

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.688 OF 2009

Mudas @ Mumtaz Hajrat Ali Sayyad	]	
Aged 27 Years,	]	
R/at Turbhe Stores, K.K. Road,	]	
House No.3462, Navi Mumbai	]	 Appellant

Versus

State of Maharashtra	]	
[At the instance of Turbhe Police Station]	]	 Respondent

Ms. Rebecca Gonsalves for the Appellant.

Mr. H.J. Dedia, A.P.P., for the Respondent-State.

CORAM : SMT. V.K. TAHILRAMANI, ACTING C.J. &
DR. SHALINI PHANSALKAR-JOSHI, J.

RESERVED ON : 5TH FEBRUARY, 2016.

PRONOUNCED ON : 11TH FEBRUARY, 2016.

JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. The Appellant, who stands convicted for the offence punishable under Section 302 of IPC and sentenced to suffer R.I. for life and to pay fine of Rs.5,000/-, in default to suffer R.I. for one month, by the Judgment and Order dated 13th June 2008 of the Ad-Hoc Additional Sessions Judge, Thane in Sessions Case No.394 of 2006, by this Appeal challenges her conviction and sentence.

2. Brief facts of the Appeal can be stated as follows :-

. Deceased in this case by name Bablu Sagir Ahmed Rain was having love affair with the Appellant since last about one year prior to the incident. He used to go to her house for sleeping at night. On 29th June 2006 also, as usual, he went to her house at night. Both of them consumed liquor, had dinner and went to sleep. At that time, Appellant expressed her desire to have sexual intercourse with him. Deceased pleaded his inability as he was already in drunken condition. Hence, Appellant raised quarrel with him and then poured kerosene on him and set him ablaze by lighting the match-stick. Deceased raised shouts for help and rushed out of the house. The persons residing nearby, namely, PW-3 Mustakali Ansari and PW-4 Istakal Khan, rushed to his help. They extinguished his fire and took him in the auto-rickshaw of PW-6 Deva Tayde to the Municipal Corporation Hospital at New Bombay. There PW-2 Dr. Sachin Chitnis examined him and found that he was having superficial to deep burn injuries to the extent of 57%.

3. On the same night, PW-7 PSI Satish Jadhav recorded complaint of the Deceased in the hospital itself vide Exhibit-20. On this complaint, C.R. No.299 of 2006 came to be registered against the Appellant initially for the offence under Section 307 of IPC. During the course of investigation, PW-

7 PSI Jadhav visited the spot of incident and from the spot, he seized burnt clothes of the Deceased, plastic kerosene can and match-box under Panchanama (Exhibit-10). Appellant came to be arrested on the same day and her clothes were also seized under Panchanama (Exhibit-11). She was also referred for medical examination and some injuries were found on her person. The seized muddemal articles were sent to Chemical Analyzer vide requisition letter (Exhibit-45). During the course of his treatment at Municipal Corporation Hospital, New Bombay, Deceased succumbed to the burn injuries on 15th July 2006. The Postmortem Report (Exhibit-40) revealed the cause of death as “*septicemia due to superficial to deep thermal burns*”. In view thereof, the charge was altered to Section 302 of IPC and further to completion of investigation, Charge-Sheet was filed in the Court against the Appellant.

4. On committal of the case to the Sessions Court, the Trial Court framed charge against the Appellant vide Exhibit-2. The Appellant pleaded not guilty and claimed trial. In support of its case, prosecution has examined seven witness and on appreciation of their evidence, the Trial Court was pleased to hold the guilt of the Appellant to be proved beyond reasonable doubt and convicted and sentenced the Appellant, as aforesaid.

5. This Judgment of the Trial Court is challenged in this Appeal by learned counsel for the Appellant, whereas, supported by learned A.P.P. In our considered opinion, before adverting to the submissions advanced by them, it would be useful to refer to the evidence on record.

6. The prosecution case against the Appellant stands on the basis of Written and Oral Dying Declaration of the Deceased. As regards the written Dying Declaration, it is recorded in the form of complaint by PW-7 PSI Jadhav in the presence of PW-2 Dr. Sachin Chitnis in the hospital itself on the very same day. As per evidence of PW-2 Dr. Chitnis, the Deceased was brought to the hospital with burn injuries. Dr. Chitnis examined him in the Casualty Ward at about 4:45 am. and found 57% superficial to deep burn injuries on his person. The Deceased has given before him the history of pouring kerosene on his person and being set on fire by lighting of match-stick by one lady, who was residing with him. Dr. Chitnis informed the Police about injured condition of the Deceased. PW-7 PSI Jadhav then came to the hospital and after verifying from PW-2 Dr. Chitnis that Deceased was conscious oriented, mentally alert and sound and was in a position to give the statement, PW-7 PSI Jadhav recorded statement of the Deceased in the presence of PW-2 Dr. Chitnis. According

to evidence of PW-2 Dr. Chitnis, the Deceased, throughout recording of his statement, was conscious, oriented and sound.

