

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

CRIMINAL APPEAL NO. 92 OF 2006

Salim s/o. Ismail Inamdar,
Age 42 years, Occu. Labourer,
R/o. Datta Nagar, Rahuri (Bdk.),
Tq. Rahuri, Dist. Ahmednagar.

....Appellant.

Versus

The State of Maharashtra

....Respondent.

Mr. R.R. Karpe, Advocate for appellant.

Mr. Y.G. Gujrathi, APP for respondent/State.

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.
DATED : MAY 3, 2018.**

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

1) The appeal is filed against judgment and order of Sessions Case No. 43/2005, which was pending in the Court of Ist Ad-hoc Additional Sessions Judge, Ahmadnagar. The appellant is convicted and sentenced for the offences punishable under sections 302, 498-A of Indian Penal Code (hereinafter referred to as 'IPC' for short). The Trial Court has given sentence of imprisonment for life and fine is also imposed. Both the sides are heard.

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

Deceased Mumtajib was sister of Latif Shaikh. She was given in marriage to the appellant about 10 years prior to the date of incident. Prior to marriage of Mumtajib with the appellant, she was given in marriage to other person, but there was divorce and similarly, present appellant had married, but his marriage, according to him, with first wife was also dissolved. Out of the present wedlock, Mumtajib gave birth to two issues. She was having a daughter aged 7-8 years and one younger son.

3) The appellant was living in Datta Nagar, Rahuri Budruk, Tahsil Rahuri, District Ahmadnagar and the parents of the deceased including her brother Latif were living at Momin Akhada, Tahsil Rahuri, District Ahmadnagar. Deceased used to complaint against the appellant that the appellant was addicted to liquor and after consuming liquor, he was giving illtreatment to the deceased. She used to disclose that appellant was asking her to bring Rs. three lakh for hotel business from her parents. There was direct talk between the relatives of the deceased and the accused and it was expressed to the accused appellant that the parents of the deceased were not in a position to meet this demand. Even after that, the illtreatment was continued to the deceased by the appellant.

4) The incident took place on 27.11.2004 at about 5.00

p.m. in the house of the appellant. In the noon time, the appellant returned home after consuming liquor and picked up quarrel by saying that the deceased was not bringing Rs. three lakh from her parents for his business. The appellant first gave beating to her and after that, by saying that he wanted to finish her, he poured kerosene on her person and set fire to her. After that, appellant ran out of the house. The deceased started shouting. The neighbours rushed to the house of the deceased, they extinguished the fire and they shifted the deceased to Rahuri Government Hospital. From there, message was given to Latif and Latif went to Rahuri Hospital. Rahuri Hospital referred the deceased to Civil Hospital, Ahmednagar and so, the deceased was taken to Civil Hospital, Ahmednagar on the same day at about 8.00 to 8.30 p.m.

5) In Civil Hospital Ahmednagar, dying declaration of the deceased was recorded by Special Judicial Magistrate after obtaining opinion regarding fitness of the deceased from the doctor. In the dying declaration, she disclosed the incident and so, crime came to be registered against the appellant. Mumtajbi died due to burn injuries on 30.11.2004 at about 4.00 p.m. The crime was then converted to one punishable under section 302 of IPC. During investigation, statements of witnesses, who include Latif came to be recorded. Statements of neighbours also came to be recorded. The

death took place due to 76% burn injuries. Chargesheet came to be filed for aforesaid offences. The charge was framed and plea was recorded. The appellant pleaded not guilty.

6) The prosecution examined in all seven witnesses for proving the offences. The defence examined one witness, who is neighbour of the appellant. The Trial Court has placed reliance on the dying declaration and evidence given by Latif (PW 3).

