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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 254 OF 2013**

Shivaji Rohidas More	]	
Convict No. C-8516	]	
Nashik Road Central Prison, Nashik	]	..Appellant
		[Ori. Accused]

Vs.

The State of Maharashtra	]	..Respondent
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Ms. Ameeta Kuttikrishnan Advocate appointed for the Appellant

Mrs. A.S. Pai A.P.P. for the State

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**CORAM : SMT.V.K.TAHILRAMANI AND
SHRI.B.P.COLABAWALLA, JJ.
DATED : APRIL 17, 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 20.10.2010 passed by the learned Extra Joint Ad-hoc Additional Sessions Judge, Thane in Sessions Case No. 31 of 2010. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of IPC and sentenced him to R.I. for life and fine of Rs.10,000/- in default S.I. for one year.

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

Deceased Sulochana was the younger sister of P.W. 2 Bharat. The marriage of Sulochana and the appellant took place about 22 years prior to the incident. Sulochana and the appellant had three children i.e. Sambhaji, Renuka and P.W. 3 Rekha. Since one year prior to the incident, the appellant along with his wife Sulochana and their children started residing at T.M.T. Chawl at Jai Bhavani Nagar in Thane. Sulochana was working as a maid servant. Her daughters were also working as maid servants. The appellant was addicted to liquor and he was not doing any work. The appellant used to beat Sulochana under the influence of liquor. The incident occurred on 5.12.2007. In the morning, Sambhaji, Renuka and Rekha left the house and went for work. Only Sulochana and her husband i.e. appellant were in the house. At about 9.30 a.m. the appellant demanded Rs.50/- from Sulochana to bring liquor. Sulochana gave the appellant Rs. 50/-. Thereafter at 9.45 a.m. the appellant again came back to the house and he demanded money for liquor. Sulochana did not give him money. The appellant then started quarreling with Sulochana. Then the appellant poured kerosene from the stove on Sulochana and set her on fire with match-stick. Sulochana

started shouting and she came running out of the house. The neighbours then extinguished the fire. Thereafter Sulochana was taken to the hospital. In the hospital, the dying declaration of Sulochana was recorded by P.W. 4 Special Executive Officer Asha Shishupal. In the said dying declaration, Sulochana stated that her husband poured kerosene on her and set her on fire. This dying declaration was recorded on 5.12.2007 at 2.45 p.m. This dying declaration is at Exh. 22. Thereafter, P.W. 6 P.S.I. Patil recorded another dying declaration of Sulochana. This was recorded on 5.12.2007 at 3.25 p.m. In the said dying declaration, Sulochana stated that her husband demanded money for drinking liquor. She gave him the money. Thereafter her husband again demanded money for drinking liquor. She did not give money, hence, her husband started quarreling with her. Her husband then poured kerosene on her and set her on fire. At that time, she and her husband were alone in the house and her daughters had gone out for work. This dying declaration is at Exh. 27. This dying declaration was treated as F.I.R. Thereafter, investigation commenced. Sulochana expired on 12.12.2007. The offence was converted from Section 307 to 302 of IPC. After

completion of investigation, the charge sheet came to be filed. In due course, the case was committed to the Court of Sessions for trial.

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 Sulochana and set her on fire which led to her death.

5 The conviction is mainly based on two dying declarations Exh. 22 and Exh. 27. Dying declaration Exh. 22 was recorded by P.W. 4 Special Executive Officer Asha Shishupal and dying declaration Exh. 27 was recorded by P.W. 6 P.S.I. Patil. Special Executive Officer Asha Shishupal has stated that on 5.12.2007 at about 2.45 p.m. she went to the hospital and recorded the statement of Sulochana. Sulochana told her that her husband set her on fire after pouring kerosene on her. This dying declaration is at Exh. 22. Thereafter, P.W. 6 P.S.I. Patil recorded the dying declaration of Sulochana on the very same day i.e. on 5.12.2007 at 3.25 p.m. P.S.I. Patil has stated that Sulochana stated that at about 9.30 a.m. the appellant demanded Rs.50/- from Sulochana to bring liquor. Sulochana gave the appellant Rs. 50/- Thereafter at 9.45 a.m. the appellant again came back to the house and he demanded money. He then started quarreling with Sulochana. Then the appellant poured kerosene from the stove on Sulochana and set her on fire with match-stick. At that time, she and her husband were alone in the house and her daughter had gone out for work. Thereafter Sulochana was taken to the hospital. Nothing has been elicited in the cross-examination of both

