

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

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CRIMINAL APPEAL NO. 84/2005

- 1) Arun Sukhdeo Wankhede
Aged about 33 years
- 2) Sau. Shahubai w/o Sukhdeo Wankhede
Aged about 55 years,

Both R/o Adsul, Tah. Telhara
Dist.Akola.

...

...**APPELLANTS**

v e r s u s

The State of Maharashtra
Through P. S.O. Telhara
Dist. Akola.

...

...**RESPONDENT**

.....

Ms. FN.Haidari, Advocate for appellants
Mr. T.A.Mirza, Additional Public Prosecutor for Respondent

.....

CORAM: A.B.CHAUDHARI &
INDIRA K. JAIN, JJ.

DATED : 19th August, 2015

JUDGMENT : (Per INDIRA K. JAIN, J.)

This Appeal is preferred by the appellants/original

accused nos. 1 and 2 against the judgment and order dated 16.12.2004 passed by the learned Additional Sessions Judge, Akola in Sessions Case No.205/1997. By the said judgment and order, the learned Addl. Sessions Judge convicted and sentenced both the appellants for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced them to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default, to suffer simple imprisonment for three months each.

For the sake of convenience we shall refer the appellants in their original status as accused as they were referred before the Trial Court.

2. The prosecution case in nutshell is as under :-

(i) Complainant Sukhdeo Shrawan Dusekar was resident of village Wai, Tq.Akot, District Akola. Asha was his daughter. She was married to accused No.1 Arun Wankhede on 5.5.1995. Since marriage Asha was residing with the accused.

Accused No.2 is mother-in-law of Asha.

(ii) It is the prosecution case that after marriage accused started ill-treating Asha. On some occasions she was beaten without any reason. Therefore, for about seven months she had to stay with her parents. Shivaji, brother of accused No.1, came to fetch her and assured of good behaviour. On such assurance, Asha was sent back to her matrimonial home.

(iii) It is alleged that despite assurance from Shivaji, accused continued ill-treatment to Asha. They made a demand of Rs. 10,000/- for cultivating the land. She was threatened to her life on non-fulfillment of the demand.

(iv) On 19.3.1997 one Shrirang Wankhede informed father of Asha that she received burn injuries and admitted to the hospital. On receiving message complainant and his wife rushed to the hospital at Akola. They met Asha. She disclosed to them that she was beaten by her husband with stick and while beating one blow was received by her mother-in-law too. She also disclosed that her mother-in-law poured kerosene on her person and her husband set her on fire. Thereafter Sukhdeo went to

Telhara Police Station. He informed about the incident to Deputy Superintendent of Police, Akola and lodged report.

(v) On the basis of report Crime No.27/1997 came to be registered u/s. 307 r/w 34 I.P.C. Asha was initially admitted to the hospital at Shegaon. Her dying declaration was recorded by the Executive Magistrate. Thereafter she was shifted to Akola General Hospital. At the request of her father Sukhdeo, second dying declaration of Asha was recorded by the Executive Magistrate. Asha succumbed to burn injuries on 20.3.1997 while she was under treatment at Akola General Hospital. On the death of Asha offence u/s 302 r/w 34 of the I.P.C. was substituted against the accused.

(vi) The death of Asha was informed to City Kotwali Police Station, Akola. In turn, City Kotwali Police Station informed Police Station, Telhara. API R.R. Shukla took over investigation. On 21.3.1997 he prepared scene of occurrence *panchanama*. A can of kerosene, soil stained with kerosene, ordinary soil and pieces of red *saree* were seized from the spot. Seizure memo of

these articles was separately drawn. Statement of several witnesses were recorded. Accused were arrested.

(vii) In further investigation a carpet and a stick were recovered at the instance of accused Arun. Accordingly, discovery *panchnama* u/s. 27 of the Evidence Act was drawn. On completing investigation charge-sheet was filed. In turn, case was committed to the court of Sessions.

3. Charge came to be framed against both the appellants at Exh.31. Accused pleaded not guilty to the said charge and claimed to be tried. The defence was that of total denial and false implication.

4. Prosecution examined in all nine witnesses. After going through the evidence adduced in the case, the learned Additional Sessions Judge convicted both appellants/ accused as stated in paragraph 1 above. Hence this Appeal.