7) The evidence of Latif (PW 3) and the record show that Latif reached Rahuri Hospital after receiving the message and he went to Civil Hospital and the deceased was shifted to Civil Hospital, Ahmednagar on 27.11.2004 itself. Though Latif (PW 3) has tried to say that the deceased was unconscious till she was reached to Civil Hospital, the evidence of Medical Officer from Rahuri Hospital and the record is not consistent with this version of Latif. Dr. Prakash Bhosale (PW 4) was working in the hospital from Rahuri and his evidence shows that the deceased was conscious and he had given initial treatment to the deceased. The record was prepared in respect of the history given, about the injuries and that record at Exh. 29 shows that reference letter was given by Rahuri Hospital for admitting the deceased to Civil Hospital Ahmednagar and in the referral card, the history was mentioned as burn injuries (stove

burst). The extent of burn injuries was 50% to 60%. This record shows that the deceased was kept in Rahuri Hospital from 6.02 p.m. onwards and the evidence is given by Latif (PW 3) that she was shifted to Civil Hospital at about 8.00 to 8.30 p.m. The record of Civil Hospital shows that the deceased was admitted in Civil Hospital at about 8.00 p.m. Thus, for sufficient time, the deceased was kept in Hospital from Rahuri and in ordinary course, police must have reached Rahuri Hospital after learning about the admission of Mumtajibai in Rahuri Hospital. Inquiry must have been made with the deceased in Rahuri Hospital even by police. That record is not made available. It can be said that prosecution made a positive attempt to see that record which must have been prepared in Rahuri is not produced in the Court as that record would not have supported the case of prosecution. Hanumant Gade (PW 7), Investigating Officer has dared to say that he did not feel it necessary to go to Rahuri and collect the said record. In any case, there is record like referral card prepared by Rahuri Hospital. The history of burn was given as bursting of stove. It needs to be presumed that the history was obtained from patient as per the substantive evidence and as per the record. This record needs to be treated as first disclosure made by the deceased to independent persons including the doctor and this record is not consistent with the case of prosecution. This record is not at all considered by the Trial Court and inconsistency created by

this record with the other recorded dying declaration is not considered.

8) If Latif (PW 3) had reached Rahuri Hospital immediately after learning about the incident and he had taken steps to shift the deceased to Civil Hospital, it can be said that he knew about the aforesaid record. This witness is the only witness examined by the prosecution to give evidence on the illtreatment and also on the oral dying declaration, when in the dying declaration, which is proved by the prosecution there is mention that neighbours had extinguished the fire. If the deceased was conscious in Rahuri, in ordinary course, Latif must have made inquiry with the deceased. If the deceased had blamed the appellant for the burn injuries, Latif would have approached police and would have given report against the accused at Rahuri itself. That was not done. From Rahuri to Ahmednagar, Latif was in the company of deceased and this circumstance creates probability of tutoring.

9) In the evidence of Special Judicial Magistrate Jayant Joshi (PW 6), recorded dying declaration is proved as Exh. 37. In this dying declaration, the deceased disclosed that she had quarrel with husband as husband was insisting her that she should bring Rs. three lakh from her parents for his business. She disclosed that

during the quarrel, first beating was given to her and then husband poured kerosene on her and set fire to her and he ran outside of the house. She disclosed that she sustained injuries to face, chest, neck, abdomen, both hands, both legs and back. She disclosed that she was shifted to Rahuri Government Hospital by her neighbours and there, her brother came as message was given to him and from there, she was shifted to Civil Hospital Ahmednagar. The disclosure does not show that she had become unconscious at any time.

10) The prosecution has examined Dr. Prakash Bhosale (PW 4) from Rahuri and his evidence shows that he had examined not only the deceased, but also the appellant as he had burn injuries on both his hands. The injury certificate is proved as Exh. 24 and it shows that on both the hands of appellant, there were burn injuries and extent of burn was 12%. The injuries were sustained within 12 hours due to fire. Thus, the prosecution is not disputing that the accused had also sustained injuries on both his hands. There is no explanation about these injuries in aforesaid dying declaration. Even in the evidence of Latif (PW 3), there is no such explanation. If the accused had poured kerosene and had ran away after setting fire to the deceased, he would not have sustained injuries to aforesaid extent on both the hands. These circumstances create a probability in favour of accused that he had tried to save the deceased. It also

creates a probability that the disclosure is not consistent with other facts and it is not truthful. It is already observed that from Rahuri up to Civil Hospital, Latif (PW 3) was in the company of deceased and there was opportunity to tutor the deceased. Thus, a probability is created that the disclosure made by the deceased was not voluntary in nature.

