

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

CRIMINAL APPEAL NO.488 OF 2007

Parubai w/o. Gulab Watane,
Age : 22 years,
Occ. Household,
r/o. Wazar, Tq. Jintur,
Dist. Parbhani

..Appellant
(Orig. accused no.1)

Vs.

State of Maharashtra,
Through Police Station Officer,
Police Station, Bamni,
Tq. Jintur,
Dist. Parbhani

..Respondent
(Prosecution)

Mr.S.S.Rathi, Advocate for appellant
Ms.S.S.Raut, APP for respondent

**CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.**

**RESERVED ON : SEPTEMBER 29, 2017
PRONOUNCED ON : OCTOBER 12, 2017**

JUDGMENT (PER SANGITRAO S. PATIL, J.) :-

Heard

2. The appellant (original accused no.1) has been convicted for the offences punishable under Sections 302 and 436 of the Indian Penal Code

("I.P.C." for short) and sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/- in respect of the offence punishable under Section 302 of the I.P.C.; and rigorous imprisonment for five years and a fine of Rs.2,000/- in respect of the offence punishable under Section 436 of the I.P.C. in Sessions Case No.27 of 2007 by the learned Sessions Judge, Parbhani on 16.11.2007. Being aggrieved by the said conviction and sentence, the present appeal has been filed.

3. The deceased Mandabai was the wife of original accused no.2 namely, Gulab s/o. Gajanan Watane, r/o. Wazar, Tq.Jintur, Dist. Parbhani. Their marriage was performed in the year 2000. From the said wedlock, they had got a son namely, Akash and a daughter namely, Nikita, who were aged about 5 years and 2 years respectively, at the time of the incident which took place in the night intervening 2nd and 3rd August, 2006. Accused no.2 had extra-marital relations with the present appellant. Ultimately,

they married on 02.01.2006 and got registered their marriage in the office of Registrar of Marriages at Jintur on 18.02.2006. The appellant started residing in the house of accused no.2 along with the deceased Mandabai, her children and parents of accused no.2, which was situate in the agricultural land. The house of accused no.2 was comprising of three rooms, out of which one room was allotted to their servants namely, Piraji Mankari and two rooms were in possession of the family of accused no.2.

4. On 02.08.2006, accused no.2 had gone to Jalna for bringing tractor-tyres and dynamo. He did not come back even in the night. Accused no.3, who is the mother of accused no.2, had gone to the house of her younger son, who was residing in the village, since his wife had delivered a child in the morning on that day.

5. In the night of the incident, the deceased Mandabai, both of her children and the appellant were

sleeping inside their house. The father of accused no.2 namely, Gajanan Watane, who is the informant, was sleeping outside the house. The appellant came out of the house at midnight and shouted that there was fire inside the house. The informant got up from the sleep. The deceased Mandabai also came outside the house along with her daughter Nikita. Both of them were caught by flames. Piraji Mankari placed a wet blanket on the person of the deceased Mandabai and extinguished the fire. The son of the deceased Mandabai namely, Akash remained inside the house itself. Due to extensive fire inside the house, he could not be saved. Piraji Mankari brought a jeep from the village, whereon the deceased Mandabai and her daughter were taken to the Civil Hospital at Parbhani. The body of Akash, the son of the deceased Mandabai, had turned into ashes. Nikita died in the Civil Hospital at Parbhani on the same day. The deceased Mandabai also died on 04.08.2006 at about 5.20 p.m.

6. After the deceased Mandabai was admitted in the Civil Hospital at Parbhani, her statement was recorded by a Police Head Constable who was on duty in the Police Outpost of Civil Hospital, Parbhani, at about 8.30 a.m. on 03.08.2006, after getting it verified from the Medical Officer that she was conscious and in a fit condition to give statement. On the same day, at about 9.20 a.m., the Naib Tahsildar recorded her statement after confirming from the Medical Officer that she was conscious and in a fit condition to give the statement. In those statements, she narrated that she got burnt when she was under the sleep. Both of her kids also got burnt. In her dying declaration before the Police Head Constable, she stated that when she went outside the house along with her daughter who also was burning, she found that the appellant had already been out of the house. She stated that her son remained inside the house and could not be saved. She did not raise

any suspicion against anybody or complain against anybody behind the incident of fire.

