

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 405 OF 2002

Suman w/o. Kisan Tagad,
Age 51 years, Occu. Household
and Agri., R/o. Sillegaon,
Tq. Rahuri, Dist. Ahmednagar.

....Appellant.

Versus

The State of Maharashtra

....Respondent.

Mr. Ambar S. Barlota h/f. Mr. S.K. Barlota, Advocate for appellant.
Mr. S.J. Salgare, APP for respondent/State.

**CORAM : T.V. NALAWADE AND
ARUN M. DHAVAL, JJ.**

DATED : November 6, 2017

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed against judgment and order of Sessions Case No. 8/2001, which was pending in the Court of learned First Ad-hoc Additional Sessions Judge, Ahmednagar. The appellant is convicted for the offence punishable under section 302 of Indian Penal Code ('IPC' for short) and she is sentenced to suffer imprisonment for life and to pay fine of Rs.3,000/-. In default of payment of fine, she is sentenced to further undergo simple imprisonment for six months. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :-

Deceased Surekha was daughter of Bhausaheb Ghule, who is resident of village Lohgaon, Tahsil Newasa. She was given in marriage to son of present appellant viz. Babasaheb. Babasaheb is suffering from mental disease and he cannot even properly talk. The deceased has left behind two issues.

3) The dispute had started between deceased on one hand and appellant on other after the birth of first issue of Surekha. Due to the dispute, Surekha had left the matrimonial house for the house of his parents where she had lived for about two years. About three years prior to the date of incident, she had returned to the matrimonial house. After that the second son was born to her. Deceased was living in joint family with the parents of her husband and the family of brother of her husband.

4) The incident in question took place on 12.10.2000 at about 9.30 p.m. in the matrimonial house of deceased. On that night, there was some quarrel between the husband of the deceased and father in law. Then there was quarrel between the deceased and the present appellant, mother in law of the deceased. During quarrel the appellant set fire to the Sari of deceased by using match stick from match box. The fire was extinguished and then she was shifted to Rahuri Hospital. From there, she was shifted to Pravara Hospital,

Loni. In both the hospitals, her statements came to be recorded as dying declarations. She died on 30.11.2000 due to burn injuries and the extent of burn injuries was 86%.

5) On the basis of her dying declaration recorded by police crime was registered in Rahuri Police Station, District Ahmednagar at C.R. No. 221/2000. During investigation, panchanama of the spot where the incident had taken place was prepared. The statements of relatives of husband came to be recorded and the statements of relatives of parent's side of deceased also came to be recorded. After the death of Surekha, chargesheet came to be filed for aforesaid offence. The articles like pieces of partly burn Sari taken over on the spot of offence were sent to C.A. Office and kerosene is detected on these articles.

6) Prosecution examined in all eight witnesses to prove the offence. Both the dying declarations are proved by the prosecution. Bhausaheb (PW 5), father of deceased was examined to prove the oral dying declaration made to him by the deceased in the hospital. The doctors who gave certificates regarding fitness of Surekha at the time of recording of dying declarations are also examined. The Trial Court has based the conviction on dying declarations.

7) In the evidence of Ramesh Unde (PW 6), Police Head Constable, who was attached to Rahuri Police Station, the first dying declaration is proved as Exh. 34. In his evidence the document like order given to Head Constable Unde to record the dying declaration is proved as Exh. 33. The dying declaration was recorded in Rahuri Hospital at 3.30 a.m. of 13.11.2000.

8) The evidence of Bhausaheb (PW 5), father of deceased shows that intimation about the incident was given to him at about 11.00 p.m. on the day of incident and so, first he went to village Sillegaon, the place of appellant/accused and then went to Rahuri Hospital. The statement of Bhausaheb was recorded by police on 13.11.2000 itself and it shows that he and his wife had gone to Rahuri Hospital to see the deceased where so called oral dying declaration was made to them by the deceased. From the evidence, it is not easy to ascertain as to whether Police Head Constable Unde recorded the dying declaration first or whether the deceased made the disclosure first to the father of deceased. However, it is certain that immediately after the incident the relatives of the present appellants had informed to the father of the deceased about the incident.