7. In his statement, the Deceased has stated that the lady, who was residing with him, by name Mumtaz, forced him to have sexual intercourse. As he declined, she poured kerosene on his person and set him on fire. This statement of the Deceased was recorded by PW-7 PSI Jadhav vide Exhibit-20. PW-2 Dr. Chitnis has made endorsement on the said statement about fitness of the Deceased to make such statement. PW-2 Dr. Chitnis has further certified that as thumbs of both the hands of the Deceased were burnt and hence under dressing, the Deceased could not make his thumb impression or signature on the statement. PW-2 Dr. Chitnis himself has signed thereon, after affixing the seal of the hospital. PW-7 PSI Jadhav has also signed thereon and has deposed about the contents of the statement.

8. Though both these witnesses have been cross-examined at length by learned counsel for the Appellant, absolutely nothing worthwhile is elicited in their cross-examination to disbelieve their evidence relating to this written Dying Declaration, which is recorded immediately after the incident and at the time when the Deceased was in a fit condition to give

the statement. The statement contains all the details of the incident. Considering the fact that the burn injuries sustained by the Deceased were only to the extent of 57% superficial to deep and the Deceased has succumbed to those burn injuries nearly about 15 days after the incident, there can hardly be any reason to doubt his fitness, both physical and mental, to give such statement. Merely because PW-7 PSI Jadhav has not called Magistrate to record the statement of the Deceased, truthfulness of the Dying Declaration recorded by PW-7 PSI Jadhav in the presence of PW-2 Dr. Chitnis can hardly be questioned.

9. Moreover, this written Dying Declaration of the Deceased stands completely supported and corroborated from the oral Dying Declaration made by the Deceased before PW-3 Mustakali Ansari and PW-4 Istakal Khan. Both of them were residing near the house of the Appellant. According to them, Appellant was working as Commercial Sex Worker. They were knowing her and also the Deceased, who was frequently coming to the house of the Appellant and staying with her at night. As per their evidence, on the night of incident, at about 3 to 4 am, they heard the sound of the shouts for help from the house of the Deceased. Hence, they came out and saw that the clothes of the Deceased were burning and he was asking for help. They assisted the Deceased to remove his burnt

clothes and extinguished his fire. According to them, the Appellant was also present there. Then they took the Deceased to the Hospital in the auto-rickshaw of PW-6 Deva Tayde. On enquiries with the Deceased in the rickshaw, Deceased told them that Appellant has poured kerosene on him and set him on fire as he refused to have sexual intercourse with her, though she was insisting for it. PW-6 Auto-rickshaw Driver Deva has also deposed about oral Dying Declaration made by the Deceased before PW-3 Mustakali and PW-4 Istakal.

10. We do not find any reason to disbelieve the evidence of these three witnesses as they are independent one, being acquainted equally with both, the Deceased and Appellant. Nothing is brought on record in their cross-examination to challenge their testimonies as that of the interested or partial witnesses. Though there is some delay in recording of their statements by the Investigating Officer, their evidence to the effect that they had taken the Deceased in the auto-rickshaw of PW-6 Deva to the hospital is not at all challenged or disturbed in any way through their cross-examination. This fact is found mentioned in the Dying Declaration of the Deceased also vide Exhibit-20.

11. The evidence relating to the Dying Declaration gets further support

from the circumstantial evidence like the Spot Panchanama (Exhibit-10) proved through the evidence of PW-1 Panch Ramji Yadav, in whose presence PW-7 PSI Jadhav has recovered from the spot the kerosene can, the match-box and also the burnt clothes of the Deceased. The evidence of PW-1 Panch Yadav also proves that the Appellant was arrested on the same day and the gown, which she was wearing at the time of incident, was also seized under Panchanama (Exhibit-11). As per the evidence of PW-7 PSI Jadhav, all these seized articles were sent to Chemical Analyzer.

