

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.533 OF 2003

Subhash s/o Namdev Chandanshive,
Age-35 years, Occu:Business,
R/o-Wanjarwadi, Tq-Bhum,
Dist-Osmanabad.

...APPELLANT
(Ori. Accused)

VERSUS

The State of Maharashtra,
Through Govt. Pleader, High Court,
Bombay, Bench at Aurangabad.

...RESPONDENT

...
Mr. A.S. Kale Advocate h/f. Mr. S.B. Talekar
Advocate and Mr. S.M. Vibhute Advocate for
Appellant.
Shri. S.M. Ganachari A.P.P. for Respondent.
...

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

DATE OF RESERVING JUDGMENT : 7TH APRIL, 2016.

DATE OF PRONOUNCING JUDGMENT: 20TH APRIL, 2016.

JUDGMENT :

1. The Appellant — original accused

(hereafter referred as 'accused') has been convicted for offence under Section 306 and Section 498-A of the Indian Penal Code, 1860 ("I.P.C." in brief). For Section 306 of I.P.C. he has been directed to suffer sentence of rigorous imprisonment for two years and pay fine of Rupees One Thousand. In default of fine, he is directed to undergo further imprisonment for a period of three months. Under Section 498-A of I.P.C. he has been sentenced to suffer rigorous imprisonment for the period of one year and to pay fine of Rupees Five Hundred, and in default to suffer further imprisonment for a period of one month. The sentence was passed by Sessions Judge, Osmanabad in Sessions Case No.128 of 2000 on 11th July 2003.

2. Agitated by the conviction the Appellant-accused filed this Appeal.

3. In the Sessions Court, along with the present Appellant- accused, there were two more

accused i.e. accused No.2 – Arjun Kamble and accused No.3 – Gojarbai w/o Arjun Kamble. Accused Nos.2 and 3 were acquitted by the trial Court.

4. The facts in brief, are as follows:-

(A). On 3rd November 1999, Dr. Sanjiv Madhekar (PW-7) working as medical officer, civil hospital, Osmanabad informed police (vide Exhibit 35) that lady Asha Subhash Chandanshive (hereafter referred as "victim") had been brought to hospital in burnt condition. On getting information, A.S.I. Pratap Kulkarni (PW-2) posted at the out-post of the hospital, went and met the doctor and in the presence of the doctor, recorded the dying declaration (Exhibit 36) of the victim. The victim informed the police in her dying declaration that her husband had illicit relations with accused No.3 Gojarbai and on the day of incident, the accused Nos. 2 and 3 had come to her house and quarrelled with her. Getting angry, she went to

the inner room and put kerosene on herself and burnt herself.

(B). The victim succumbed to her injuries on 4th November 1999. Postmortem was done by Doctor Ashok Kathare (PW-1). Postmortem report (Exhibit 33) found that the victim had 82% burn injuries and that she had died due to the burn injuries. Brother of the victim, Gautam Kalkhaire (PW-3) took the dead body to his village Iet and performed the last rites. On 4th November 1999 at about 23.15 hours, he filed F.I.R. (Exhibit 38) against the accused Nos.1 to 3 at Bhum Police Station and Crime No.111 of 999 was registered. Police took up investigation and recorded statements of witnesses. The spot panchanama (Exhibit 45) had been done on 3rd November 1999 itself on the basis of station diary entry. After investigation, A.C.P. Nana Patil (PW-8 – wrongly marked as PW-7 in the record of the trial Court) filed charge-sheet.

5. On committal of the matter to the Court of Sessions, charge was framed for above Sections. The accused persons pleaded not guilty. Their defence is of denial. In cross-examination of witnesses, there are suggestions of the victim dying of accidental burns.

6. The trial Court, after the trial was concluded, convicted the accused No.1 (present Appellant) and the other two accused came to be acquitted.

Arguments of Appellant-Accused

7. I have heard learned counsel for Appellant- accused and the learned A.P.P. for the State. It is claimed in the Appeal and it is argued that the Judgment of conviction as recorded by the trial Court, is not maintainable. The trial Court failed to appreciate the evidence properly. In the dying declaration, the victim had

complained only against accused Nos.2 and 3 and relying on such dying declaration, wrongly the Appellant has been convicted. Rather there was evidence that the Appellant – accused rescued his wife when she was burning and in the process, himself got injured. There is no evidence that in fact there were illicit relations between the Appellant -accused and the original accused No.3. It is unlikely that if a woman is having illicit relations with another person, she would go with her husband to the house of the other person and quarrel with his wife. In the trial Court, evidence was brought to claim that the Appellant-accused was suspecting character of the victim. At the same time, evidence was brought that the victim was suspecting her husband. For both aspects, wrongly blame has been put on the accused. The victim was an educated woman who was serving as teacher in Anganwadi. She had never made any complaint of ill-treatment. Rather there is evidence that the couple was living happily

even till the date of incident. The learned counsel for the Appellant referred to the observations of the trial Court to submit that the same were not acceptable reasonings.

