

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.136 OF 2003

1. Syed Noor s/o Syed Ibrahim
Age 30 years, Occ. Labour work,
R/o Itwara by the side of
Bakra Market, Nanded
 2. Smt. Chotibee w/o Syed Ibrahim,
Age 50 years, Occ. Household,
R/o Itwara by the side of
Bakra Market, Nanded
- ... APPELLANTS
(Original Accused No.1 & 2)

VERSUS

The State of Maharashtra
through Itwara Police Station,
Nanded
(Copy to be served on
Public Prosecutor, High Court,
Bench at Aurangabad)

... RESPONDENT

.....

Mrs. A.N. Ansari, Advocate for appellants
Shri A.M. Phule, A.P.P. for respondent/ State

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CORAM: A.I.S. CHEEMA, J.

DATED: 2nd May, 2016.

Date of reserving judgment : 13th April 2016

Date of pronouncing judgment : 2nd May, 2016.

J U D G M E N T :

1. The appellants were accused No.1 and 2 in Sessions Case No.117/2001 tried before Additional Sessions Judge, Nanded. The appellant No.1 is son of the appellant No.2. Along with them, accused No.3 Afsanabee (the daughter of appellant No.2) and accused No.4 Sayyed Jainoddin (the son-in-law of appellant No.2) as well as accused accused No.5 Sayyed Gaus, (the other son of appellant No.2) were also tried for offence under Section 498-A, 306 read with Section 34 of the Indian Penal Code, 1860 (I.P.C. in brief). The other accused came to be acquitted while the present appellants were convicted by the Additional Sessions Judge by judgment dated 29.1.2003. Thus this appeal.

2. Case of the prosecution in short is as follows :

On 29.3.2001, complainant Shaikh Zainuddin (P.W.1) filed F.I.R. Exh.18 at Police Station, Itwara, Nanded and Crime No.66/2001 was registered. The complainant informed the police as under :

(a) The complainant informed that his sister Shahedabegum (hereinafter referred as victim) got married to the accused No.1 Sayyed Noor on 25.5.2000. She was treated well for about 3 months. Thereafter, for money and T.V., there were demands and she was being brought to the place of her parents at Kalmula, Tq. Purna, District Parbhani. Accused Nos.3 and 4 used to come and say that she will not be troubled and took her back to the matrimonial home 2-3 times, but her trouble did not reduce. Complainant reported that, whenever victim was coming to their place, she was stating that accused No.2 Chhotibee and accused No.4 Sayyed Jainoddin tell her that she is at fault by not waking up early and that she does not know how to cook. She was given mental torture like this. Accused No.2 Chhotibee and accused No.1 Sayyed Noor used to beat her for petty reasons. On 26.3.2001, his father Shaikh Afzal (P.W.2) had gone to the matrimonial home of victim to bring her for the festival of Moharram, but accused No.3 Chhotibee did not send her stating

that there was nobody to do work at home. Victim had cried and told her father that she is unable to bear the trouble and beating and she wants to come to the place of her parents. The father explained to her and came back. On 27.3.2001, complainant came to know from accused No.5 Sayyed Gaus by phone at about 2.00 p.m. that, the victim had stomach ache and that she had been taken to Government Hospital, Nanded. Complainant went there and saw that she was in burnt condition. He went back to his village and told his father and they with 5-6 persons came to the hospital. The victim was in unconscious condition at that time. At about 9.00 p.m., she gained back her consciousness and when asked about the incident, told that, on earlier day, father had come to take her and thereafter her mother-in-law and husband started telling her that she keeps feeling like going to her parent's place all the time and so saying, she was beaten, which she could not bear and getting fed up of the trouble, she burnt herself.