7. When the deceased was in the Civil Hospital at Parbhani, she talked to her sister namely, Chhaya on phone and informed that in the night of the incident, the appellant poured kerosene on her person, her husband i.e. accused no.2 and the mother-in-law i.e. accused no.3 caught hold of her and the appellant set her on fire by a matchstick. Chhaya visited the Police Station and gave statement accordingly, on the basis of which accused nos.2 and 3 also came to be arrested in connection with the present crime.

8. The post mortem of the bodies of Nikita and Mandabai were conducted. Nikita had sustained 100% of burns, while Mandabai had sustained 99% of burns. Dr.Bhalerao, who conducted post-mortem on the body of Nikita, opined that she died of hypo-volumic shock due to 100% superficial to deep burns. Dr. Doiphode,

who conducted post mortem on the body of Mandabai, opined that she died due to Cardio-respiratory failure secondary to hypo-volumic shock due to extensive 99% burns.

9. Initially, A.D.Nos.3 of 2006 and 12 of 2006 were registered in the Police Station, Bamni. P.H.C. Puri visited the spot of the incident, prepared spot panchnama and seized the burnt frock of Nikita. The dead body of the deceased Akash was also found in that house. The burnt frock of the deceased Nikita was sent to C.A. for analysis and report. Kerosene residues were detected thereon.

10. The informant Gajanan had suspicion about the foul-play behind the incident of burning the house. He inquired with the appellant on 05.08.2006 as to how the fire erupted in the house in the night of the incident, whereon she confessed that she poured kerosene on the cot, on which the deceased Mandabai was sleeping with her kids and set fire to the saree of the deceased Mandabai. After the

deceased Mandabai was caught by fire, she came out of the house and raised shouts. On the basis of the statement made by the appellant, the informant Gajanan, lodged report against her in the Police Station, Bamni, on the basis of which, Crime No.36 of 2006 came to be registered against her for the offence punishable under Section 302 of the I.P.C.

11. The investigation followed. The statements of the witnesses were recorded. The appellant came to be arrested on 05.08.2006 at about 11.00 a.m. When she was in the police custody, she gave a disclosure statement and offered to produce a kerosene can which was thrown in the bushes near the house. Accordingly, she took the panchas and P.S.I. Phad, Investigating Officer, towards the bushes and produced the plastic can from the said bushes. The same was seized under a panchnama.

12. After completion of the investigation, the appellant as well as, accused nos.2 and 3 came to be charge-sheeted for the offences punishable under

Section 302, 436, 429 read with Section 34 of the I.P.C. in the Court of the learned Judicial Magistrate First Class, Jintur. Since the case was triable by the Court of Session, the learned Magistrate committed it to the Court of Session for trial.

13. The learned Sessions Judge framed charges against the appellant and accused nos.2 and 3 for the above-mentioned offences vide Exh.18 and explained the contents thereof to them in vernacular. The appellant and accused nos.2 and 3 pleaded not guilty and claimed to be tried. According to accused nos.2 and 3, they were not at all present at their house in the night of the incident and that they have been falsely implicated by the sister of the deceased Mandabai.

14. The appellant stated that in the night of the incident, she went to sleep inside the house along with the deceased Mandabai and kids. Diesel and

kerosene cans, which were inside their house, were caught by fire in the midnight. She got up from the sleep due to the heat of flames and rushed outside the house to save her life. The deceased Mandabai and her children were just near the diesel and kerosene cans. All of them were caught by fire. The deceased Mandabai came out of the house along with her daughter. The informant Gajanan and others extinguished the fire from the person of the deceased Mandabai and her daughter and took them to the hospital. According to the appellant, the informant Gajanan was against her marriage with accused no.2. Therefore, he lodged a false report against her. She further came with a case that the sister of the deceased Mandabai namely, Chhaya gave a false statement against her with a view to grab the entire property of her parents, in which the deceased Mandabai had a share.

15. The prosecution examined nine witnesses to bring home the guilt of the appellant and accused

nos.2 and 3. After evaluating the evidence, the learned trial Judge accepted the case of accused nos.2 and 3 that they were not present in the house in the night of the incident and were not involved in the above-mentioned offences. He, therefore, acquitted them. The learned trial Judge, however, came to hold that the prosecution established beyond reasonable doubt, that the appellant poured kerosene and set the deceased Mandabai and her children on fire in the night of the incident. The learned trial Judge, therefore, convicted the appellant of the offences punishable under Sections 302 and 436 of the I.P.C. and sentenced her, as stated above.