12. Further, there is evidence of PW-5 Dr. Prakash Shinde, who has conducted postmortem examination on the dead body. According to him, Deceased succumbed to the burn injuries on 15th July 2006 and on examination of the dead body, he has found superficial to deep thermal burns to the extent of 63% on the dead body. The cause of death, according to him, was *“septicemia on account of the burn injuries”*. The Postmortem Report is produced on record vide Exhibit-40.

13. In our considered opinion, the aforesaid evidence adduced by the prosecution more than sufficiently establishes involvement and guilt of the Appellant in the incident of pouring kerosene on the Deceased and setting

him ablaze. The real question for consideration is the nature of the offence made out against the Appellant. The Trial Court has held her guilty for the offence under Section 302 of IPC, which conviction, according to learned counsel for the Appellant, is not sustainable in the case. To advance her submissions, learned counsel for the Appellant has relied upon the evidence relating to medical examination of the Appellant herself on the same day by PW-2 Dr. Chitnis. It is urged that the said medical evidence reflects that, in the same incident, Appellant has also sustained some injuries, which prove that the incident in question of setting the fire has occurred in the hit of passion on account of sudden quarrel between the Deceased and Appellant. It is urged that, as per the contents of Dying Declaration itself, both, the Appellant and the Deceased, had consumed liquor. When Appellant demanded sexual intercourse, Deceased was unable to satisfy her, as, according to his own version, he was in drunken condition. According to learned counsel for Appellant, the quarrel and sudden fight might have been ensued between them. The evidence relating to this sudden fight is found in view of presence of the injuries on the person of the Appellant. According to learned counsel for Appellant, the extent and nature of burn injuries found on the person of the Deceased and the fact that he has succumbed to those injuries about 15 to 16 days after the incident, necessarily makes it clear that it was not the

intention of the Appellant to kill the Deceased. At the most, the knowledge on her part of causing him burn injury, which was likely to result into his death, can be inferred. Therefore, according to learned counsel for the Appellant, the case of the Appellant is squarely covered by Exception 4 to Section 300 of IPC.

14. We find much substance in the submissions advanced by learned counsel for the Appellant, because her submissions are found rooted in the medical evidence adduced on record by PW-2 Dr. Chitnis. According to his evidence, on the same day, Police had brought the Appellant for examination after her arrest. On her examination, he found following injuries :-

(i) *Incised wound on her right hand dorsal, admeasuring 4.5 cm x 0.7 cm.*

(ii) *Incised wound on her left hand dorsum, admeasuring 5 cm x 0.7 cm.*

15. According to PW-2 Dr. Chitnis, the age of the injuries was less than 12 hours. He has issued her Injury Certificate vide Exhibit-22.

16. In our considered opinion, the presence of these two recent injuries

on the person of the Appellant, found immediately after the incident, are not at all explained by the prosecution and they, therefore, probabalize the defence raised by the Appellant that as both, Appellant and Deceased, were in drunken condition, in sudden fight ensued between them, the Appellant might have taken the step of pouring kerosene on him and setting him ablaze. The expression “sudden fight”, as used in Exception 4 to Section 300 of IPC, implies mutual provocation and aggravation, which appears to be fairly possible in the present case on refusal of the Deceased to satisfy the sexual urge of the Appellant. The extent and nature of burn injuries found on the person of the Deceased, which were only superficial to deep burns, upto 57%, clearly brings the case of the Appellant within the expression, as used in Exception 4 to Section 300 of IPC, that, “without the offender having taken undue advantage or acted in a cruel or unusual manner”. The act of the Appellant of setting ablaze the Deceased was without any premeditation or intention to cause his death. Their relations were quite cordial. Both of them were in love with each other. No motive is also attributed for her to cause his death. Therefore, when the entire incident, as such, appears to have occurred in a sudden fight, without premeditation and without the Appellant taking any undue advantage or acted in a cruel or unusual manner, the case of the Appellant necessarily falls within the ambit of Exception 4 to Section 300

of IPC. As the evidence on record does not show that there was any intention on her part to commit murder of the Deceased, her case would stand excluded from the clutches of Part I of Section 304 IPC. However, as the knowledge on her part that by her act she was likely to cause death of the Deceased can sufficiently be inferred, her case stands covered under Part II of Section 304 of IPC.

17. In this view of the matter, the Appeal is allowed partly. Conviction of the Appellant for the offence under Section 302 of IPC is set aside. Instead, the Appellant is convicted for the offence under Section 304 Part II of IPC and sentenced her to suffer R.I. for ten years. As the Appellant has already undergone the imprisonment of about ten years in the Jail, Appellant is directed to be released forthwith, if not required in any other offence.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [ACTING CHIEF JUSTICE]