(b) Before filing of the F.I.R. as above on 29.3.2001, when the victim was admitted to the Government Hospital, Nanded on 27.3.2001, on the request of one Head Constable Dhulgande, Special Judicial Magistrate Narayan Balatkar (P.W.4)

had gone to the hospital at about 11.45 p.m. and recorded the dying declaration Exh.26 of the victim, in which she had stated that on that day at about 11.30 a.m., her husband and mother-in-law started speaking ill with her and also abused her sister Saudir, which she could not bear and she put kerosene on herself and burnt herself. She claimed that, her mother-in-law and husband accused Nos.2 and 1 do not look at her well and so, she burnt herself. P.W.4 Special Judicial Magistrate, on recording such dying declaration, had sealed it in envelope Exh.27 with covering letter Exh.25 on same day and sent it to the Chief Judicial Magistrate

(c) Victim was under treatment and died on 7.4.2001. The inquest panchanama was drawn and post mortem done. Statements of witnesses were recorded and the investigation was done by P.W.7 P.I. Nivrutti. Subsequently, charge sheet came to be filed.

(d) Charge was framed against the accused person. They pleaded not guilty. Their defence is of denial. In the statements under Section 313 of the Code of Criminal Procedure, read with cross-examination of prosecution witnesses, defence suggested

was that, P.W.2 Shaikh Afzal, father of victim wanted her and her husband to reside separate and thus, had promoted her to burn herself slightly so that the accused could be pressurized to separate them.

3. The prosecution brought on record evidence of seven witnesses. The trial Court discussed the evidence which was brought on record and for reasons recorded, found the offence proved and convicted the accused Nos.1 and 2 (appellants). The appellant No.1 has been convicted and sentenced to suffer rigorous imprisonment for three years under Section 498-A of the Indian Penal Code and rigorous imprisonment for five years under Section 306 of the Indian Penal Code. Accused No.2 has been convicted and sentenced to suffer rigorous imprisonment for three years. They have been sentenced to different amounts of fine and sentence in default have also been passed. The other three accused came to be acquitted.

4. I have heard learned counsel for the appellants - accused. The appellants claim that, no case of demand was made out in evidence. There was no satisfactory evidence regarding ill-treatment being given to the victim. In the dying

declaration, the victim did not claim that any articles were demanded and for that, she was ill-treated. In the dying declaration, reference is made to the presence of sister by the victim referring to her as Saudir although name of her sister is Shamim. The learned counsel referred to the evidence of investigating officer to show that there was yet another statement recorded of the victim by Head Constable Dhulgande, which was not brought before the Court and the investigating officer stated that, in the statement, victim had stated that she got burnt while making tea. Thus, according to the learned counsel, the prosecution has failed to establish the case and accused should have been acquitted.

5. Against this, learned A.P.P. has taken me through the judgment of the trial Court and the other evidence of the trial Court to show that the offence was clearly established and there was sufficient evidence. According to the learned A.P.P., Shamim, the sister of victim, was mentally ill is clear from the cross-examination of the investigating officer. As such, the prosecution could not examine her. A.P.P. supported the judgment of the trial Court. He prayed that the appeal should be dismissed.

6. On record, there is firstly evidence of P.W.1 Zainuddin, brother of the victim. His evidence shows that marriage had taken place on 25.5.2000. The victim died in 2001 and thus, it is within seven years. There is no dispute regarding the fact that the incident of burning of the victim took place while she was in custody and at the house of accused Nos.1 and 2. There is evidence on record to show that accused No.3 Afsanbi and accused No.4 Syed Zainuddin, the sister and brother-in-law of accused No.1 were residing separate. In fact, the evidence shows that, at times they had gone to the place of P.W.1 Zainuddin and his father P.W.2 Shaikh Afzal and brought back the victim and had made efforts to see that the victim is not ill-treated. These two accused have rightly been acquitted by the trial Court. As regards accused No.5 Syed Gaus, there was hardly or no evidence of his involvement in the crime and he has also been rightly acquitted. However, regarding the appellants, the original accused Nos.1 and 2, there does appear to be evidence on record.