Arguments of State

8. The learned A.P.P. for State has supported the reasonings recorded by the trial Court. According to the learned A.P.P., there was evidence of the brother of the victim as well as her mother PW-4 Satyabhama regarding ill-treatment which she was suffering at the hands of the accused. No doubt, PW-5 Suman, the neighbour turned hostile, but there was sufficient other direct and circumstantial evidence available to convict the accused. According to him, in the dying declaration also the victim stated that the accused had illicit relations with accused No.3 Gojarbai and because of which there used to be quarrels between the couple. Thus, according to him, the conviction may not be disturbed and the

Appeal may be dismissed.

Analysis

9. The dying declaration Exhibit 36 has been proved in the trial Court. The prosecution brought on record the evidence of PW-7 Doctor Sanjiv and PW-2 A.S.I. Pratap. The A.S.I. recorded the dying declaration in presence of the doctor. The evidence shows that none of the relatives were allowed to be nearby at the time of recording of the dying declaration. The incident had occurred at about 9.00 a.m. on 3rd November 1999 at Wanjarwadi, Tq-Bhum and it appears that the Appellant- accused along with relatives had taken the victim to the Government Hospital at Osmanabad and soon thereafter between 12.15 – 12.30 p.m. the dying declaration came to be recorded. The dying declaration has, in the opening part endorsement of the Doctor regarding the condition of the victim and even at the concluding part there is endorsement of the Doctor regarding her condition.

The evidence brought on record of the A.S.I. as well as Doctor shows that the victim was conscious at the time of recording of her statement. It also shows that till that time of recording the dying declaration, she had not been administered any sedatives and that she was conscious and in a fit mental condition to make the statement. The trial Court has discussed about this evidence and concluded that the victim was fully conscious and had the capacity to understand the things and in such condition she had made the dying declaration.

10. At the time of arguments of this Appeal, the learned counsel for the Appellant-accused has not made any submissions to challenge the findings on this count of the trial Court regarding fit mental condition of the victim to give the dying declaration and the fact that the dying declaration was duly and properly recorded.

Dying Declaration

11. Now it would be appropriate to refer to

the dying declaration. The same is in Marathi. The contents of the dying declaration (changing from 1st person to 3rd person) may be stated to be as under:

". Victim stated that she was admitted in the Government hospital, Osmanabad and was giving the statement. She had been married ten years back at Wanjarwadi with the accused Subhash. Her parental place was Ieet. She and her husband were residing together. She had no children. Since eight years she is working as teacher in Anganwadi. In their village Arjun Kamble (accused No.2) and his wife Gojarbai Kamble (accused No.3) reside. Her husband does tailor work and thus knows many people in the village. In that, he came to know the above two (i.e. accused Nos.2 and 3). There are illicit relations between her husband and Gojarbai Kamble since last four years. Because of that reason, there used to be quarrels between her husband and her.

. That, today i.e. 3rd November 1999 in the morning at about 9.00 a.m. Arjun

Kamble and his wife Gojarbai Kamble of the village, both came to her house. The husband and wife, for above reason, abused and quarrelled with her and threatened her with life. Because of which, in the heat of anger she went inside the house at which time her husband was sitting in the outer room. Quarrel had taken place in the presence of her husband. She went in the kitchen and took the can of kerosene and poured the same on her person and burning match stick, she burnt herself. Then saree which she was wearing started burning, and her both hands, chest, both thighs, back and neck have got burn. Thereafter her husband came because of her shouting loudly and he put cloth on her person and put out the fire and while he was putting out the fire, both his hands have got burnt. Later, for treatment her husband and villagers have brought her to the hospital. At present, she is under treatment and is fully conscious.

. Thus, today on 3rd November 1999 at about 9.00 a.m. from the village No.1 – Arjun Kamble, No.2 – Gojarbai Kamble, both

resident of Wanjarwadi, in this Gojarbai and husband of victim have illicit relations since four years and for such reason, both the persons mentioned above, came and abused the victim and threatened to kill in front of her husband. Because of such trouble and fear, getting fed up, she went inside the house and herself poured kerosene on her person and herself burnt match stick and burnt herself. Thus, she had complaint against No.1 Arjun Kamble and No.2 Gojarbai Arjun Kamble.

. Statement had been read over to her and it was correct."