16. The acquittal of accused nos.2 and 3 has not been challenged by the State/prosecution. The judgment and order of acquittal in respect of accused nos.2 and 3, thus, has attained finality.

17. The learned Counsel for the appellant submits that there is no sufficient, cogent and

dependable evidence on record to establish that the appellant set the deceased Mandabai and her children on fire in the night of the incident. He submits that the case is entirely depending on the circumstantial evidence. There are written dying declarations of the deceased Mandabai recorded after getting it confirmed that she was in a fit condition and in those statements, she did not allege anything against the appellant in respect of the incident of burning. Her oral dying declaration coming through the evidence of her sister Chhaya (PW 2) has not been believed by the learned trial Judge since Chhaya (PW 2) tried to implicate accused nos.2 and 3 in the incident of fire, though they were not at all present in the night of the incident. Moreover, Mangala (PW 9), who allegedly was present when the deceased Mandabai had telephonic talks with Chhaya (PW 2) about the occurrence of the incident of fire, also does not support the version of Chhaya (PW 2). He then submits that the extra-judicial confession allegedly made by

the appellant before the informant Gajanan also has been disbelieved by the learned trial Judge. According to him, the only circumstances that weighed the learned trial Judge are that the appellant was inside the house in the night of incident and particularly, when there was fire inside the house, that she came out of the house without suffering even slightest injury and she did not explain as to how the fire erupted inside the house, for holding the appellant guilty of the above-mentioned two offences. He submits that no motive has been proved, which would have prompted the appellant to finish the deceased Mandabai and her children by setting them on fire. According to him, the circumstances relied upon by the prosecution do not form a complete chain to connect the appellant with the above-mentioned offences. He submits that the appellant has been wrongly convicted by the trial Court.

18. As against this, the learned A.P.P. submits that though accused no.2 was married to the deceased

Mandabai in the year 2000 and had got two children from that wedlock, the appellant had illicit relations with him. The appellant compelled accused no.2 to get married with her. Accused no.2 executed an agreement in favour of the deceased Mandabai on 17.02.2006 and assured that he would treat her and her children properly even after getting married with the appellant and further assured to transfer certain agricultural lands in her name for her maintenance. Accused no.2 got registered the marriage with the appellant on 18.02.2006. The learned A.P.P. submits that the appellant was not happy in seeing the deceased Mandabai and her children living in the house with accused no.2. Therefore, with an intent to eliminate them, she set them on fire by pouring kerosene around them in the night of the incident. The learned A.P.P. submits that had there been accidental fire, the appellant also would have sustained burns because she also would have taken some time in getting up from the sleep and running

away out of the house due to fire. The learned A.P.P. submits that there was a strong motive on the part of the appellant to finish the deceased Mandabai and her children. The appellant did not explain the circumstances under which the fire erupted inside the house, which fact was within her special knowledge. According to her, these are the strong circumstances to establish the guilt of the appellant for the above-mentioned offences. The learned A.P.P. supports the impugned judgment.

19. The informant Gajanan (Exh.26) deposes that on the next day of death of Mandabai, he inquired with the appellant, as to how the fire erupted inside the house, whereon she disclosed that she herself poured kerosene on the deceased Mandabai and her children and by means of a burning kerosene lamp set them on fire. Thereafter, she came out of the house. On the basis of this statement, the informant Gajanan lodged the report (Exh.27) in the Police Station, Bamni, on 05.08.2006 at about 5.15 p.m. So far as

this extra-judicial confession of the appellant is concerned, the learned trial Judge, after considering the circumstances under which it was allegedly made, held in paragraph 22 of the judgment, that since the appellant and accused no.2 got married against the wish of the informant Gajanan, he could not be said to be a man of confidence for making confessional statement before him. He further observed that the informant had not immediately reported the incident to the police even after making extra-judicial confession by the appellant. Therefore, his evidence would not be worthy of placing reliance and the extra-judicial confession of the appellant cannot be relied upon. We subscribe to the views expressed by the trial Court while discarding the extra-judicial confession allegedly made by the appellant. The informant certainly could not have happily accepted the appellant as the second wife of his son i.e. accused no.2, when accused no.2 had already got married to the deceased Mandabai and had got two

children from her. If that be so, the appellant would not have made any incriminating disclosure before him, which would bring her in trouble. It is not that the appellant, at her own, approached the informant after two days of the incident and disclosed that she had set the deceased Mandabai and her children on fire. Such a conduct certainly was not natural and probable on the part of the appellant. The learned Counsel for the appellant cited the judgment in the case of **Sahadevan and anr. Vs.State of T.N., AIR 2012 SC 2435**, wherein the principles for deciding admissibility and reliability of the extra-judicial confession have been given in paragraph 22, thus :-

- (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the Court with greater care and caution.
- (ii) It should be made voluntarily and should be truthful.
- (iii) It should inspire confidence.