7. The evidence of P.W.1 Shaikh Zainuddin is that, after initial period of proper treatment, the victim was ill-treated as

there was insistence to bring money, almirah and TV from her parents. P.W.1 says that, the victim had told them about this. According to P.W.1, at the time of Moharram, P.W.2 Shaikh Afzal had gone to bring the victim, but came back without her as it was told that the accused No.2 did not let the victim come claiming that there is nobody to do household work. In a new marriage, which was not even one year old, this can be treated as cruelty.

8. P.W.2 Shaikh Afzal has also deposed about the treatment which the victim received. His evidence shows that, accused No.1 and accused No.2 along with accused No.4 used to tell the victim that she does not wake up early and does not cook properly. According to P.W.2, the victim was being told that her father did not give TV, almirah etc. in the marriage. He deposed that, the victim was telling this to him when she used to come to his place. According to him, he had persuaded accused No.2 not to quarrel, but accused No.2 used to give abuses to the victim and the accused used to reach the victim to his house. He says that, he made several efforts to make accused No.2 understand, but she did not listen and ultimately he had to say that in such case, there should be divorce. Thereafter, however, the accused

assured good treatment for his daughter and leaving her at the place of accused, he had returned. P.W.2 has deposed that, after 15-20 days, when he again visited the victim, he found that she was being ill-treated and brought her back. Thereafter, on the assurance of accused Nos.3 and 4 she was sent. The evidence shows that, after one and half month, P.W.2 went and saw that there was some change, but the daughter was still being troubled by accused Nos.1 and 2 only. His evidence is that, he had again gone at the time of Moharram to bring the victim, but accused No.2 did not let the victim come claiming that there was nobody to do household work. The evidence of P.W.2 is that, as per their religion, for first Moharram, daughter is to be taken to the place of parents, but the victim was not allowed to come.

. It is argued, evidence shows that, accused already had a T.V. and there was no need to ask for T.V. P.W.1, when asked, stated and explained that accused had Black & White T.V. and wanted Colour T.V. This came on record due to the cross-examination and cannot be treated as improvement.

9. The evidence shows that, after P.W.2 Shaikh Afzal

came back, on next day, the incident of victim burning herself took place. The evidence of P.W.1 and P.W.2 shows that, at about 2.00 p.m., P.W.1 came to know from accused No.5 about the victim being admitted to hospital and he had gone to the hospital and saw that she had got burnt. He went back to village Kalmula and came back with his father P.W.2 and other villagers. When they came to the hospital, at that time, the victim was not conscious and the other villagers went back. It appears, the villagers included P.W.5 Gangadhar and P.W.6 Shankarrao also. P.W.3 Sk. Farooq also had gone to the hospital. These people appear to have come back without being able to talk to the victim. P.W.6 Shankarrao has further corroborated P.W.1 and P.W.2 regarding the earlier fact that the victim, when she was coming to Kalmula, was speaking about her ill-treatment. P.W.6 claimed that he had made the victim understand that things will get set right and to keep hope.

10. The evidence of P.W.1 Shaikh Zainuddin shows that, on 27.3.2001 in the evening, the victim became conscious and when he asked her, she told him that accused Nos.1 and 2 had abused her and beaten her and due to such ill-treatment, she poured kerosene on herself and set herself ablaze. In his F.I.R.

also he had reported that the victim told him that she had been beaten by accused Nos.1 and 2 and so she had burnt herself. Then there is evidence of P.W.2 and he has stated that victim was in a position to talk at 9.00 - 9.30 p.m. and she told that, after he had returned, she was abused and beaten and could not bear it and so she poured kerosene on herself and burnt herself. Thus, these are the oral dying declarations.