12. The dying declaration recorded which is referred to as above, shows that the victim had grievance that her husband was having illicit relations with accused No.3 Gojarbai, because of which there used to be quarrels between the couple. For the incident of she burning herself, however, she made the complaint specifically against accused Nos. 2 and 3. Those two accused

have been acquitted by the trial Court and it does not appear that the State has filed any Appeal against that acquittal. Reading the dying declaration as a whole, it appears that the accused Nos.2 and 3 came and quarrelled with the victim in the presence of the Appellant-accused on the count of victim's claim of illicit relations. Although the accused is stated to have been present, in the quarrel no role was attributed to the accused – Appellant. Rather when the victim put fire to herself and shouted, the husband appears to have rushed in and put out the fire and in such process, burnt his hands. The prosecution suppressed the medical evidence regarding the nature and extent of burns of the accused – Appellant. There is evidence of A.S.I. Pratap (PW-7) that he had received intimation also of the fact that the accused No.1, husband of the victim had also suffered burn injuries. The trial Court, while analyzing the evidence, did not refer to this aspect regarding the hands of the accused

getting burnt. The extent of burns of the hands of the accused has not been brought on record. Had it been brought, it would have been possible to assess whether or not the Appellant – accused was serious in putting out the fire or acted or reacted merely by way of formality. This is not to say that in such situation husband must necessarily react like this to show his innocence.

F.I.R.

13. PW-3 Gautam filed the F.I.R after the death of the victim. In the F.I.R. Exhibit 38, he claimed that the accused looked after his wife well for 2-3 years. Then she started working as teacher in Anganwadi and because of such work, she had to attend meetings and even was required to go to office. Because of her job if she would talk with any person, the accused was suspecting her character. If for meeting and for the diet of children she went with somebody, the accused started beating the victim. His sister used to

come to village Ieet and had told regarding this treatment to mother of the complainant. From his mother, complainant came to know that victim had told the mother that the accused and Mrs. Kamble had illicit relations. On 3rd November 1999 he came to know about the incident and went to the hospital. Except her face and eyes, the whole body was burnt and when inquired, victim told him in soft tone and on repeatedly asking, that there was quarrel with Mrs. Kamble and husband of Mrs. Kamble and due to consistent trouble, she burnt herself. F.I.R. claimed that the husband also had suffered some burn injuries and is admitted in the hospital.

Evidence of Complainant and his mother

14. With such F.I.R., the complainant PW-3 Gautam entered in the witness box and inter-alia deposed that the accused was suspecting fidelity of the victim and when the victim was coming to their place, she was complaining regarding this.

He claimed that he had told the accused not to suspect character of the victim but the harassment increased. He claimed that the victim had "once" told him that her husband had illicit relations with Mrs. Kamble. He claimed that he had told victim as well the accused that they should behave properly. Thus, complainant claimed that in the hospital, victim gave oral dying declaration to him that she was fed up with the illicit relations and so she burnt herself.

15. Before discussing the cross-examination of complainant PW-3, it would be appropriate to refer to the evidence as brought of PW-4 Satyabhama also. Satyabhama is the mother of the victim. She deposed that the accused used to tell victim not to serve any more and used to abuse her. She claimed that the victim had told her that the accused used to beat her in the night. PW-4 Satyabhama claimed that victim was being ill-treated because of accused No.3 Gojarbai. Even

this witness claimed that victim by way of oral dying declaration told her that accused No.3 Gojarbai had come to her house and quarreled and because of that accused No.1 beat her and so she put fire to herself.

16. If the above evidence of PW-3 Gautam and his mother PW-4 Satyabhama is seen, although in the dying declaration victim claimed that there used to be quarrels, she did not claim that she was beaten at any time, leave aside on the day of incident. But these near relatives introduced the element of beating of the victim. They also introduced the element that accused used to suspect the character of his wife, something which the victim herself did not claim as reason of her ill-treatment, in the dying declaration which was otherwise recorded in some details. The cross-examination of complainant PW-3 shows that although he is residing at a village which is 27 Kms away from where the victim was residing, since

last 1 ½ years he had not gone to the place of his sister. It appears that the couple did not have any children for which they were taking treatment. He stated that as the accused Subhash was alone and has only an old mother, and so they had taken the dead body for cremation to Ieet. Thus, it is not that the accused ignored his wife in her death.