9) In the dying declaration recorded by Unde (PW 6), the

deceased disclosed as under :-

- i) The incident took place at 9.30 p.m. of 12.11.2000 inside of the house.
- ii) The mother in law, present appellant set fire to Sari of deceased by using burning match stick.
- iii) After starting fire, the deceased stood in the same position for some time (she did not make any attempt to extinguish the fire).
- iv) When the extent of fire increased, the deceased started raising hue and cry to call others to save her.
- v) After hearing hue and cry, her neighbours like Ramkisan Mhase, her relatives Meerabai, Mandabai, Chandrabhaga and Sunita rushed there and they extinguished the fire.
- vi) Her father in law was present at the time of incident, but husband was not present.
- vii) Her son Vilas was sleeping in other room.
- viii) Her brother in law and wife of brother in law were present in other room where there is the fire place for cooking food.

10) Vithal Parbhane (PW 1), Executive Magistrate recorded the dying declaration at about 1.00 a.m. of 13.11.2000. He has

produced the requisition letter given to him which is at Exh. 19. This document shows that after receipt of letter this witness had visited the hospital from Rahuri, but the patient was not there as patient was already referred to Pravara Hospital Loni. That was done at about 10.30 a.m. of 13.11.2000. Thus, it was not possible for this witness to record the dying declaration on that night. He recorded the dying declaration at 1.00 p.m. of 13.11.2000 in Pravara Hospital Loni. The requisition letter which was given to him by police shows that it was informed to him that there was history given that when the deceased was cooking food on kerosene stove, there was explosion of kerosene stove and due to that she had sustained burn injuries. Her father in law Kisan Tagad had admitted her in Vivekanand Nursing Home Rahuri Hospital. Police had received this information at 00.10 hours of the night between 12th and 13th November 2000 and the letter was sent after that to Executive Magistrate. It needs to be mentioned here that the record of bed head ticket is not produced by the prosecution.

11) The dying declaration recorded by Vithal (PW 1) is proved in his evidence as Exh. 20. In the dying declaration, following things were disclosed by the deceased.

- i) The incident took place at about 9.30 p.m. of 12.11.2000 inside of the house.
- ii) Mother in law set fire by using matchstick to Sari of

deceased.

iii) At the relevant time, in the house the accused (mother in law), father in law were present.

iv) One son of deceased was sent to her parent's house, but the other son was sleeping in the house.

v) When fire started, she shouted loudly and then became unconscious and due to that she does not know as to who extinguished the fire.

vi) On that day, mother in law had come from Pandharpur.

vii) On that day, there was quarrel between her husband and father in law.

viii) After returning from Pandharpur her mother in law picked up quarrel and set fire to her.

ix) After the incident her father in law and mother in law had warned her not to disclose the incident to anybody, but she was not feeling well and she was disclosing the incident.

12) Bhausahab (PW 5), father of deceased has given evidence on the disclosure made to him as follows :-

i) There was quarrel between the deceased and the present appellant.

ii) During quarrel, mother in law set her on fire by using

matchstick.

iii) Mother in law used to ask the deceased to leave the house and she used to give beating to her.

13) In the dying declaration recorded by police and by Executive Magistrate, no motive was given by the deceased. The father of deceased has, however, tried to give motive for the crime. The evidence of the father that after the birth of son, the deceased had lived in his house for about two years and after that she was sent back to the matrimonial house shows that the family of the accused persons had accepted the deceased back in the matrimonial house. It is the case of prosecution that after resumption of cohabitation, second son was born to the deceased. When the husband of the deceased was affected mentally, there was no reason for the family of the appellant to ask the deceased to leave the matrimonial house. She was of help to the family and she was taking care of two sons. Thus, the evidence given by the father of deceased on motive does not appear to be probable in nature. On the contrary, the evidence given by father creates probability that due to mental ill health of husband, the deceased had returned to parent's house, but ultimately she was required to return to the matrimonial house.

14) In the dying declaration recorded by police which was first

in time, she disclosed that even after starting of fire, the deceased did not attempt to extinguish the fire and she raised hue and cry only when the extent of fire increased. This disclosure cannot be taken that lightly. In all the three dying declarations mentioned above, the deceased did not disclose that appellant/accused had poured kerosene on her person before setting fire to her clothes. Though C.A. report is not exhibited by the Trial Court, C.A. report is on record which ought to have been exhibited by the Trial Court. Surprisingly, the Trial Court has not considered the C.A. report in evidence. The C.A. report shows that kerosene was detected on the pieces of Sari recovered from the spot of offence under spot panchanama by police. The Trial Court has not considered this circumstance in proper perspective. This circumstance creates serious doubt about the so called three versions given by the deceased.

