with her, whereupon Survanta told her that her husband's another wife, along with her son and her brother, poured kerosene on her and set her ablaze. It is further deposed by her that she recorded the answers given by Survanta and signed on it. The said statement is at Exhibit-39.

13. However, in examination-in-chief itself, PW-7 SEO Smita Mhatre has deposed that sister-in-law of the burned lady, i.e. PW-5 Shantabai, was very much present at the time of recording this Dying Declaration. Further she has admitted that she did not take the signature or thumb impression of Survanta on the said Dying Declaration, but she told her relatives to get it. In cross-examination, she has further admitted that there is overwriting in respect of the names of the Appellants in answer to the Question No.12, which question pertains to the role attributed to

the Appellants of setting her on fire. Further, she has admitted that she has recorded the statement as per the directions of the Police and she does not know anything about it.

14. Considering the answers given by this witness in evidence before the Court, in our considered opinion, the Trial Court has rightly made a note below her deposition that she has given evidence in a very slipshod manner; she was not even ready to look into the papers, making her exercise of recording the Dying Declaration very suspicious. We are also constrained to observe that the manner in which the Dying Declaration is recorded and the evidence is given by this witness is clearly required to be deprecated. The entire approach of the witness appears to be casual though recording of Dying Declaration is such a solemn duty, which is required to be discharged with utmost sincerity. The Dying Declaration being the last words of the deceased, they assume significance as the fate of the persons involved by the deceased in the Dying Declaration depends on it. At times, even the sole Dying Declaration is held sufficient to convict the culprits. Therefore, recording of Dying Declaration is not to be taken in such a casual and slipshod manner, as is done by this

witness. She has not even taken the efforts to obtain the signature or thumb impression of the burnt lady on the said statement. She has also not taken the pains to read over the said statement to the deceased to find out whether the contents thereof are true and correct. As held by the Apex Court in ***Shaikh Bakshu & Ors. Vs. State of Maharashtra, (2008) 1 SCC (Cri.) 679***, and followed by our High Court in several of its decisions, including ***Shivaji Tukaram Potdukhe Vs. State of Maharashtra, 2004 ALL MR (Cri.) 3220***,

“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.”

15. This Dying Declaration also does not bear the endorsement of Medical Officer, though it was recorded in the hospital itself, about the fitness of the deceased to give such a Dying Declaration. It also does not reflect that PW-7 SEO Smita Mhatre has satisfied herself about the mental and physical fitness of Survanta to give such statement. In view of these major fatal infirmities in the Dying Declaration (Exhibit-39), in our considered opinion, it deserves no more value than the paper on which it is written and hence has to be discarded in toto.

16. Now coming to the evidence of two eye witnesses, namely PW-1 Kishor and his mother PW-5 Shantabai, according to their evidence, at about 6 pm, along with Survanta, they went to their house at Mankhurd and found all the three Appellants present there and started quarreling with them. As per evidence of PW-1 Kishor, Appellant No.3 pulled deceased on one side and asked Appellant No.1 to pour kerosene on her. Accordingly, Appellant No.1 poured kerosene from the plastic can on the deceased Survanta and Appellant No.2 lit a match-stick and set deceased Survanta on fire. Appellant No.3 also instigated other Appellants to set PW-5 Shantabai on fire. PW-1 Kishor, however, pulled his

mother aside. When Appellants saw Survanta in flames, they fled away from the spot. PW-1 Kishor and his mother PW-5 Shantabai extinguished the fire of Survanta and brought her to Shatabdi Hospital in Govandi. There, as per the advise of Doctor, they took her to Joy Hospital in Govandi. Police arrived in Joy Hospital and recorded the complaint of PW-5 Shantabai. Thereafter, Survanta was shifted to Sushrut Hospital, where she was admitted for ten days.

17. The evidence of PW-5 Shantabai, mother of PW-1 Kishor, is also, more or less, on the same lines. In her cross-examination she has admitted that the quarrel with the Appellants was going on for about 10 to 15 minutes. Some persons had assembled there when the incident was going on. She has further admitted that she did not enter in the room in which the incident was taking place. Further she has admitted that she was in the hospital with Survanta for the entire night.