5. We have heard the learned Advocate for the appellants

and the learned Additional Public Prosecutor for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, judgment delivered by Trial Court and the evidence on record, for the reasons stated below, we are of the opinion that prosecution has not proved beyond reasonable doubt that appellants in furtherance of their common intention set Asha on fire and caused her death.

6. The accused have not disputed genuineness of Inquest *panchnama* (Exh.67), post mortem (Exh.70), *panchanama* of scene of occurrence (Exh.71), seizure of articles from the spot (Exh.72) and the first dying declaration of Asha recorded by the Executive Magistrate at Shegaon vide Exh.65.

7. The conviction of the appellants is based on two oral dying declarations and one written dying declaration recorded by the Executive Magistrate in General Hospital, Akola.

8. The oral dying declarations were made to PW 1 Sukhdeo, father and PW 2 Chandrakala, mother of Asha. PW 1 Sukhdeo stated that on 19.3.1997 he was informed by Shriram Wankhede that Asha received burn injuries and was admitted to the hospital. Therefore, he and his wife rushed to the hospital. He stated that when they met Asha she narrated to him that she was beaten by her husband and set on fire by pouring kerosene on her person. It is stated by Sukhdeo that Asha disclosed to him that her mother-in-law poured kerosene and her husband set her ablaze.

9. The evidence of PW 2 Chandrakala on oral dying declaration is identical to the evidence of PW 1 Sukhdeo.

10. Both the witnesses admitted in their cross-examination that dying declaration of Asha was recorded at Shegaon. They state that the said dying declaration was not properly recorded and so an application was moved to City Kotwali Police Station, Akola for re-recording statement of Asha. They admitted that as

they made request to record the dying declaration, Tahsildar recorded second dying declaration of Asha.

11. In respect to alleged cruelty PW 1 Sukhdeo and PW 2 Chandrakala stated that there was demand of Rs. 10,000/- from the accused for cultivating the land. As demand was not fulfilled accused used to harass Asha. So far as alleged ill-treatment and demand of money is concerned, the material omissions and contradictions have been brought in the cross-examination of complainant Sukhdeo. He admitted that he did not state before police about demand of Rs.10,000/- and ill-treatment to Asha before the incident. The report is proved at Exh.60. In the said report, it was not mentioned that mother-in-law of Asha poured kerosene on her and husband set her on fire. It is stated by Sukhdeo that he was mentally disturbed due to death of Asha and, therefore, he could not give the details.

12. It is not in dispute that initially Asha was admitted to Saibai Mote Hospital at Shegaon on 18.3.1997. The Executive

Magistrate, Shegaon Mr. N.S.Bawne recorded dying declaration of Asha on 18.3.1997 at 19.02 hours. This dying declaration is first in point of time. In the said dying declaration, Asha disclosed that she sustained burn injuries while preparing tea on stove for the guests who arrived for settlement of marriage of her brother-in-law. She stated that guests who were present there extinguished fire and brought her to hospital. Asha had sustained 76% burn injuries. The Medical Officer certified that she was fit to give her statement. From the tenor of dying declaration (Exh. 65) recorded by a responsible Magistrate having no reason to grind an axe against the complainant, it is apparent that Asha sustained accidental burns.

13. The prosecution, however, wants to place strong reliance on the second dying declaration recorded by PW 3 Executive Magistrate Keshav Sarkate on 20.3.1997. It is stated by the Executive Magistrate that he received a letter from PSO City Kotwali Police Station, Akola for recording dying declaration of Asha Arun Wankhede. Then he went to District Hospital, Akola.

He met the Doctor and requested him to examine the patient and state whether the patient was fit to make her statement. The Executive Magistrate asked the other persons who were near the patient to leave the Ward and to go out. Doctor examined and certified that patient was conscious and in a fit condition to make her statement. The Executive Magistrate also put some questions to the patient and ascertained about her fitness to make the statement.

