

JPP

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

CRIMINAL APPEAL NO. 11 OF 2014

Pramod Ramchandra Zore
Age : 40 yrs., Occ : Business,
R/at : Room No.7, Ashtavinayak
Chawl No.2, Near N.G. Park,
Koknipapa, Dahisar (East),
Mumbai – 400 068.

... Appellant.

V/s.

The State of Maharashtra
(At the instance of Inspector of
Police, Dahisar Police Station).

... Respondent.

Mr. S.V. Marwadi a/w. Mr. Kartik S. Garg for the Appellant.
Mr. H.J. Dedhia, APP for the State.

**CORAM : P.V. HARDAS &
Dr. SHALINI PHANSALKAR-JOSHI, JJ.**

MARCH 10, 2015.

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

The Appellant who stands convicted for offence punishable under Sections 302, 408-A, 342 r/w. 34 of the Indian Penal Code and sentenced to imprisonment for life and

to pay fine of Rs.5,000/- in default of which to undergo R.I. for 6 months, R.I. for 2 years and to pay fine of Rs.2,000/- in default of which to undergo R.I. for 2 months and S.I. for 6 months and to pay fine of Rs.1,000/- in default of which to undergo S.I. for 15 days, with a direction that the substantive sentences shall run concurrently, by the Additional Sessions Judge, Greater Bombay, by Judgment dated 21.8.2013, by this Appeal challenges his conviction and sentence.

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

PW-9 Police Constable Vikas Pawar, who was attached to the MHB Colony Police Station and on 16.3.2009 was on duty at the Police Outpost at the Bhagwati Hospital, Boriwali (West), recorded the statement of injured Poonam when she was brought in the Hospital. The said statement was recorded in the Emergency Patient Register at Serial No.685 of 2009. On recording the said information, he informed to the Dahisar Police Station and accordingly, took an entry in the Register. The entry is at Exhibit 73.

3. PW-10 PSI Tatya Gosavi, who was attached to the Dahisar Police Station and was on duty on 16.3.2009 was informed by PW-9 Police Constable Pawar about the admission of Poonam in the Bhagwati Hospital due to burns. He accordingly proceeded to the Bhagwati Hospital and inquired from the Medical Officer if Poonam was in a fit condition to give her statement. Accordingly, statement of Poonam was recorded by PW-10 PSI Gosavi. In the said statement Poonam had disclosed that the Appellant had ill-treated her and had poured kerosene on her at about 4.30 to 4.45 a.m. and had set her ablaze. Poonam also disclosed that the Appellant had latched the door from outside and had fled. The said statement of Poonam is at Exhibit 78.

After recording the statement of Poonam, PW-10 PSI Gosavi returned to the Police Station and registered an offence under Sections 307, 341, 498-A r/w. 34 of the Indian Penal Code. The printed FIR is at Exhibit 79. The accused were arrested on 16.3.2009 under panchnama at Exhibit 80. Meanwhile, injured Poonam had succumbed to her injuries and

accordingly, an inquest panchnama of the dead body of Poonam was drawn at Exhibit 35. A scene of the incident panchnama was also drawn in the presence of PW-4 Anil at Exhibit 49. Statements of witnesses were recorded and further investigation was then entrusted to PW-12 PI Pradeep Kale.

4. PW-12 PI Pradeep Kale, who was attached to the Dahisar Police Station was entrusted with the investigation of the said crime. He recorded the statement of PW-9 Police Constable Vikas Pawar. He recorded the statement of other witnesses. The seized property was then forwarded to the Chemical Analyzer. Further to the completion of investigation, a charge-sheet against the Appellant and other accused was submitted.

5. Postmortem on the dead body of deceased Poonam was performed by PW-8 Dr. Ashok Gite. PW-8 Dr. Gite noticed that deceased Poonam had sustained 95% superficial to deep thermal burns. According to him, deceased Poonam had died due to shock due to 95% superficial to deep thermal burns.

The postmortem report is at Exhibit 64.

6. On the case being committed to the Court of Sessions, the Trial Court framed charge against the Appellant and other accused vide Exhibit 13 for offence punishable under Section 498-A r/w. 34, 302 r/w. 34 and 342 r/w. 34 of the Indian Penal Code. Prosecution in support of its case examined 13 witnesses while the accused in his defence examined 3 witnesses. The Trial Judge upon appreciation of the evidence convicted and sentenced the Appellant as afore-stated while acquitting the other accused. The Trial Judge has inadvertently convicted the Appellant for the substantive offences read with Section 34 of the Indian Penal Code. Since the Appellant alone had been convicted, the Trial Judge should have convicted the Appellant for the substantive offences and could not have convicted him with the aid of Section 34 of the Indian Penal Code.