18. Admittedly, both these eye witnesses are highly interested ones, as the dispute pertained to the property on which they are making claim rival to the claim of the Appellants. The evidence of these two witnesses, therefore, has to be scrutinized with

greater caution and care. Their evidence has also to be tested on the touch-stone of the evidence of two Defence Witnesses. The law is well settled that the evidence of the Defence Witnesses is also required to be given the same weightage as that of the Prosecution Witnesses and merely because they are examined by the Accused, their evidence cannot be suspected of credibility. Both these Defence Witnesses are admittedly the neighbours. Their presence at the time of incident is not at all disputed by Prosecution also. As a matter of fact, the cross-examination of DW-1 Aakkabai Dombale is even declined by the Prosecution. Her evidence shows that, at the time of incident, as Appellant No.2 was being assaulted, she intervened and separated him. She took him upto the lane.

19. DW-2 Asha Ghule, who is again a neighbour, has deposed that after hearing commotion, she and DW-1 Aakkabai Dombale came out of their house and saw that Appellant No.2 was beaten by some persons. They separated him and took Appellant No.2 upto the water tank. 10 to 15 minutes thereafter, they heard the sound of "*burnt....burnt....*". She has further deposed that she has not seen Appellant No.3 on that day. In her cross-

examination, it is brought on record that there was quarrel between PW-5 Shantabai and Appellant No.1 in respect of the ownership of the said room and Survanta was saying that she had purchased the said room from compensation received by her on account of the death of her husband, but Appellant No.1 was not leaving that room. She has further admitted that at the time of incident, there was quarrel between PW-5 Shantabai and Appellant No.1 on account of that room. This suggestion, which is put up by the Prosecution to her in cross-examination, thus, reveals that the quarrel was between PW-5 Shantabai and Appellant No.1 and not between deceased Survanta and the Appellants. In such circumstances, there was no reason at all for the Appellants to set deceased Survanta on fire. At the most, they can have grievance against PW-5 Shantabai, as she was claiming ownership and possession over that room, but no reason for them to have grievance against deceased Survanta.

20. Prosecution has not examined any other independent witness, though the said room was situate in a densely populated locality, The evidence of the neighbours, who were examined by the Appellants, as Defence Witnesses, revealed

that after the Appellants left the spot of incident, the lady Survanta was burnt. Thus, there are two rival versions given by the Prosecution Witnesses PW-1 Kishor and PW-5 Shantabai and the Defence Witnesses DW-1 Aakkabai Dombale and DW-2 Asha Ghule. In the face of the fact that PW-1 Kishor and PW-5 Shantabai are highly interested in the outcome of the case on account of the dispute relating to ownership and possession over the said room, in our considered opinion, their evidence cannot be accepted as wholly reliable or completely truthful to base conviction of the Appellants on their testimonies alone. It required corroboration from some independent source, which is not forthcoming in the present case.

21. It is also pertinent to note that in the history given before PW-2 Dr. Ashok Dhaygude of Shatabdi Hospital, deceased Survanta had stated that she was burnt by pouring kerosene by known persons. However, she had not taken the names of any of the Appellants, though she was knowing their names, they being her relatives. It is also not the case that she was not in a position to give the statement, because as per the evidence of PW-2 Dr. Ashok Dhaygude of Shatabdi Hospital, where she was brought,

she had burn injuries of 15% to 25% only and that too on her hands, legs and abdomen. Thus, the history given before the Doctor is also not corroborating the Dying Declaration, attributing the role of setting her on fire to the Appellants.

22. In the Dying Declaration (Exhibit-39) also, deceased Survanta has not attributed any specific role to each of the Appellant, but has made a general and omnibus statement that Appellants had poured kerosene on her and set her ablaze. However, PW-1 Kishor and PW-5 Shantabai have assigned such roles by stating that Appellant No.1 has poured kerosene, Appellant No.2 has lit the match-stick and set her on fire, whereas, Appellant No.3 has given instigation.

23. Thus, as both the Dying Declaration and the evidence of eye witnesses fail to pass the judicial scrutiny to hold the guilt of the Appellants to be proved beyond reasonable doubt. Hence, this Criminal Appeal has to be allowed.

24. Consequently, this Criminal Appeal is allowed. The conviction and sentence of Appellant No.1-Smt. Sunita Shrimant Shinde, Appellant No.2-Hanuman and Appellant No.3-Balasaheb

for the offences punishable under Sections 448, 302 and 504 r/w. 34 of the IPC, is quashed and set aside. They are acquitted of all the offences charged against them. Fine amount, if deposited by the Appellants, be refunded to them. As all the three Appellants are in Jail, they may be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K. TAHILRAMANI, J.]