

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 706 OF 2013

Ganesh Ramesh Kamble

.....Appellant

V/s.

The State of Maharashtra

.....Respondent

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Ms. Dharmistha Rathod i/by. Mr. Amin Solkar, Advocate for the
appellant.

Mr. H.J. Dedhia, APP for the State, respondent.

CORAM :- SMT. V.K. TAHILRAMANI, &

SANDEEP K. SHINDE, JJ.

DATE :- 12 JUNE, 2017.

ORAL JUDGMENT : (Per :- SMT. V.K. TAHILRAMANI, J) :

1. The appellant, original accused has preferred this Appeal against the judgment and order dated 24th January, 2013 passed by the Learned Additional Sessions Judge, Kalyan in Sessions Case No. 90 of 2009. By the said judgment and order, the Learned Sessions Judge convicted the appellant under Section 302

of Indian Penal Code ("IPC" for short) and sentenced him for the said offence to imprisonment for life and fine of Rs.5,000/- in default R.I. for 4 months.

2. The prosecution case briefly stated is as under :-

. The appellant was married to deceased, Kavita in the year 2006. Some months after the marriage, the appellant started consuming liquor and beating Kavita. Kavita lodged criminal case against the appellant under Section 498A IPC. The said case was compromised and at the time of compromise, the appellant signed a document stating that he will not trouble Kavita and he will treat her properly. This document was executed on a stamp paper. However, even thereafter the appellant continued to illtreat Kavita. On 14th December, 2008 the appellant came home in an intoxicated condition. Kavita questioned him about drinking liquor. Thereupon, a quarrel took place between Kavita and the appellant. The appellant then poured kerosene on Kavita and set her on fire. Kavita was taken to the Central Hospital, Ulhasnagar. In the hospital, two dying declarations of Kavita came to be recorded. The first dying declaration was recorded by P.W.8, P.I. Kamble. The said dying declaration is at Exhibit-39. Kavita told P.I. Kamble that, on 14th December, 2008 her husband came home

after drinking liquor. When she questioned him about this fact, a quarrel took place between them. Her husband then poured kerosene on her and set her on fire. This dying declaration was treated as FIR. In the hospital, on the very same day i.e. on 14th December, 2008 P.W.7 Special Executive Officer, Lajwanti Motwani recorded the dying declaration of Kavita. The said dying declaration is at Exhibit-33. In this dying declaration, Kavita stated that on account of quarrel between her and her husband, he poured kerosene on her and set her on fire. After registration of FIR, investigation commenced. Kavita expired on 22nd December, 2008 in the hospital. Thereafter, the offence was converted into Section 302 IPC. After completion of investigation, chargesheet came to be filed. In due course, the case was committed to the Court of Sessions.

3. Charge came to be framed against the appellant under Section 302 IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant was that of total denial and of false implication. After going through the evidence adduced in this case, the Learned Sessions Judge convicted and sentenced the appellant as stated in para-1 above, hence, this appeal.

4. We have heard the Learned Counsel for the appellant and the Learned APP for the State. We have carefully considered their submissions, the judgment and order passed by the Learned Sessions Judge and the evidence in this case. After carefully considering the matter, for the below-mentioned reasons, we are of the opinion that the appellant poured kerosene on Kavita and set her on fire which led to her death.

5. The conviction of the appellant is based on two dying declarations i.e. Exhibit-33 and Exhibit-39. The dying declaration at Exhibit-33 was recorded by P.W.7, Special Executive Officer, Smt. Lajwanti Motwani. The dying declaration at Exhibit-39 was recorded by P.W.8-P.I. Kamble. Both these dying declarations were recorded on 14th December, 2008 in the Hospital. In addition to these two dying declarations, conviction is also based on oral dying declarations made by Kavita to P.W.2-Mayurakshi, P.W.3-Meenakshi and P.W.6-Dilip. Mayurakshi was the mother of Kavita, Meenakshi was the maternal aunt of Kavita and Dilip was the father of Kavita.

6. We now proceed to deal with the first dying declaration i.e. Exhibit-39. This dying declaration, as stated earlier, was recorded by P.W.8-P.I. Kamble. P.I. Kamble has stated that on 14th December, 2008 at about 11.00 p.m. he received telephone call

from Central Hospital, Ulhasnagar, that one, Kavita Ganesh Kamble was admitted in the Hospital with burn injuries. P.W.8 then asked the Doctor (P.W.1-Dr. Raju Muskawad), whether Kavita was able to give a statement. The Doctor examined her and certified that, she was conscious and able to give statement. Thereafter, P.W.8 proceeded to record the dying declaration of Kavita. Kavita told him that, her husband came home after consuming liquor. She asked her husband, why he consumed liquor. On that count, there was a quarrel between her and her husband. Her husband in anger poured kerosene on her and set her on fire with the help of a matchstick.

7. P.W.1, Dr. Raju Muskawad has stated that on 14th December, 2006 he was on duty at Central Hospital, Ulhasnagar. Patient, Kavita Ganesh Kamble who had sustained burn injuries was brought to the Hospital by her husband. She was conscious. P.I.- Ajay Kamble came to the Hospital. Dr. Muskawad then examined the patient and after seeing the condition of the patient, he certified that the patient was conscious and her statement can be recorded. Dr. Muskawad, has thereafter stated that, the Special Executive Officer came to the Hospital and told him that the dying declaration of the patient is to be recorded. Dr. Muskawad gave

permission to the Special Executive Magistrate to record the statement of Kavita. He certified that the patient was conscious and her statement can be recorded.