11. Then there is evidence of the written dying declarations given by the victim to P.W.4 Narayan Balatkar, Special Judicial Magistrate. His evidence shows that, he received letter on 27.3.2001 at about 11.30 p.m. from police. He went to the Ward at 11.45 p.m. and the victim was shown by the Medical Officer. He recorded her dying declaration. His evidence is that, he ensured that the persons who were attending the patient were made to go outside the hall and near the patient there was only the Special Judicial Magistrate and the Medical Officer. His evidence gives details as to the questions he asked the victim and the answers she gave. The dying declaration is at Exh.26. After the introductory questions, with regard to the incident the victim told the Special Judicial Magistrate that on that day of 27.3.2001, at about 11.30 a.m., her husband and mother-in-law

started speaking ill with her. Her sister Saudir had come and even she was abused. Victim stated that, she could not bear all this and she put kerosene oil on herself and burnt herself. Her mother-in-law and husband do not look upon her well and thus, she has burnt herself. She stated that, the name of her mother-in-law is Chhotibi (accused No.2). The dying declaration shows endorsement of the doctor in the beginning to the effect that - patient is conscious and in fit state of mind to give statement. The time put by the doctor was 00.15 Hrs. of 28.3.2001. The same doctor at the end of the statement also endorsed that patient was conscious throughout the statement and put date 28.3.2001 with time as 00.45 Hrs. Evidence of Special Judicial Magistrate (P.W.4) gives details of the questions he asked and answers which were received as seen in the dying declaration. The witness further stated that, after recording the dying declaration, he checked from the victim and she stated that, it was correctly recorded. According to him, he had read over the statement to her and in response, the victim had stated that it was correct. His evidence is that, he had then taken her right hand thumb impression on the dying declaration and attested the same. The witness has deposed about he taking the endorsement of the medical officer in the beginning and at the

end of the statement as can be seen in the dying declaration. The witness repeated that, at the time of recording of the dying declaration none of the relatives was there and only medical officer was with them. He deposed that, when the statement was recorded, the patient was fully conscious. His evidence further is that, he sent the original dying declaration to Chief Judicial Magistrate, Nanded under envelope and covering letter. The covering letter has been proved as Exhibit 25 and the envelope which was opened in the Court, has been proved at Exhibit 27.

12. Trial Court accepted the above evidence of the witnesses regarding ill-treatment and cruelty as well as the oral dying declarations. The learned counsel for the accused, at the time of arguments, has referred to the cross-examination of P.W.1 and P.W.2 to say that, there were contradictions and omissions. I have considered the evidence of P.W.1 Shaikh Zainuddin along with his F.I.R. which was filed. There does not appear to be any material contradictions or omissions. In the cross-examination of the complainant, he was asked as to why allegations of ill-treatment were not made against the father of the accused No.1. The question was surprising. The witness,

however, gave the right answer that as there was no ill-treatment at the hands of the father of the accused No.1, his name was not reported. In fact, this shows fair approach of the complainant. It was suggested to the complainant that, after death of the victim, they had demanded money from the accused persons, but as the same was refused, false report was lodged by them. The witness denied the suggestion. The cross-examiner lost sight of the fact that the F.I.R. Exh.18 was registered on 29.3.2001 itself while the victim expired on 7.4.2001, which was subsequent to the filing of F.I.R. and thus, there is no question that as money was not paid, capital of death was being made. It was suggested to P.W.1 and P.W.2 that, earlier P.W.2 had filed complaint against one Shaikh Kamal Shaikh Chand, alleging rape of Shamim, the sister of victim. This was suggested to claim that these witnesses are used to filing false cases. Filing of case is not disputed. However, the matter was pending as is stated by P.W.2. Merely by pointing out such one instance, I am not convinced that it shows a particular modus operandi of P.W.1 and P.W.2. I am also not convinced that a father would file a false case rape of his own daughter. Mere pendency of such case would not be reason to draw any such inferences as the accused are trying to suggest.

13. In the cross-examination of the complainant also, various suggestions were made to say that there were contradictions and omissions with statement to police. However, the investigating officer P.W.7 Nivrutti were not put up those alleged contradictions or omissions. He was only asked whether the complainant has stated in his statement that his elder daughter Shamim was at the house of accused No.1 when he had gone to bring the victim for Moharram. The investigating officer stated that, such statement was not made. Thus, for other part of the evidence of P.W.2, it cannot be said that any contradiction or omission had been proved.

