

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1705 OF 2017

IN

CRIMINAL APPEAL NO.1035 OF 2017

JAGADISH@KHADESHWAR DAMU KHOTARE)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.P.R.Kalantri, Advocate for the Applicant.

Mr.P.P.Jadhav, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 18th DECEMBER 2017

P.C. :

1 This is an application for suspension of sentence and releasing the applicant/accused on bail during pendency of the appeal filed by him. The applicant/accused was charged for the commission of offence punishable under Section 498A and 302 of the Indian Penal Code (IPC). After due trial, the learned trial

court convicted him of the offence punishable under Section 304(Part I) of the IPC and sentenced him to suffer rigorous imprisonment for 10 years, apart from imposition of fine of Rs.5,000/-. For the offence punishable under Section 498A of the IPC, he is sentenced to suffer rigorous imprisonment for 2 years, apart from payment of fine of Rs.1,000/-.

2 Heard the learned advocate appearing for the applicant/accused. He argued that the applicant/accused was on bail throughout the trial and the charge for the offence punishable under Section 302 of the IPC is not established against him. The learned advocate further argued that first dying declaration at Exhibit 55 was not considered by the learned trial court while deciding the case, and as such, the impugned judgment and order is perverse. The learned advocate drew my attention to statement of Investigating Officer PW13 Dagadu Deshmukh to buttress this submission.

3 The learned APP opposed the application by drawing my attention to the second dying declaration of deceased to demonstrate that it was the applicant/accused, who had poured kerosene on her person and set her ablaze. The learned APP further drew my attention to the evidence of PW7 Tai Bombale to show that the present applicant/accused was also present at the scene of occurrence and he had also sustained burn injuries.

4 I have carefully considered the rival submissions and also perused the impugned judgment and order as well as copies of deposition and record produced before me.

5 The applicant/accused and the deceased Nalini married on 9th December 2009. The deceased Nalini was a Constable working with Trimbakeshwar Police Station, whereas the applicant/accused was a teacher by occupation. They both were residing at police quarter provided to Nalini (since deceased). Nalini as well as the applicant/accused sustained burn injuries on 23rd April 2010. Ultimately, while taking medical

treatment at Civil Hospital, Nasik, Nalini succumbed to burn injuries on 8th May 2010. On receipt of information about medico legal case, the police got dying declaration of Nalini recorded through the Special Executive Magistrate on 29th April 2010 itself. Father of Nalini (since deceased) namely Bhimrao Raut was informed about the incident and then he met his daughter Nalini who was admitted at the Burn Ward of Civil Hospital, Nashik. He lodged report of the incident against the present applicant/accused and also made an application for recording second dying declaration of Nalini, which came to be allowed by the learned Chief Judicial Magistrate and that is how, second dying declaration of Nalini came to be recorded on 30th April 2010.

6 After due trial, the learned Additional Sessions Judge came to the conclusion that the prosecution could prove the offence punishable under Section 304(Part-I) of the IPC and it had failed to prove the offence punishable under Section 302 of the IPC. That is how, the applicant/accused came to be convicted for the offence punishable under Section 304 (Part I) as well as 498A of the IPC.

7 It is seen that deceased Nalini was Police Constable attached to Trimbakeshwar Police Station. Immediately after sustaining burn injuries, she was admitted to the Government Hospital at Nashik. On request by the Police Department itself, her dying declaration came to be recorded by the Special Executive Magistrate. It is at Exhibit 55. In this first dying declaration, Nalini has stated that when she was preparing tea, the corner of her saree got burnt and she suffered accidental burns. In a specific question to her by the Special Executive Magistrate, Nalini has stated that she has no complains against anybody.