8. The second dying declaration was recorded by P.W.7-Special Executive Officer, Lajwanti Motwani. She had stated that, she went to Central Hospital, Ulhasnagar and recorded the dying declaration of Kavita. The Special Executive Officer, Motwani has stated that, on enquiry, Kavita told her that there was quarrel between her and her husband. Her husband then poured kerosene on her and set her on fire.

9. In addition to dying declarations, Exhibit-33 and Exhibit-39, the prosecution has relied upon the evidence of P.W.2-Mayurakshi, P.W.3-Meenakshi and P.W.6-Dilip to whom Kavita made oral dying declarations when she was admitted to Central Hospital, Ulhasnagar. Meenakshi, has stated that, she was the mother of Kavita. Kavita was married to the appellant in the year 2006. Three months after the marriage, the appellant started illtreating her daughter, Kavita. Kavita then lodged criminal case against the appellant under Section 498A IPC. A compromise was arrived at and the appellant executed a document on stamp paper stating that, he would treat Kavita well. However, even thereafter, the

appellant continued to illtreat Kavita. Meenakshi has stated that, she came to know that her daughter had received burn injuries and was admitted in Central Hospital, Ulhasnagar. Hence, she went and met her daughter in the Hospital. Her daughter told her that, her husband poured kerosene on her and set her on fire. The evidence of P.W.3-Meenakshi who was the maternal aunt of Kavita and P.W.6-Dilip who was the father of Kavita is on similar lines as that of P.W.2-Mayurakshi.

10. That Kavita died a homicidal death, is brought out from the evidence of P.W.2, 3, 6, 7, 8 and P.W.1, Dr. Chaurasia who conducted the post-mortem on the dead body of Kavita. Dr. Chaurasia, has stated that, Kavita had sustained 95% burns. Those burns were superficial to deep burns and the cause of death was 95% superficial to deep burns with septicemic shock. In the light of the evidence on record, we have no hesitation to hold that, Kavita died a homicidal death.

11. Mr. Solkar, submitted that, even if it is held that the appellant set his wife Kavita on fire, the act of the appellant would not fall under Section 302 IPC but it would at the most fall under Section 304 (Part-II) IPC. He submitted that, the appellant had no intention to cause death of his wife, Kavita. To support his

contention, he has placed reliance on the dying declarations, Exhibit-33 and Exhibit-39 and the evidence of P.W.1-Dr. Raju Muskawad. Mr. Solkar, pointed out that, in both the dying declarations, Kavita has stated that, when she questioned her husband, why he had consumed liquor, a quarrel took place between her and her husband and then her husband poured kerosene on her and set her on fire. Mr. Solkar, pointed out that, the dying declaration, Exhibit-39, shows that thereafter, the appellant extinguished the fire. Mr. Solkar, placed reliance on the evidence of P.W.1-Dr. Chaurasia, who has stated that Kavita was brought to the Hospital by her husband. Thus, Mr. Solkar submitted that the fact, that the incident had occurred during the course of a sudden quarrel and the fact that the appellant extinguished the fire and immediately took Kavita to the Hospital shows that, he had no intention to kill his wife, Kavita.

12. No doubt, the evidence on record shows that, it was the appellant who set his wife, Kavita on fire. However, the pivotal question which arises in the facts and circumstances of the case, is what is the nature of the offence proved against the appellant. It is an admitted fact that, the appellant set Kavita on fire during the course of a sudden quarrel which took place between the appellant

and Kavita. However, the dying declaration, Exhibit-39 shows that, after Kavita caught fire, the appellant alongwith others extinguished the fire. It appears that, in the process of extinguishing the fire, both the hands of the appellant were burnt. This is brought out in the evidence of P.W.8, P.I.-Kamble, who has stated that, the appellant was also admitted in Central Hospital, Ulhasnagar as both his hands were burnt. P.W.8-P.I.-Kamble has also stated that the appellant was discharged from the Hospital on 26th December, 2008. Moreover, the evidence of P.W.1, Dr. Raju Muskawad shows that, Kavita was brought to the Hospital by her husband i.e. the appellant. The dying declaration, Exhibit-33 also shows that, Kavita was brought to the Hospital by the appellant. This conduct of the appellant cannot be seen divorced from the totality of the circumstances. Very probably, the appellant would not have anticipated that, the act done by him would have accelerated to such a proportion that, Kavita may die. If the appellant had intended his wife Kavita to die, he would not have extinguished the fire and immediately rushed her to the hospital in an effort to save her life. In view of the evidence on record, we are inclined to think that, all the appellant thought of, was to frighten Kavita and not kill her, but unfortunately, the situation

slipped out of control and went to a fatal incident. Looking to the facts of this case, we are of the opinion that, the case would not fall under Section 302 IPC. We stand fortified in taking this view by the observations of the Supreme Court, in the case of, **Kaluram V/s. The State of Rajasthan reported in (2000) 10 Supreme Court Cases page 324**. In the said case also, similar facts arose and the Supreme Court held that, the case would not be covered by Section 302 of IPC, but it would be covered by Section 304 (Part-II) IPC.

13. However, as far as the submission of Mr. Solkar is concerned, that the case would fall under Section 304 (Part-II), looking to the extensive nature of the injuries sustained by Kavita, we are of the opinion that, the case would fall under Section 304 (Part-I) of IPC.

14. In view of the above facts and circumstances, we alter the conviction of the appellant from Section 302 of IPC to Section 304 (Part-I) of IPC. Both the sides agreed that the appellant has been custody since December, 2008. In this view of the matter, we are of the opinion that, for the offence under Section 304 (Part-I), sentence of 9 years rigorous imprisonment with fine amount of Rs.5,000/- , in default, simple imprisonment for four months, would

meet the ends of justice.

15. The Appeal is allowed to the aforesaid extent.

(SANDEEP K. SHINDE, J)

(SMT. V.K. TAHILRAMANI, J)