

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.726 OF 2003

Khurshidabegum W/o. Sk. Mahemood,
Age-55 years, Occu:Household
R/o-Badnapur, Dist. Jalna
(Presently in Yerwada Jail Pune)

...APPELLANT
(Ori. Accused No.1)

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. Joydeep Chatterji Advocate for Appellant.
Mr. K.S. Hoke Patil, A.P.P. for Respondent.
...

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

DATE OF RESERVING JUDGMENT : 13TH JULY,2016.

DATE OF PRONOUNCING JUDGMENT: 1ST AUGUST, 2016.

JUDGMENT :

1. The Appellant- original accused No.1 was charged with offence punishable under Section 498-A read with Section 114, alternatively Section

498-A read with Section 109 of Indian Penal Code, 1860 ("I.P.C." in brief). She was also charged with offence punishable under Section 306 read with Section 114, Section 106, Section 109 of I.P.C. Alternatively charge was framed for offence under Section 304-B read with 34 and Section 304-B read with 114 of I.P.C. There was yet another alternative charge under Section 498-A read with 114 of I.P.C. read with Section 4 of the Dowry Prohibition Act, 1961. Along with her, the accused No.2 arrayed was her son Shaikh Jumman. After the trial before 3rd Additional Sessions Judge, Jalna, the son got acquitted of all the Sections, while the Appellant came to be convicted on 21st October 2003 for offence punishable under Section 306 of I.P.C. and was sentenced to rigorous imprisonment for seven years and fine of Rs.100/-, and in default to suffer further rigorous imprisonment for three months. She was acquitted of the other offences with which she had been charged. Thus, this Appeal.

2. The case of prosecution, in brief, is as follows:-

(A) On 1st November 1998 victim Shabana, the wife of original accused No.2 - Shaikh Jumman was admitted at Civil Hospital, Jalna with 96% burns. The hospital authorities sent Medico Legal Case (M.L.C.) Report to the police out-post and then head constable Bhujangrao Mante (PW-5) went in the hospital and asked the doctor to examine the victim. Doctor examined and found the victim to be conscious and in position to make statement and the statement of the victim was recorded (Exhibit 33 - first dying declaration) on 1st November 1998 between 9.00 - 9.30 a.m. by PW-5 Bhujangrao Mante.

(B) In the first dying declaration Exhibit 33 the victim informed police that she got married seven months back with accused No.2 - Shaikh

Jumman. She gave details of the other brothers and sisters of Shaikh Jumman and her mother-in-law accused No.1 Khurshidabegum. She stated that on 1st November 1998 in the morning since 5.00 a.m. her mother-in-law - Khurshidabegum was abusing her. She had rushed against the person of victim to beat her. In anger victim put kerosene available in the house in a can on her person and with the help of match stick put fire to her own person. She stated that she had trouble from her mother-in-law. The mother-in-law had been harassing her and because of her trouble, on that day of 1st November 1998 at about 7.00 a.m. she poured kerosene on herself from can and with the help of match stick has burnt herself. She added that she has no trouble from her husband and when she burnt herself, the mother-in-law said that let her burn and so saying she had gone out. When she shouted, people from the lane gathered and put out the fire.

(C) The dying declaration as above was recorded by the head constable Bhujangrao Mante and sent to police station Kadim Jalna, where entry was taken at 0/1998 at 11.10 a.m. on 1st November 1998 and the F.I.R. was forwarded to police station Badnapur. At Badnapur, District Jalna crime was registered as No.134/1998 on 2nd November 1998 at 12.35 p.m.

(D) After PW-5 Bhujangrao Mante recorded the first dying declaration, he sent note to Tahsildar for recording of the dying declaration. Consequently, Naib-Tahsildar Shyamrao Nandedkar (PW-3) went to the Hospital and recorded the second dying declaration of the victim vide Exhibit 29 on 1st November 1998 between 9.50 - 10.20 a.m. after the doctor examined victim and found the victim to be in fit and conscious condition to make statement.

(E) P.S.I. Pralhad Susar (PW-4) went to the

spot and recorded panchnama on 3rd November 1998 between 9.30 - 10.15 a.m. As per the spot panchnama recorded, from the spot burnt clothes and plastic can smelling of kerosene were seized. A.S.I. Walmik Avhade (PW-7) further investigated crime. Statements of the witnesses were recorded. The victim expired on 6th November 1998 and police recorded her inquest panchnama (Exhibit 22) and postmortem was got done on the same day (Exhibit 23). After the investigation, charge-sheet came to be filed. The prosecution brought on record evidence of seven witnesses. The defence of the accused in the trial Court is that of denial. The trial Court, after considering the evidence, convicted and sentenced the accused as mentioned above.

3. I have heard learned counsel for the Appellant-accused. It is stated that the evidence of PW's 1 and 2 shows that the accused No.1 and accused No.2 were residing separate. The dying

declaration Exhibit 33 showed that the victim had burnt herself in a fit of anger on spur of moment. According to the counsel, there was no evidence of persistent torture to tantamount to abetment. The counsel referred to the evidence recorded and submitted that the trial Court wrongly relied on the evidence and the accused should have been acquitted. It was alternatively argued that if the conviction is maintained, the sentence may be reduced, as the Appellant-accused is now around 70 years of age.

