

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

CRIMINAL APPEAL NO.680/2012

- 1] Mohammad Osman Amin Khan Pathan
Age 23 years, Occ-R/o Noor Colony Road,
Sillod, Tq. Sillod, Dist.Aurangabad.
 - 2] Rukhsanabi w/o Aminkhan Pathan
Age 42 years, R/o Sillod,Ta.Sillod
Dist.Aurangabad.
- ..APPELLANTS
[ORIGINAL ACCUSED]

VERSUS

- 1] The State of Maharashtra
[Copy to be served on the
Public Prosecutor,
High Court of Judicature
at Bombay, Bench at
Aurangabad
- .. RESPONDENTS

...
Mr. S.G.Ladda,Advocate for appellants.
Mr. M.M.Nerlikar, APP for Respondent-State

...
**CORAM : A.V.NIRGUDE &
V.L.ACHLIYA,JJ.**

DATED : 29TH JULY, 2016

ORAL JUDGMENT [PER A.V.NIRGUDE,J.] :-

This Appeal challenges judgment and order dated 12/12/2012 passed by learned Additional Sessions Judge-4, Aurangabad in Sessions Case No.325/2010 convicting both appellants who were accused no.1 and 2 in the lower Court for offence punishable under

Section 302 read with 34 of IPC and sentenced them to suffer life imprisonment and to pay fine of Rs.2000/- in default to suffer rigorous imprisonment for 3 more months.

2] Accused no.1 and 2 are son and mother and the deceased Samina was wife of accused no.1. It was alleged that on 3/7/2010, accused assaulted and abused Samina and then poured kerosene on her person and set her on fire.

3] The evidence of the prosecution that came on record through as many as 7 witnesses in short can be narrated as under :

4] P.W.4 Sk.Abdul Gaffar -Samina's father- stated that Samina was married to accused no.1 on 13/5/2010. After marriage, Samina went to stay with accused at village Sillod. About 3 to 4 times Samina had come to meet her parents. She used to tell her parents that accused were quarrelsome and that she had dispute with her husband over his desire to have sex with her. On 3/7/2010, accused no.1's father made a phone call at about 9.30 p.m. and told him that Samina had sustained burn injuries and was taken to Jaiswal hospital. Abdul Gaffar and his wife reached to the hospital and saw Samina in burnt condition. Both of them asked Samina as to how she suffered burn injuries. Samina told them that since she refused to have sex with her husband, her mother-in-law caught her hands and poured kerosene on her person and then her husband set her on fire by utilising a match stick. Samina also told them that her husband also poured kerosene on her person before setting her on fire. Thereafter, Samina was removed to Ghati Hospital, Aurangabad. On 10/7/2010, Samina died.

5] P.W.1 was one Ratnakar Kulkarni, Naib Tahsildar, Sillod. He

stated that on 4/7/2010, he received a letter from Sillod City Police Station requesting him to record dying declaration of Samina by visiting her at Ghati Hospital, Aurangabad. Accordingly, he went to Ghati Hospital, Aurangabad and from Dr.Gangurde, he got verified as to whether Samina was able to make statement. Dr.Gangurde gave such certificate to him and thereafter, he proceeded to record Samina's dying declaration. One P.D.Sawant, Police Constable Buckle No.788 of Sillod City Police Station went with Shri Kulkarni. Samina told Shri Kulkarni and Police Constable Sawant as to how she sustained injuries. She told them that she got married with accused no.1 in May, 2006. On 2/7/2010, there was quarrel with her husband and mother-in-law. On 3/7/2010, when she refused to have intercourse with her husband at 10 p.m. the accused abused her. Accused no.2 Rukhsanabi then caught her hands, accused no.1 Mohd.Osman poured kerosene on her person and set her on fire with the help of match stick. It is because of this, she sustained burn injuries. Samina's statement was reduced into writing in the hand writing of Police Constable Sawant. On the basis of said statement, P.S.O. Sillod Police Station registered an offence at about 11.30 a.m. The investigating Officer thereafter, completed the investigation which involved recording of scene of occurrence panchanama, seizure of clothes and obtaining post mortem report.