these witnesses to cause us to disbelieve their testimony.

6 That Sulochana was conscious and in a fit condition to give a dying declaration is brought out in the evidence of P.W. 5 Dr. Naik. Dr. Naik has stated that on 5.12.2007 she was on duty as Medical Officer at civil hospital Thane. At about 2.00 to 2.30 p.m. Special Executive Officer Asha Shishupal came to her and told her that she wanted to record dying declaration. Dr. Naik therefore examined Sulochana and found that she was conscious and she was able to talk. Considering condition of her health, Dr. Naik allowed the Special Executive Officer Asha Shishupal to record the dying declaration of Sulochana. Dr. Naik has stated that Special Executive Officer Asha Shishupal recorded dying declaration of Sulochana in her presence. She has identified Exh. 22 as the dying declaration recorded by S.E.O. Asha Shishupal. Dr. Naik has further stated that thereafter P.W. 6 P.S.I. Patil came to record dying declaration of Sulochana. P.S.I. Patil recorded dying declaration of Sulochana. Dr. Naik gave endorsement on the said dying declaration that the patient is conscious and able to give a statement.

7 In addition to the two dying declarations Exhs. 22 and 27, the prosecution is relying on two oral dying declarations which were made by Sulochana to P.W. 2 Bharat and P.W. 3 Rekha. P.W. 2 Bharat was the elder brother of Sulochana and P.W. 3 Rekha was the daughter of Sulochana. Bharat has stated that Sulochana was his younger sister. Sulochana was married to the appellant. Since about one year prior to the incident, his sister Sulochana was residing in T.M.T. chawl in Jai Bhavani Nagar in Thane along with her husband and children. Sulochana and the appellant had three children i.e. Sambhaji, Renuka and Rekha (P.W. 3). Bharat has stated that on 5.12.2007 at about 9.30 a.m. he and his brother Chandu had gone to the residential place of his sister Sulochana. When they reached there, they found that Sulochana had sustained burn injuries and Sulochana was crying that her husband had set her on fire. The persons from the neighbourhood had extinguished the fire. Thereafter Bharat along with children of Sulochana took Sulochana to the hospital.

8 P.W. 3 Rekha was the daughter of Sulochana and the appellant. She has stated that on 5.12.2007 she had left the

house at about 9 a.m. to go for work. At about 9.30 a.m. to 10.00 a.m. she returned home along with her sister Renuka. At that time, she saw that her mother Sulochana had sustained burn injuries. She made enquiry with her mother about how she had sustained burn injuries. Sulochana told her that she had 50 rupees left which she had kept for purchasing ration. The appellant demanded money from Sulochana but Sulochana refused to give him money. The appellant then poured kerosene on Sulochana and set her on fire.

9 In the decision in **Jai Kiran Vs. State of Delhi, 1999 SCC (Cri) 1385 : (1999 Cri. L. J. 4529)**, the observations of the Supreme Court with regard to the dying declaration are as follows:

"A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premises that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premise which is considered strong enough to set off the need that the maker of the statement

should state so on oath and be cross-examined by the person who is sought to be implicated. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on a strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence - neither extra strong nor weak - and can be acted upon without corroboration if it is found to be otherwise true and reliable."