7. We have heard Mr. S.V. Marwadi, learned Counsel for the Appellant and the learned APP. The Appellant was in Jail since his arrest and therefore, expedited hearing of the

Appeal was granted. In order to effectively deal with the submissions advanced before us by the learned Counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

8. Prosecution has examined PW-1 Smt. Shobha, who was working as a Special Executive Officer. According to PW-1 Shobha, on 16.3.2009, she was called to the Bhagwati Hospital for recording the dying declaration of injured Poonam. PW-1 Shobha accordingly reached the Hospital at about 8.15 a.m. She noticed that Poonam had sustained burns. 2 to 3 women were sitting near Poonam and therefore, she had asked those women to withdraw themselves. According to Shobha, she inquired from Poonam and Poonam disclosed to her that her husband was good and the family members were also good. Thereafter, Poonam disclosed to her that the Appellant had poured kerosene on her and thereafter, had fled. Shobha again inquired from Poonam and Poonam disclosed that the Appellant was suspecting character of Poonam. Shobha read over the statement to Poonam. In the examination-in-chief itself PW-1 Shobha has admitted "at the

same time she was not replying my questions properly". The dying declaration of Poonam is at Exhibit 29.

In cross-examination she has admitted that PW-2 Prakash, brother of Poonam had met her. Shobha has admitted that she learnt that Poonam had sustained injuries at about 4.30 to 5.00 a.m. She has also admitted that she learnt that the Appellant was doing the business of milk. She has also admitted that she learnt that the Appellant had left the home early in the morning. She has then admitted that the voice of Poonam was not clear and Shobha was unable to understand exactly what Poonam was stating. Shobha has admitted that since she did not understand exactly what Poonam was stating, she has drawn inferences and recorded the statement of Poonam. She has admitted that initially she had taken rough notes while inquiring with Poonam and thereafter, had scribed the statement at Exhibit 29. She has admitted that the Medical Officer had not examined Poonam in her presence. She has admitted that the Police Officer had disclosed to her the facts of the case while Shobha was being taken to the Hospital.

9. In the light of the admissions given in the cross-examination, in our opinion, no reliance whatsoever can be placed on the dying declaration at Exhibit 29. In an unheard of practice, PW-1 Shobha took rough notes and thereafter scribed the statement. She has admitted that she has drawn inferences as she could not understand exactly what the deceased was stating. In that light of the matter therefore, in our opinion, no reliance whatsoever can be placed on the dying declaration at Exhibit 29.

10. PW-10 PSI Gosavi has recorded the dying declaration of Poonam. PW-10 PSI Gosavi deposes that on 16.3.2009, he had received a message at about 6.00 a.m. regarding admission of Poonam in the Hospital. He had therefore gone to the Hospital and had requested the Medical Officer to endorse if Poonam was in a fit condition to give her statement. The Medical Officer accordingly endorsed at 8.50 a.m. about the ability of Poonam to give her statement. Accordingly, PW-10 PSI Gosavi recorded the statement of Poonam. Poonam had stated that she was ill-treated by the

Appellant, who was suspecting her character. The Appellant had quarrel with her and had assaulted her and at about 4.30 to 4.45 a.m. the Appellant had poured kerosene on her and had set her ablaze. The Appellant had latched the door from outside and had fled. The dying declaration of Poonam is at Exhibit 78. In cross-examination PW-10 PSI Gosavi has admitted that when the statement of Poonam was being recorded, her brothers were present. Importantly, this witness does not depose that the statement of Poonam was read over to her and she had admitted the contents to have been correctly recorded. The time of recording of the dying declaration and the conclusion of the dying declaration is also not stated in the dying declaration. Since there is no evidence that the dying declaration had been read over to Poonam and Poonam had admitted the contents to have been correctly recorded, in our opinion, no reliance can be placed on the dying declaration. A reference may usefully be made to the Judgment of the Supreme Court in **Shaikh Bakshu and Ors. v/s. State of Maharashtra [(2007) 11 SCC 269]** as well as to the Division Bench Judgment of this Court in **Abdul Riyaz Abdul Bashir V/s. State of Maharashtra [(2012) 3 Bom.**

C.R. (Cri.) 329].