11) Above all, there is one more circumstance like non examination of the Medical Officer, whose opinion was obtained regarding fitness of the deceased at the time of recording of dying declaration. The Trial Court has observed that merely because, the doctor is not examined, the evidence of dying declaration cannot be discarded. Though it is true that it is not trite law that there should be evidence of Medical Officer in each and every case to show that the deceased was fit to give statement, the facts of each and every case are always different. In the present matter, the record which must have created at Rahuri is withheld by the prosecution. Latif (PW 3) has given evidence that the deceased was unconscious and she regained consciousness only in Civil Hospital though the record is otherwise. The bed head ticket of Civil Hospital shows that deceased was conscious, but bed head ticket is not properly proved. The record could have been proved only by examining doctor, who gave treatment to the deceased in Civil Hospital. In view of peculiar

circumstances of the present matter, this Court holds that there is suspicion about the voluntariness and truthfulness of the dying declaration on which conviction is based by the Trial Court.

12) The evidence of Latif (PW 3) does not show that as to when first time demand of Rs. three lakh was made. Even in dying declaration, there is no such mention. The marriage had taken place 10 years prior to the date of incident. Latif has tried to say that the trouble started after one year of the marriage. The evidence on the record shows that appellant was working as waiter in Green Hotel right from beginning and the marriage ceremony was performed in the said hotel. It can be said that the expenses of the marriage was born by the appellant. There is no allegation that for the marriage any demand was made by the accused. It was second marriage of both the deceased and the appellant. After the marriage, two issues were born to the deceased from the appellant. These circumstances cannot be ignored. Due to these circumstances, this Court holds that the version of prosecution witness that there was demand of Rs. three lakh from accused is not that convincing. The appellant was working as waiter and there is no evidence to show that he had made an attempt to start the business independently. Further, the evidence given by Latif (PW 3) on financial condition of the relatives of deceased on parents' side shows that they were not in a position

to give such amount from the year 1994 to 2005. Thus, it does not look probable that appellant had made demand of Rs. three lakh, he wanted to start hotel business and on that count, he was giving illtreatment to the deceased.

13) The material produced by prosecution and the version given by the defence witness Kusum Lokhande (DW 1) show that there is possibility that the fire started accidentally. When as per the disclosure made by the deceased, the neighbours had extinguished the fire, it was necessary for the prosecution to examine few neighbours. Statements of neighbours were recorded during investigation by police including that of Kusum Lokhande (DW 1). It is surprising that the Trial Court has compared the substantive evidence of Kusum (DW 1) with her police statement to hold that she is not telling the truth. Immediately after the incident, the deceased must have disclosed the reason of fire to the neighbours and so, the evidence of such neighbours cannot be brushed aside lightly.

14) Kerosene was detected on the clothes of deceased. The spot panchanama shows that the incident probably took place right in the middle of the room, there was stove by the side of the spot and there was can of kerosene. The husband is not disputing his

presence in the vicinity of the house at the relevant time. Thus, the possibility of suicide due to quarrel with the husband is also there. Thus, there are other possibilities like accidental fire and attempt of suicide by the deceased. When there are such possibilities and material record which must have been created at Rahuri is withheld and there is circumstance like in the history recorded by Rahuri Hospital, there is mention of accidental fire, bursting of stove, it is not possible to convict the accused for the offence of murder. The aforesaid lacunae in the case are material, but the Trial Court has ignored those lacunae. In such a serious case, conviction cannot be based on the evidence of such dying declaration and the evidence of witness Latif (PW 3). Such conviction cannot sustain in law.

15) In the result, the appeal is allowed. The judgment and order of the Trial Court, convicting the appellant for the offences punishable under section 302 and 498-A of IPC is hereby set aside. The accused stands acquitted of both the aforesaid offences. Fine amount, if any, deposited by the appellant is to be returned to him. The bail bonds of the appellant already given are to continue for a period of six months u/s. 437-A of Cr.P.C.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

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