10 In the present case, we find the evidence of P.W. 4 Special Executive Officer Asha Shishupal and P.W. 6 P.S.I. Patil is unimpeachable. Moreover, the evidence of P.W. 5 Dr. Naik shows that Sulochana was conscious and in a fit condition when she gave both the dying declarations Exh. 22 and 27.

Thus, on the basis of evidence of P.W. 4 Special Executive officer P.W.4 Asha Shishupal and P.W. 6 P.S.I. Patil and two dying declarations Exh. 22 and 27 and two oral dying declarations, it can be said that prosecution has proved that the appellant poured kerosene on his wife Sulochana and set her on fire which led to her death.

11 It is the prosecution case that the appellant poured kerosene on his wife Sulochana and set her on fire. This is borne out by the medical evidence. P.W. 7 Dr. Naik conducted the post-mortem on the dead body of Sulochana. According to him, Sulochana died due to "septicemia with hypovolumic shock due to superficial to deep 60% burns".

12 Ms. Kuttikrishnan submitted that even if it is accepted that the act of the appellant of setting his wife on fire resulted in her death, the case would not fall under Section 302 of IPC but it would fall under Section 304-II of IPC. She pointed out that the evidence on record shows that a quarrel was going on between the appellant and his wife Sulochana. To support her contention that the incident occurred during a sudden quarrel,

she placed reliance on the evidence of P.W. 6 P.S.I. Patil who has stated that Sulochana told him that at 9.45 a.m. her husband started quarreling with her, then her husband poured kerosene on her and set her on fire. This is also reflected in her dying declaration Exh. 27 wherein Sulochana has stated that at 9.45 a.m. her husband asked her for money to bring liquor. She did not give him money, hence, her husband quarreled with her and he then poured kerosene on her and set her on fire. Ms. Kuttikrishnan further pointed out that the medical evidence shows that Sulochana had sustained only 60% superficial to deep burns. Ms. Kuttikrishnan submitted that the fact that the appellant set his wife Sulochana on fire during the course of sudden quarrel, would bring the case under Exception 4 to Section 300 of IPC and would thus be covered by Section 304-II of IPC.

13 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 word '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 the parties had indulged into a quarrel, the appellant did not come home armed with a weapon but he took kerosene which was available in the room and poured it on his wife and set her on fire. The fact that Sulochana had sustained only 60% superficial to deep burn injuries and she expired on 12.12.2007 i.e. about 7 days after the incident has also to be taken into account. However, we are not inclined to accede to the submission of Ms. Kuttikrishnan that the case would fall under Section 304-II of IPC. In our view, the case would fall under Section 304-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 but in fact, the appellant intended to cause death of his wife Sulochana. No doubt, Sulochana had sustained 60% burn injuries but this was caused only because the neighbours had rushed to the spot and extinguished the fire. Had the neighbours not rushed to the spot, it was possible that Sulochana may have sustained more burn injuries. Looking to all these facts, we are of the considered opinion that the case cannot fall under Section 304-II of IPC.

14 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-I of IPC. Hence, the following order is passed:

ORDER

- (1) The conviction and sentence imposed on the appellant under Section 302 of IPC by judgment and order dated 20.10.2010 passed by the learned Extra Joint Adhoc Additional Sessions Judge, Thane in Sessions Case No. 31 of 2010 is set aside. Instead, the appellant is convicted under Section 304-I of IPC and sentenced to R.I. for nine years and fine of Rs.2000/- in default S.I. for one month.
- (2) Set off be given to the appellant as per rules.
- (3) Appeal is allowed to the aforesaid extent.
- (4) Office to communicate this order to the appellant who is in Nashik Road Central Prison.
- (5) We quantify legal fees to be paid to Advocate Ms. Ameeta Kuttikrishnan by the High Court Legal Services Committee at Rs. 5000/-.

[SHRI.B.P.COLABAWALLA,J.]

[SMT. V.K.TAHILRAMANI, J.]