11. Prosecution has examined PW-2 Prakash, brother of deceased Poonam as well as PW-5 Sitaram, brother of deceased Poonam and PW-6 Vaishali, sister of deceased Poonam. Prosecution has also examined PW-7 Dhondhu, father of deceased Poonam. All these witnesses are on the point of ill-treatment of Poonam. The evidence of these witnesses indicates that a N.C. Complaint had been lodged by Poonam and a meeting of the villagers had been called and a settlement of the dispute between the Appellant and Poonam had been arrived at. This was soon after the birth of the daughter of deceased Poonam. Though these witnesses have been cross-examined at length, we find that the prosecution has been able to establish that the Appellant had treated deceased Poonam with cruelty and therefore, in our opinion, the Appellant has been rightly convicted for offence punishable under Section 498-A of the Indian Penal Code. As pointed out by us above, since the other accused had been acquitted, the conviction of the Appellant ought to have been simplicitor under the substantive provision i.e. Section 498-A

of the Indian Penal Code and he could not have been convicted with the aid of Section 34.

12. Prosecution has relied upon the evidence of PW-9 Police Constable Vikas Pawar in respect of the entry at Exhibit 73. Though in his substantive evidence, PW-9 Police Constable Pawar deposes and he had recorded the statement of Poonam at Exhibit 73, perusal of Exhibit 73 does not disclose that the information in respect of the incident was given by injured Poonam. In the entry at Exhibit 73 there is no reference that the information was disclosed by Poonam. It further appears that the medical case papers relating to the injuries sustained by Poonam as well as her 2 daughters at Exhibit 86 discloses that the information was given by PW-2 Prakash. Admittedly, PW-2 Prakash was not an eye witness to the incident and admittedly, no oral dying declaration had been made to PW-2 Prakash. In such circumstances therefore, in our opinion, no reliance can be placed on the entry at Exhibit 73 recorded by PW-9 Police Constable Vikas Pawar as well as the history disclosed in the medical case papers at Exhibit 86. PW-11 Dr. Lalit Agarwal also does not depose that

any history was narrated to him by injured Poonam regarding the injuries sustained by her.

13. Prosecution has examined PW-4 Anil, a panch to the scene of the incident panchnama, who deposes that the door which was a wooden door had been found broken and the latch on the inner side of the door had also been broken. The evidence of this witness thus discloses that the door had been latched from inside and the door had been broken open by the neighbours who had seen smoke coming from the house of deceased Poonam. The conviction of the Appellant therefore cannot be sustained for an offence punishable under Section 342 of the Indian Penal code that the Appellant had confined deceased Poonam inside the house by latching the door from outside. We have already recorded a finding that the dying declaration cannot be relied upon and thus, there is no evidence that the Appellant had latched the door from outside. The evidence on the other hand discloses that the door had been latched from inside and had been forced opened. In respect of the offence punishable under Section 302 of the Indian Penal Code, we find that there

is no evidence whatsoever which would prove the offence against the Appellant beyond reasonable doubt.

14. The Appellant has examined 3 witnesses in his defence. DW-1 Sitaram and DW-2 Ashwini, neighbours of the Appellant deposed about noticing the smoke and on hearing the cries of deceased Poonam and then rushing to the house of deceased Poonam. They deposed that injured Poonam was then taken to the Hospital. The APP while cross-examining DW-2 Ashwini had confronted her with the portion from the statement recorded by the police during investigation. Such an exercise is impermissible. The defence witness cannot be contradicted with the statement made by the witness in the statement recorded under Section 161 of the Code of Criminal procedure, by the Police during investigation. A reference may usefully be made to the Judgment of the Supreme Court in **Mrs. Shakila Khader and Ors. V/s. Nausheer Cama and Ors. [(1975) 4 SCC 122]**. We therefore find that there is absolutely no evidence in support of the charge against the Appellant for offence punishable under Sections 302 and 342 of the Indian Penal Code. We have however noticed that there

is evidence in respect of the charge under Section 498-A of the Indian Penal Code. The Appellant has been rightly convicted for an offence punishable under Section 498-A of the Indian Penal Code. The aforesaid ill-treatment and the strained relations between the Appellant and his deceased wife Poonam may at the most furnish motive for the Appellant to commit murder of deceased Poonam. However, even if the evidence in respect of the motive is strong, motive by itself is insufficient for sustaining the conviction under Section 302 of the Indian Penal Code. There is no evidence in respect of the Appellant pouring kerosene on Poonam and setting her ablaze.

15. Thus, the present Criminal Appeal is partly allowed. The conviction and sentence of the Appellant/Accused for offence punishable under Sections 302 and 342 of the Indian Penal Code is hereby quashed and set aside and the Appellant is acquitted of the aforesaid offences. Fine, if paid by the Appellant, be refunded to him. The conviction and sentence of the Appellant for offence punishable under Section 498-A of the Indian Penal Code is hereby confirmed. Since the Appellant has already undergone the sentence of two years

R.I. for offence punishable under Section 498-A of the Indian Penal Code, the Appellant be released forthwith if not required in any other case.

(DR.SHALINI PHANSALKAR-JOSHI, J.) (P.V. HARDAS, J.)