17. The cross-examination of the complainant PW-3 and his mother PW-4 Satyabhama read with the evidence of PW-8 investigating officer Nana Patil, shows some material contradictions and omissions. Cross examination of PW-3 Gautam (Para 6 and 7) need to be referred. Complainant claimed that he had told police while recording his statement that his sister had personally told him about the illicit relations between her husband and accused No.3. The F.I.R. however claims that the complainant came to know of such statement by the victim only from his mother. Complainant

further stated in the cross-examination that victim did not tell him that accused No.1 had illicit relations with accused No.3. Complainant admitted that it was true that victim did not tell him that her husband had illicit relations with accused No.3. He admitted that he had not lodged report with police about ill-treatment to his sister. In the cross-examination, complainant claimed that he had told police that his sister said that she had set her on fire because she was fed up with the illicit relations of her husband with Mrs. Kamble. This is an omission. In further cross-examination, he accepted that victim had not told him specifically that she set herself on fire because she was fed up of illicit relations of accused No.1 with accused No.3. Cross-examination of PW-4 Satyabhama read with the evidence of PW-8 Nana Patil, shows that she had not told police while recording her statement that on the day of incident accused No.1 had beaten her daughter. Omission is also proved that she had not told the

police that accused No.1 was telling her daughter not to serve any more. There is also omission regarding her claim that victim had told her that she was beaten after altercations with accused Nos. 2 and 3.

18. The above discussion shows that PW-3 Gautam and PW-4 Satyabhama, the brother and mother of the victim exaggerated while deposing. The trial Court has not considered these aspects in details. In fact these contradictions and omissions become material if the other evidence regarding the victim and accused as a couple, is seen.

The Couple was living happily

19. The evidence of PW-3 Gautam shows (in Para 4 of his evidence) that the accused had horticultural land and he was also working as tailor and was earning about Rs.5000/- per month. The victim was also earning Rs.5000/- per month.

The mother of accused was living separate in the farm house, while the victim and accused were living in the house in the village. He deposed in the Examination-in-chief itself that the accused and his sister were living happily. Coming to the evidence of the mother PW-4 Satyabhama, she also deposed in cross-examination (Para 2) that the accused No.1 and her daughter were living alone in the house in the village. She admitted that it was true that her daughter and her husband (i.e. accused) were living happily. In fact, she accepted that till the incident occurred, her daughter was living happily. The trial Court without considering the above contradictions and omissions in the evidence of PW-3 and PW-4, brushed aside this evidence that the couple was living happily right up to the point of incident taking place, by saying (In Para 18 of the Judgment) that, "stray admission" on the part of the witness cannot be held sufficient to negative the dying declaration and other statements made to

PW-3 and PW-4. The trial Court reasoned that if the victim was living happily, she would not have taken the extreme step. But then keeping the above contradictions and omissions of PW-3 and PW-4 in view and considering the F.I.R. filed by PW-3 vis-a-vis the dying declaration, it is a matter of consideration that in the dying declaration the victim had not put the blame on the accused-Appellant although she had stated that because of (what she claimed to be the) illicit relations, there used to be quarrels. To repeat, she did not claim in the dying declaration that she was ever beaten on such count.

20. PW-5 Suman, the neighbour was examined and she turned hostile. Trial Court has ignored her evidence. She, of course, stated in the cross examination that the victim told her that she accidentally got burnt. However, such evidence can be ignored looking to the fact that witness has turned hostile.

Conclusion

21. Having gone through the evidence which has come on record, taking over-all view, what appears is that the victim had, probably suspicion of the accused having illicit relations with accused No.3. This is so as no specific act of misbehaviour of husband with another lady has been pointed out by anybody. This is likely to have caused accused Nos.2 and 3, who are a couple, to come and quarrel with the victim. It may be that because of the suspicion of the victim that her husband had illicit relations, there were quarrels between the couple. The dying declaration does not say that because of the illicit relations the victim was committing the suicide. The trigger point was the act of accused Nos.2 and 3 coming and raising quarrel. The dying declaration did not blame the husband for the act of the wife of burning herself. This being so, I find it difficult to accept the view of the trial Court

that letting off accused Nos.2 and 3, the husband is responsible for the suicide and that he should be held guilty under Section 498-A as well as Section 306 of I.P.C. It appears, out of suspicion of such relations, there were quarrels between, otherwise a perfectly happy couple till the last moment, as can be seen from the evidence discussed above. Even in the dying declaration, the wife did not brand the husband to be responsible for her burning herself. Merely because there were earlier quarrels on what could be mere suspicion, the husband cannot be held guilty under Section 498-A and 306 of I.P.C.

22. I find that the Judgment of the trial Court is not maintainable. The Appellant – accused is entitled to benefit of doubt in the matter.

23. For the afore stated reasons, I pass the following order:-

O R D E R

(I) The Criminal Appeal is allowed.

(II) The Judgment of conviction and sentence as passed by the trial Court against the Appellant in Sessions Case No.128 of 2000 dated 11th July 2003, is quashed and set aside.

(III) The Appellant- accused is acquitted of the offence punishable under Section 306 and 498-A of the I.P.C.

(IV) Fine if paid, be refunded to the Appellant-accused.

(V) The bail bonds of the Appellant-accused are cancelled.

[A.I.S. CHEEMA, J.]