- (iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
- (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
- (vi) Such statement essentially has to be proved like any other fact and in accordance with law.

20. The learned Counsel for the appellant further cited the judgment in the case of **Ishwar Pandurang Masram Vs. State of Maharashtra, 2013 Cri. L.J. 3597**, wherein it is held that an extra-judicial confession given by the accused in response to a query, cannot be said to be made voluntarily.

21. In the present case, it is not probable and acceptable that the alleged extra-judicial confession would have been made by the appellant before the informant, who was not happy with the marriage of the appellant with accused no.2. Moreover, the appellant is alleged to have made that confession on being inquired by the informant. It cannot be said to have been made voluntarily. In the circumstances, the said extra-judicial confession would be of no help to the prosecution to connect the appellant with the incident in question.

22. The prosecution has relied on the evidence in respect of the discovery of kerosene can at the instance of the appellant. It has come in the evidence of Vijay (PW 4)(Exh.39) and the P.S.I. Phad (PW 8) that on 09.08.2006, when the appellant was in the police custody, she gave a statement as recorded in memorandum (Exh.40) and offered to produce a plastic can thrown into the bushes near the house and

accordingly, produced the same from under the bushes, which was seized vide panchnama (Exh.41). P.S.I. Phad (PW 8) states that the said can was smelling of kerosene.

23. The learned Counsel for the appellant submits that the said can was not sent to C.A. for examination. There is no positive evidence on record to show that it was smelling of kerosene. Vijay (PW4), the panch, does not state that he smelt that can and found that it was smelling of kerosene. He submits that the evidence in respect of discovery of the said can is not at all believable. According to him, there is no record to show that when the appellant came out of the house, she had brought any can with her. Therefore, the case of the prosecution that the appellant threw the can in the bushes, cannot be believed. We find substance in the contention of the learned Counsel for the appellant in this regard. When the entire house was in the process of burning, the plastic can containing

kerosene also would have burnt. It does not appear to be natural and probable that the appellant would save the said can from being burnt in the fire inside the house, took out the same from the house and threw it at any particular place for being pointed out to the police so as to enable them to collect incriminating evidence against her. The alleged discovery of the can at the instance of the appellant, being not natural and probable, cannot be believed.

24. The oral dying declaration of the deceased Mandabai that has been sought to be proved by the prosecution through the evidence of Chhaya (PW 2) (Exh.28), also has been disbelieved by the learned trial Judge. Chhaya (PW 2) states that when the deceased Mandabai was admitted in Civil Hospital, Parbhani, Mangala (PW 9)(Exh.54) had gone to see her. At that time, the deceased Mandabai talked with Chhaya (PW 2) through the cell phone of Mangala (PW9). Chhaya (PW 2) further states that the deceased Mandabai told her that in the night of the incident,

when she was slept, the appellant poured kerosene on her person and set her on fire by a matchstick and at that time, accused nos.2 and 3 had caught hold of her. However, Mangala (PW 9), who was present at that time, does not corroborate the version of Chhaya (PW2) in respect of the above-mentioned conversation between Chhaya (PW 2) and the deceased Mandabai. It has come consistently in the dying declarations (Exhs.37 and 38) of the deceased Mandabai that in the night of the incident, accused nos.2 and 3 were not present at the home. The informant also states so. It is, thus, clear that Chhaya (PW 2) tried to implicate accused no.2 and 3 also in the incident in question. In the circumstances, the learned trial Judge rightly disbelieved the said oral dying declaration of the deceased Mandabai.