14. PW 3 Executive Magistrate states that he recorded statement of Asha as per her say. After the writing was concluded statement was read over to her. She admitted the contents to be correct. Then he obtained right hand thumb impression of Asha and put his signature on dying declaration. According to the Executive Magistrate patient was conscious throughout. At the time of recording dying declaration, Doctor was present with him. Medical Officer certified at the bottom of dying declaration regarding the consciousness of the patient. The second dying declaration proved by the Executive Magistrate is at Exh.75. It

can be seen from the second dying declaration that it was recorded on 20.3.1997 between 7.30 and 8.00 p.m. In this dying declaration it was stated by Asha that on Tuesday in the noon between 12.00 and 12.30 there was quarrel between her and her mother-in-law as she had taken her thirteen-month-old son along with her to answer nature's call. She was not feeling well and suffering from stomach ache. That time her husband Arun came and assaulted her by means of stick. During the course of assault one blow of stick was received by her mother-in-law on her forehead. She was abused by her mother-in-law. Then her mother-in-law took a can containing two litres kerosene from the house and poured kerosene on her person. She was feeding her child that time. Her mother-in-law ignited the matchstick and threw it on her person. When matchstick was thrown her son was not with her. She raised alarm. People rushed there. Her husband also came. He put a quilt on her person and then admitted her to the Government Hospital at Shegaon. She says that the incident might have happened at about 5 o' clock. She then stated that her statement recorded at

Shegaon Hospital was at the instance of her husband who prevented her from telling the truth.

15. Commenting upon the second dying declaration, learned counsel for the appellants Mr.R.M.Daga, submitted that this dying declaration was recorded due to insistence of father of deceased and being outcome of tutoring no reliance can be placed on it. In support thereof, learned counsel placed reliance on *Suresh Dodorkar (Sonar) vs. State of Maharashtra {(2005) All MR (Cri) 1599 (Bom)}*. In this case two written and two oral dying declarations were recorded. Perusal of both the dying declarations revealed *inter se* variance. On considering the evidence of prosecution witnesses it was found highly unsafe to place any reliance on the oral as well as written dying declarations.

16. Needless to state that dying declaration recorded by a competent Magistrate can form the sole basis of conviction if the statement is made at the earliest possible opportunity and it

inspires confidence. In order to pass the test of reliability dying declaration has to be subjected to a very close scrutiny keeping in view the fact that statement has been made in the absence of accused who had no opportunity of testing the veracity of statement by cross-examination. But once Court comes to the conclusion that dying declaration is the truthful version, there is no question of further corroboration.

17. In the present case, it is admitted by PW 1 Sukhdeo and PW 2 Chandrakala that an application was moved to City Kotwali Police Station, Akola for recording second dying declaration as first dying declaration was not properly recorded at Shegaon. Due to their insistence Executive Magistrate recorded the second dying declaration.

18. In the first dying declaration story of accidental burns was narrated by Asha, whereas in the second dying declaration theory of homicidal death was tried to be introduced. Perusal of both the dying declarations would reveal that there is *inter se*

variance in respect of manner of occurrence of incident. In this premise, we find that no reliance can be placed on two written dying declarations (Exhs. 65 and 75) as acceptance of any one dying declaration necessarily renders the other as false.

19. Further, there is inconsistency in the oral dying declarations made to PW 1 Sukhdeo and PW 2 Chandrakala and second dying declaration (Exh.75). No overt act is attributed to accused no.1 Arun in the second written dying declaration. On the contrary, it appears that mother- in-law was solely responsible to pour kerosene and set her on fire.

20. As per the oral dying declarations, it was the mother- in- law who poured kerosene and the husband set her on fire. Thus, it is not a case where two written dying declarations are inconsistent but it is a case where the sole dying declaration on which prosecution wants to place reliance is in conflict even with the oral dying declarations made to the parents of the deceased.

21. Under these circumstances, we are of the view that prosecution has not proved beyond reasonable doubt that appellants committed murder of Asha by pouring kerosene on her and setting her on fire. We are therefore inclined to allow the Appeal and pass the following order:

ORDER

- i) Criminal Appeal No. 84/2005 is allowed.
- ii) The judgment and order dated 16.12.2004 in Sessions Trial No.205/1997 passed by learned Additional Sessions Judge, Akola convicting and sentencing the appellants: (1) Arun Sukhdeo Wankhede and, (2) Sau. Shahubai w/o Sukhdeo Wankhede for the offence punishable under Section 302 r/ws. 34 of the Indian Penal Code, is hereby set aside.
- iii) The appellants Arun Wankhede and Sau. Shahubai are held not guilty of the offence punishable under Section 302 r/ws.34 of the I.P.C.

and are acquitted.

iv) Their bail bonds shall stand cancelled.

v) Fine if paid by the appellants, be refunded to them.

JUDGE

JUDGE

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