8 The evidence shows that thereafter, on the next day, i.e. on 30th April 2010, PW4 Bhimrao Raut – father of the deceased Nalini met her at the Civil Hospital, Nashik. It was on his request application, under the orders of the learned Chief Judicial Magistrate, second dying declaration of Nalini came to be recorded, wherein she has stated that on 29th April 2010, her

husband i.e. the present applicant/accused, informed her that an amount of Rs.1500/- will be required for payment to the photographer towards cost of video cassette and photographs of their marriage ceremony. Nalini informed him to take money from a person named Appa. She refused to wash the clothes on the pretext that she is pregnant. Upon that, the present applicant/accused asked her to pour kerosene on her person and to die. She challenged her husband that if her husband i.e. the present applicant/accused had courage then he should pour kerosene on her body and set her ablaze. That is how, according to the second dying declaration, the present applicant/accused poured kerosene on her person and set her ablaze.

9 It is seen from evidence of PW4 Bhimrao Raut that, he had conversation with Nalini prior to recording her second dying declaration. It is also seen from his evidence that, when second dying declaration of Nalini was being recorded, her mother was present with her.

10 PW1 Ramdas Dambale and PW7 Tai Bombale are next door neighbours of Nalini (since deceased). Neither PW1 Ramdas nor PW7 Tai are disclosing any oral dying declaration by Nalini to them after sustaining burn injuries. They were the first persons to notice Nalini engulfed in fire. PW1 Ramdas – an employee of Police Department residing in the neighbourhood has categorically stated in chief-examination itself that he came to know that Nalini was subjected to ill-treatment by the present applicant/accused, after death of Nalini. PW7 Tai Bombale, who is also a Police Constable and friend of deceased Nalini, has stated that Nalini had disclosed to her that the present applicant/accused was suspecting her character and Nalini was pregnant at that time.

11 On this back drop, observations of learned trial court made in paragraph 62 of the judgment are relevant. Evidence of father of deceased Nalini as well as other witnesses unerringly points out that marriage of Nalini with the present applicant/accused was an arranged marriage. PW7 Tai Bombale –

batch-mate of deceased Nalini, has stated that Nalini had consented to marriage only because her father, mother and sister insisted her for the marriage. It is seen from the finding given by the learned trial court that at the time of her death, Nalini was carrying pregnancy of 9 months duration. Nalini married the present applicant/accused in an arranged marriage on 9th December 2009. It was after her marriage that the present applicant/accused started cohabiting with her in the Police Quarter allotted to deceased Nalini. The incident in question took place on 29th April 2010 i.e. hardly in four months after her marriage. At that time, Nalini was carrying pregnancy of nine months duration. This factor is relevant at this stage because of divergent dying declarations coming on record.

12 Exhibit 55 which is very first dying declaration of Nalini is to the effect that she accidentally caught fire as her saree caught fire while preparing tea and and she did not suspect anybody in this incident. However, on the very next day, after meeting her father, Nalini had given a dying declaration to the

effect that upon being challenged to him, her husband poured kerosene on her person and set her ablaze.

13 It is well settled that when the dying declarations are plural, then, in order to base conviction, they should be consistent in material particulars. In this case of plural dying declarations, both dying declarations are divergent in material particulars. One is exonerating the applicant/accused whereas the another is implicating him in the crime in question. The one which is exculpating the applicant/accused was not at all considered by the learned trial court. The second dying declaration is, prima facie, an outcome of tutoring to the deceased by her parental relatives. In her four months after marriage with the present applicant/accused, the deceased was carrying pregnancy of nine months duration, prima facie, indicates possibility of self- effacement, but that will be subject to the appreciation of evidence on record.

14 Considering this nature of evidence against the present applicant/accused as well as the fact that he was already released on bail during pendency of the trial and had not misused the bail, the following order :

ORDER

- i) The application is allowed.

- ii) Substantive sentence of imprisonment imposed on the applicant/accused is suspended and he is directed to be released on bail on his executing P.R.Bond in the sum of Rs.15,000/- and on furnishing surety in like amount.

- iii) The application is disposed of.

(A. M. BADAR, J.)