15) In the first dying declaration, the deceased had disclosed that her neighbours and relatives had extinguished the fire, who include Sunita Devere. Her brother in law and wife of brother in law were present in the house and no allegations are made against them. Some other neighbours had also rushed to the spot, but these neighbours are not examined. In the second dying declaration, it was disclosed by the deceased that she was warned not to disclose the incident to anybody by mother in law and father in law. It does not

look probable that after the incident the neighbours had not made inquiry with her. Such inquiry must have been made even by doctor who admitted her in the hospital from Rahuri. Dr. Madhav (PW 8) has given evidence that the deceased was admitted in the hospital at about 11.45 p.m. by in laws of deceased. He has given evidence that in laws have given history about burn injuries that they were sustained due to outburst of stove. In the examination in chief, he has again given evidence that the history was not only given by in laws, but also by the said woman, by the deceased. This evidence of Dr. Madhav (PW 8) cannot be ignored. This evidence and aforesaid circumstances like presence of kerosene on the partly burn pieces of Sari of deceased create two probabilities like the explosion, the flames of stove causing fire and an attempt of suicide by deceased due to her quarrel with present appellant. The evidence of father of deceased is sufficient to infer that there was some dispute between the appellant and the deceased and due to that dispute, the deceased had lived with her parents for around two years. Thus, there was the reason for deceased to implicate the present appellant.

16) The spot panchanama at Exh. 41 shows that it was prepared on 13.11.2000 between 8.30 a.m. and 9.30 a.m. In the spot panchanama, it is mentioned that there was a stove in this room and there were pieces of partly burn Sari. Partly burn pieces of Sari

and match box were taken over, but the stove was not taken over. The spot panchanama does not show that kerosene smell was there in the room or kerosene was found on the floor of the room. There is no explanation with the prosecution for not sending kerosene stove or match box to expert when there was the first disclosure of aforesaid nature. The absence of kerosene on the floor also creates doubt about the other circumstantial evidence. Somebody must have extinguished the fire. But, no sign of such incident of extinguishing of the fire was seen in the house. The spot panchanama does not show that the fire had reached to other articles. The deceased was wearing nylon Sari and kerosene was detected on Sari. These circumstances need to be kept in mind. In the first disclosure, she disclosed that she did not even make an attempt to extinguish the fire and only after some time when the extent of fire increased, she shouted. This creates probability that she had made an attempt to set fire to herself to create fear in the mind of her in laws, but due to circumstance that she was wearing nylon Sari, the things went out of control. In ordinary course, she would have resisted if appellant wanted to set fire to her and if that was done after pouring the kerosene on the person of deceased. Thus, the version given in the dying declaration appears to be improbable in nature. No injury was found on the person of appellant showing that she was there when the fire started. There was no damage caused to any other articles from the room. No

article like container of kerosene was taken over even when there was kerosene stove present in the room where partly burn pieces of Sari were found. These circumstances show that investigation was not made fairly.

17) Prosecution did not examine any independent witness. The neighbours could have given evidence on the immediate disclosure which the deceased must have made to them as they had rushed there to extinguish the fire. This circumstance also cannot be ignored.

18) There is evidence of doctors who gave certificates on fitness of deceased when her dying declarations were recorded. There is no need of discussion of that evidence. There is clear probability that father reached the hospital immediately and only after that her first dying declaration was recorded by police in Rahuri Hospital. Admittedly, the family of the accused spent on the treatment which was for more than 15 days. The conduct of the accused was not consistent with the guilt, but it was consistent with innocence. It can be said that the deceased had dispute only with the appellant, mother in law and probably due to the dispute, the incident took place and the deceased implicated the appellant. As there are other possibilities, this Court holds that it is not safe to convict the

appellant on the basis of aforesaid dying declarations. The Trial Court has not touched the C.A. report in respect of pieces of Sari and the other probabilities are not considered by the Trial Court. Aforesaid circumstances are not touched by the Trial Court. This Court holds that the judgment and order of the Trial Court cannot sustain in law. The appellant is entitled to benefit of doubt.

19) In the result, the appeal is allowed. The judgment and order of the Trial Court convicting the appellant/accused for offence punishable under section 302 of IPC is hereby set aside. Appellant/accused stands acquitted of the offence punishable under section 302 of IPC. The fine amount deposited, if any, is to be returned to the appellant. The bail bonds of the appellant stand cancelled.

[ARUN M. DHAVALÉ, J.]

[T.V. NALAWADE, J.]

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