4. Against this, the learned A.P.P. submitted that both the dying declarations on record are consistent regarding the actual incident. Both the dying declarations show that the accused was continuously harassing the victim. It is stated that even if PW-1, the hostile witness, stated that the accused No.1 was residing separate, there was no reason to disbelieve the dying declarations which show that since the

morning itself the mother-in-law was at the house of the victim and was torturing the victim due to which the victim committed suicide. According to the A.P.P., the victim fairly stated that she had no grievance against the husband. Although, she referred to other brothers and sisters of her husband, still she did not, in any manner implicate anybody else. According to A.P.P., this shows that the victim was fair in her statements recorded as dying declarations and was not at all tutored. The A.P.P. argued that the fact that since the early morning the accused was abusing and rushed against the victim to assault her, shows that because of the abetment on the part of this accused the victim committed suicide.

5. PW-1 Bibi w/o Shaikh Haroon, the mother of victim turned hostile and did not support the prosecution. Her evidence shows that the victim Shabana was married to accused No.2 Jumman six months before the incident. This mother of the

victim tried to say that the victim was having trouble of stomach-ache and she died of stomach-ache. This is clearly not the case as can be seen from the postmortem report Exhibit 23. It shows that this witness, who was unfortunately mother of the victim and who married off her minor daughter of 17 years of age, has preferred to avoid speaking the truth. I will ignore her admission in cross-examination by the accused that at the relevant time accused No.1 was not residing with accused No.2 and that she was residing with her another son. The learned A.P.P. rightly submitted that the addresses given of both the accused are of the same village and it hardly makes any difference when the mother-in-law is staying in the same neighbour-hood or same village and keeps coming to make life miserable for the victim.

6. PW-2 Shaikh Matin was examined to prove the spot panchnama Exhibit 26. The evidence of PW-2 Shaikh Matin read with spot panchnama

Exhibit 26 shows that at the spot in front there was room of 10 ft. X 10 ft. Then there was open space of 5 ft. X 8 ft. and it was followed by the last room where the incident appears to have taken place and where there were signs of burning and clothes getting crumpled and where the plastic can smelling of kerosene was found. In the cross-examination, PW-2 Shaikh Matin stated that accused No.1 was residing separate from her son, accused No.2. He deposed that the incident took place in the last room. He accepted the suggestion of the accused that the can was found in the kitchen which was on the front side. However, the incident had occurred in November 1998 and this witness was speaking before the Court after about five years, in October 2003. The witness may have confused himself regarding the suggestion which was put by the accused. The spot panchnama read with the evidence of head constable Pralhad Susar (PW-4) shows that the police had reached the spot and did this panchnama regarding the spot and the spot of

incident was the last room of the house where the can smelling of kerosene was found. The police official denied that the plastic can, Article-1 which was before the Court was seized from the kitchen room. Thus, the evidence shows that the incident occurred in the last room of the house of accused where there were signs of burning.

7. Regarding the first dying declaration recorded, there is evidence of PW-5 head constable Bhujangrao Mante. He has deposed that he was posted at the civil hospital outpost at Jalna. He received M.L.C. Report regarding victim being admitted in injured condition. His evidence is that he went to the burn ward and issued letter to the medical officer whether the victim was in a position to give statement. According to him, the doctor gave in writing that the victim was in a position to give statement. He states that then he recorded the statement of the victim as per her say. According to him, after recording the

statement, the contents were read over to the victim and thereafter he obtained thumb impression of the victim on the statement and himself also signed the same. He identified the thumb impression of the victim on the document and deposed that the statement also bears endorsement of the doctor. The document has been proved at Exhibit 33.

8. If the cross-examination of PW-5 is perused, he was asked and he stated that he started recording Exhibit 33 at 9.00 a.m. He admitted that on Exhibit 33 there is only one endorsement of doctor of the time of 9.30 a.m. He accepted that on completing recording of Exhibit 33 he obtained the endorsement of doctor. He denied that the victim was not in a position to speak as she had received 96% burns. The further suggestions that Exhibit 33 was written on the say of the relatives were also denied. It was denied that the relatives were present when Exhibit 33

was prepared. Perusal of Exhibit 33 shows that this witness PW-5 Bhujangrao took endorsement of the doctor about victim to be conscious and in a position to give statement when he concluded the recording of Exhibit 33. His evidence shows that even before he started recording the statement, he did take steps to get the patient checked from the doctor if the patient was in a condition to make the statement.