14. As regards the dying declaration recorded by Special Judicial Magistrate, the cross-examination did not bring on record anything to shake the veracity of this P.W.4. The confusion of the name of sister referred as Saudir (and not Shamim) can be clerical mistake by P.W.4 Narayan who may not be that familiar with Muslim names.

At the fag end of the trial, in cross-examination of the investigating officer, the cross-examiner asked the investigating

officer and he stated that, statement of the injured was received by him, but was not filed with the charge sheet. Thereafter, investigating officer was asked regarding the contents of the said statement. He stated that, it was written in the statement that the victim burnt while preparing tea. The learned counsel for the accused is trying to make capital out of this, stating that the statement of the injured has been suppressed, which was recorded by Head Constable Dhulgunde. The trial Court, in para 14 of the judgment, dealt with this aspect and observed that, the other evidence on record regarding the dying declaration recorded by the Special Judicial Magistrate was a voluntary and truthful version of the victim and in the absence of Head Constable Dhulgande being examined and the statement being produced, the evidence of investigating officer on this count was of no use.

15. I have also carefully gone through the evidence of P.W.1, P.W.2 and the Special Judicial Magistrate as well as the dying declaration. The evidence regarding cause of death stated by these witnesses does inspire confidence. Prosecution brought on record acceptable evidence to prove guilt. Then, in fact, under Section 106 of the Indian Evidence Act, there was burden

even on the accused persons to bring on record as to how the victim got burnt. The victim was in their custody and in their house when the incident took place. One day earlier, accused No.2 had refused to let the victim go with her father for Moharram. What happened in their house was specifically in the knowledge of accused Nos.1 and 2. The defence put up in the cross-examination of P.W.1 and P.W.2 has no substance, and in statement under Section 313 of the Code of Criminal Procedure, these accused have preferred to keep quiet regarding what happened in their house.

16. A fleeting admission at the end of the trial by investigating officer regarding contents of a document which was not before the Court and which was in his custody, is suspect. Under Section 64 of the Indian Evidence Act, 1872, documents must be proved by primary evidence except in cases mentioned in Section 65. If the accused persons wanted to discharge the burden which Section 106 of the Indian Evidence Act put on them, they could have asked for the production of the statement. I do not think that a witness can be asked regarding contents of a document which he can produce but has not produced, without getting the document produced and without putting up the

document to the witness. There is no separate law of evidence for the accused persons. Thus, according to me, the only admissible portion from the evidence of P.W.7 was that statement of injured was received by him. Without getting the statement on record, question regarding contents of the statement was inadmissible and needs to be ignored.

17. Another aspect which needs to be kept in view in this context is that, there is evidence of P.W.1 Shaikh Zainuddin showing that when he came to know about the incident, he had gone to the hospital and saw his sister in burnt condition and at the hospital at that time accused Nos.1 to 5 were present. He has deposed that, he thereafter went back to his village and with his father and other villagers had come back to the hospital. Even P.W.2 Shaikh Afzal has deposed that, after they visited the hospital, the accused persons left the hospital and did not even attend the funeral.

18. Thus, till P.Ws.1 and 2 reached, the victim was with the accused persons. It was possible for them to influence what the hapless victim should say. It appears that, Head Constable Dhulgunde had, before registration of the F.I.R., done spot

panchanama Exh.19. He even got the Special Judicial Magistrate come and record the dying declaration. Thus, even if he had recorded any statement of the victim, earlier contents of the same could not have been deposed to by the investigating officer P.W.7 Nivrutti without the document being before the Court. The Evidence Act cannot be ignored and doubt cannot be raised for the sake of raising doubt. I thus concur with the trial Court to accept the evidence on record for holding the accused guilty.

19. Having gone through the material available, the arguments raised for the accused are rejected. There is no substance in the appeal. The appeal is dismissed. The accused shall surrender to their bail bonds before trial Court on 9th May 2016. Trial Court shall ensure execution of the sentence.

(A.I.S. CHEEMA, J.)