6] P.W.2 is Police Constable Sawant. He reiterated what P.W.1 Kulkarni has stated. He stated that while he was working as Police Constable at Sillod Police Station, on 4/7/2010, at about 1.00 hrs., (night) he received M.L.C. paper in respect of Samina's burn injuries. His superior ordered him to enquire in to it. During enquiry, he wrote a letter to Naib Tahsildar, Sillod, requesting him to record dying declaration of Samina. Thereafter, he and Naib Tahsildar Kulkarni went to Ghati Hospital, Aurangabad and recorded Samina's

statement.

7] P.W.6 is Dr.Pramod Gangurde who stated that on 4/7/2010, while he was on duty in burn ward in Ghati Hospital, Aurangabad, at about 8.30 a.m. Samina was admitted there. She had sustained burn injuries. On 4/7/2010, at about 8.30 a.m. Constable Sawant came to him. He asked Dr.Gangurde's opinion as to whether Samina was able to make statement. Thereafter, Samina's statement was recorded. Dr.Gangurde admitted that Police Constable Sawant and Naib Tahsildar Kulkarni had come to record Samina's statement.

8] The prosecution case mainly depended on 3 circumstances : (1) That after victim Samina was brought to hospital, her statement was recorded by P.W.1 and 2. (2) While she was in the hospital, she narrated the incident to her parents P.W.4 and 5. (3) The third circumstance against the accused is that clothes of accused no.1 were found stained with kerosene.

9] The question before us is whether the dying declaration and oral dying declaration are believable evidence. On careful perusal of the dying declaration and the supporting evidence of dying declaration which came on record through P.W.1 and 2, we are certain that this dying declaration is a got up document. P.W.1 Kulkarni stated that at about 9 a.m. on 4/7/2010, he received intimation at Sillod and thereafter, he went to Ghati Hospital at Aurangabad. In such circumstances it was impossible that the dying declaration could be recorded at 9 a.m. Distance between Sillod and Aurangabad is more than 60 Km. Second and more glaring defect in the dying declaration is that it was not written down by the Naib Tahsildar and that it was not as per the statement of the victim. The victim could not have stated what is actually written and

recorded in Exh.16. The language in Exh.16 does not reflect the language of the victim who was a Muslim woman. We are certain that the dying declaration is not recorded verbatim from the narration of the victim and in exact words of the victim. We therefore, discard this piece of evidence altogether.

10] The second piece of evidence is oral dying declaration made to interested witnesses i.e. P.W.4 and 5. We are not attaching much importance to this material because these witnesses are interested witnesses. There is no corroboration to their statements that they heard victim saying as to how she sustained injuries etc. In any case, oral dying declaration is a weak piece of evidence. The victim is not available for cross-examination. Presence of kerosene on the person of accused no.1 is a natural consequence because it has come on record that accused no.1 carried the victim to the Hospital from house.

11] We again record our dissatisfaction in the manner in which the investigation was carried out. The investigating officer particularly, did not -during investigation- call for and take charge of the medical case papers of the victim from two Hospitals where she was admitted during treatment. Those case papers are important because history of the incident is generally recorded in such papers. The disclosure about the incident in the case papers is relevant for finding the truth.

12] The prosecution case should therefore fail.

13] Appeal is allowed. The impugned judgment and order dated 12/12/2012 passed by Additional Sessions Judge-4,Aurangabad in Sessions Case No.325/2010 is set aside. Appellants-accused are acquitted of offence punishable under Section 302 read with Section

34 of Indian Penal Code. They be released from jail if not required in any other case. Fine amount if paid be refunded to them.

(V.L.ACHLIYA,J.)

(A.V.NIRGUDE,J.)

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