25. In the first dying declaration of the deceased Mandabai (Exh.38), which was recorded by the Police Head Constable at about 8.30 a.m. on 03.08.2006, though she did not allege anything

against the appellant, the said dying declaration would be helpful to the prosecution to throw light on the conduct of the appellant after the incident. Since the deceased Mandabai was asleep when she was caught by fire, she was not in a position to assign any reason behind the fire. Her statement shows that both of her children and herself got extensively burnt before she went out of the house along with her daughter aged about two years. As such, sufficient time must have been elapsed after starting of the fire till the deceased Mandabai and her children were caught by fire. The deceased Mandabai states that the appellant had been out of the house prior to her going out of the house along with her daughter. Admittedly, the appellant had not sustained a slightest injury due to the fire. That means, she left the house well in advance of spreading of fire. She did not try to alarm the deceased Mandabai and her children to leave the house so as to save them from fire. She did not try to bring the small

children of the deceased Mandabai out of the house to save their lives. She did not raise shouts immediately and waited until the the deceased Mandabai and her children were fully caught by flames.

26. All the above circumstances speak volumes about the guilty mind of the appellant. It is only after she saw the deceased Mandabai coming out of the house along with her burning daughter, that she raised shouts to make a show that she was totally innocent. In the circumstances, the absence of any injury on her person also would be a material circumstance to prove the guilty mind of the appellant. If that be so, only because the deceased Mandabai stated that she had no suspicion against anybody and particularly did not raise suspicion against the appellant behind the incident, it cannot be said that the dying declarations (Exhs.37 and 38) would be helpful to the appellant to establish her innocence.

27. The burnt frock of the deceased Nikita was seized vide panchnama (Exh.34). PSI Phad (PW 8) (Exh.48) deposes that he sent the said frock to the C.A. for analysis and report vide letter (Exh.50). The C.A. report (Exh.50) shows that kerosene residues were detected thereon. It is, thus, clear that kerosene was used for setting the deceased Nikita on fire.

28. The marriage certificate (Exh.29) shows that the marriage of the appellant and accused no.2 was registered on 18.02.2006. The agreement (Exh.31) has been executed on 17.02.2006 i.e. one day prior to registration of marriage of the appellant with accused no.2. From the contents of this agreement, it seems that the deceased Mandabai was rather skeptic about her future after the marriage of the appellant with accused no.2. Therefore, she obtained a written assurance from accused no.2 that after his marriage with the appellant, he would maintain the

deceased Mandabai and her children properly. Accused no.2 further assured to transfer certain land in the name of the deceased Mandabai. The appellant started residing in the house of accused no.2 after the marriage. It was quite natural on the part of the appellant as well as that of the deceased Mandabai to dominate each other to have control over the family matters. The deceased Mandabai and her children certainly would have come in the way of the appellant in establishing her primacy in the house. It is difficult to establish motive by any direct evidence. It has to be inferred on the basis of the attending circumstances. From the facts and circumstances emerging from the evidence, it is clear that in order to have the dominating position in the house, the appellant finished the deceased Mandabai and her children.

29. The appellant alone was inside the house in the night of the incident besides the deceased Mandabai and her children. As stated above, she went

out of the house much prior to spreading of the fire. In view of Section 106 of the Evidence Act, she was under an obligation to explain the circumstances, which were within her special knowledge, under which the fire erupted. She did not at all discharge this burden by giving any explanation behind eruption of fire. All these circumstances clearly show that it is the appellant, who poured kerosene around the persons of the deceased Mandabai and her children and set them on fire.

30. The prosecution established beyond reasonable doubt that it is the appellant only, who set the deceased Mandabai and her children on fire with a view to remove them from her marital life with accused no.2. If that be so, in view of the medical evidence, the deaths of the deceased Mandabai and her children would certainly be homicidal. The appellant set the dwelling house on fire. The learned trial Judge rightly convicted the appellant of the offences punishable under Sections 302 and 436 of the I.P.C.

We concur with the findings recorded by the learned trial Judge holding the appellant guilty of the said offences. We further concur with the order of sentence passed by the learned trial Judge against the appellant. The appeal is devoid of substance. It is liable to be dismissed.

31. In the result, we pass the following order :-

- (i) The appeal is dismissed.
- (ii) The impugned judgment and order convicting the appellant for the offences punishable under Sections 302 and 436 of the I.P.C. are confirmed.
- (iii) The appellant shall surrender to her bail bonds before the trial Court, within a period of two weeks from today for suffering the sentences passed against her by the trial Court.
- (iv) If she fails to appear before the trial Court within two weeks from today, the trial

Court shall issue coercive process to secure her presence.

- (v) Rest of the directions given by the learned trial Judge are maintained as they are.
- (vi) The appeal is accordingly disposed of.

[**SANGITRAO S. PATIL, J.**] [**SUNIL P. DESHMUKH, J.**]

kbp