9. The evidence of PW-5 head constable Bhujangrao Mante further shows that he had sent letter to Tahsildar for getting recorded the dying declaration through the revenue official. There is evidence of PW-3 Shyamrao Nandedkar, the retired Naib Tahsildar. He deposed that requisition was received about recording of the dying declaration and accordingly he visited the civil hospital. He deposed that he met the medical officer and requested that he wanted to record the dying declaration of the victim. According to him, he

requested the doctor to examine the victim to ascertain whether she is conscious to give statement. His evidence shows that doctor accompanied him and inquired from the victim and told this witness that the victim was conscious and witness could record her statement. His evidence shows that he then recorded the dying declaration of the victim (Exhibit 29). According to him, after recording the same, he took the thumb impression of the victim on the statement and also put his own signature. The witness obtained the endorsement of the doctor on the statement. PW-3 Shyamrao Nandedkar deposed that the doctor put his endorsement at two places on the statement. This witness produced the original dying declaration Exhibit 29. His evidence is that the dying declaration bears thumb impression of the victim and endorsement of the doctor and that the contents were correct.

10. In the cross-examination this PW-3

Shyamrao Nandedkar was asked and he stated that he had not brought document to show that he was authorized to record the dying declaration. I find that this is not material. He deposed that the victim was under the supervision of D.M.O. Poharegaonkar and this doctor put the endorsement on Exhibit 29. He denied that the parents and relatives of the victim were present near her cot when he recorded the dying declaration. He deposed that some portion of the face of the victim was burnt. He however did not agree that victim was not in a position to give statement. There are further suggestions put to the witness, but he denied the same.

11. It cannot be said that PW-5 head constable Bhujangrao Mante who recorded the first dying declaration Exhibit 33 or PW-3 Shyamrao Nandedkar who recorded the second dying declaration Exhibit 29, have been shattered in any manner in the cross-examination. If the second

dying declaration Exhibit 29 is perused, in this dying declaration also, which was recorded hardly after a gap of 20 minutes of recording of first dying declaration, victim stated here that her mother-in-law was quarreling with her since morning for petty reasons. She stated that the mother-in-law used to beat her and abuse her daily and earlier had given her lot of trouble. Her marriage had taken place about six months back. Her parents are from Jalna. Because of the daily beating by the mother-in-law, on that day at about 7.00 a.m. she had poured kerosene on her person from can and using match stick burnt herself. Victim further stated that at that time her mother-in-law was in the house but she walked away. In this dying declaration, victim referred to the presence of her sister-in-law Sajja Begum also who had come for delivery to be present, but stated that they all went away. Here also this victim claims that her husband is driver and had gone for driving and was not present. She again

added that she has no trouble from her husband. She mentioned that people from the lane put out the fire and she has been brought to the hospital with the help of her brother-in-law Shaikh Manjoor. She mentioned that in the house she was living with her husband and mother-in-law. The dying declaration records that it was read over to the victim and then she had put thumb impression as it was correct.

12. Thus, if both the dying declarations are seen, the victim was consistent that due to constant trouble from her mother-in-law who used to beat her, and on the day of incident also due to the trouble starting since early morning, she got fed up and burnt herself. The victim did not try to implicate anybody else and it shows that she had no intentions to unnecessarily trouble the relatives. There is a ring of truth surrounding the dying declarations and it appears that the trial Court rightly relied on these dying

declarations to convict this accused. The postmortem report Exhibit 23 shows that this victim died due to the extensive burns. The trial Court rightly convicted this accused for offence punishable under Section 306 of I.P.C. Due to the mother PW-1 turning hostile, other Sections were not proved and there being no Appeal against acquittal on those counts, I need not discuss those aspects.

13. In the trial Court when the matter had come up, the Appellant – accused was 55 years of age. At the time of sentence, she had pleaded for leniency being old lady. Trial Court accepted that she was old lady and it was first offence, which were treated as mitigating circumstances and took lenient view. Under Section 306 of I.P.C. it was possible for the trial Court to sentence the accused to direct imprisonment for ten years but the trial Court sentenced her to only seven years of imprisonment.

14. The Judgment of conviction and sentence was passed on 21st October 2003. Now it is July 2016. The learned counsel for the Appellant vehemently submitted that the Appellant – accused is now around 70 years of age and is not keeping good health. He prayed for further leniency on the count of sentence.

15. Old age by itself is no reason for leniency when it is juxtaposed with crime concerned. However looking to the extreme old age of the Appellant – accused and passage of so much time, some more leniency can be shown to the Appellant – accused. Sentence can be converted to simple imprisonment instead of rigorous imprisonment due to age of accused. However, I cannot forget the victim while doing justice. The victim is not standing before the Court. The record shows that her unconcerned mother like PW-1 married her off when she was still a minor and she

was put into a married life where the accused constantly mentally and physically torturing her. While reducing the sentence of imprisonment, I cannot make it a sentence for name-sake. If it is necessary to look at the accused while passing the sentence, it is also necessary to look at the offence committed by the accused and the victim who lost life in her prime.

16. I thus, proceed to pass the following order:

O R D E R

(I) The Appeal of the Appellant against conviction under Section 306 of the Indian Penal Code, 1860 is dismissed.

(II) However, the sentence of imprisonment as imposed by the trial Court is reduced from seven years to four years (4 years) of simple imprisonment

and fine of Rs.100/- (Rupees Hundred). In default of payment of fine she shall further suffer simple imprisonment for three months.

(III) The Appeal is accordingly disposed of.

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