

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.287 OF 2003

Vinayak s/o Sadashiv Jadhav,
Age-33 years, Occu:Nil,
R/o-Bharatnagar, N-12,
HUDCO, Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr.Satej S. Jadhav Advocate for Appellant.
Mr.S.M. Ganachari, A.P.P. for Respondent.

...

**CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.**

DATE OF RESERVING JUDGMENT : 23RD FEBRUARY, 2018

DATE OF PRONOUNCING JUDGMENT: 1ST MARCH, 2018

JUDGMENT [PER S.S. SHINDE, J.] :

1. This Appeal is preferred by the
Appellant - Vinayak s/o Sadashiv Jadhav
challenging the Judgment and order dated 27th

March, 2003, passed by Ist Ad-hoc Additional Sessions Judge, Aurangabad in Sessions Case No.130 of 2002, thereby convicting original accused/Appellant for the offence punishable under Section 302 of the Indian Penal Code (in short "I.P. Code") and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.1000/-, and in default to suffer rigorous imprisonment for two months.

2. The prosecution case, in nut-shell, is as under :-

A) The prosecution case, as per the complaint Exhibit 14 filed by the complainant Ravi Jagtap, is that, Nirmalabai was married to Vinayak Jadhav - the accused, about 7 to 8 years prior the incident and accused Vinayak is serving in the police department. On 12th April, 2001, at about 12.00 in the midnight, complainant Ravi Jagtap, had returned to his house at HUDCO Corner, Aurangabad from Gangapur, where he conducts the

business, in STD Booth. The complainant came to know that, Nirmalabai had sustained the burns. So, he immediately rushed to the Public Polly Clinic, Burns General Hospital, in N-11 Sector of HUDCO, Aurangabad, where the treatment was being given to Nirmalabai. In the said hospital, the complainant inquired to Nirmabai about her burns, whereupon she told the complainant that, 2-3 days prior to that day, there was a quarrel between herself and her husband, therefore, on 12th April, 2001, her husband Vinayak Jadhav, in the residential house in Bharatnagar, HUDCO area, poured kerosene on her person and set her on fire causing her burns. Thereafter Nirmalabai was brought to Ward No.22/23 of Ghati Hospital, for further treatment.

B) The in-charge of the Medical College Poice Chowki, Aurangabad, then sent a Medico-Legal Case, Exhibit 16 at about 4.00 a.m. on 13th April, 2001, informing the police station officer of City Chowk police station, Aurangabad that the patient by name Nirmalabai Jadhav was admitted in Ghati

Hospital by Kesarbai, sister of Nirmalabai for sustaining 95% burns, which were caused by her husband. Purshottam Ghuge, API was present in the City Chowk Police Station, when MLC Exhibit 16, was received and he took the cognizance of the said MLC and had been to Ghati Hospital. As per letter Exhibit 17, he ascertained the condition of the patient Nirmala, to give the statement, from the medical officer on duty and thereafter recorded her statement Exhibit 18. Complainant Ravi Jagtap lodged complaint Exhibit 14 and Crime No.77 of 2001 was registered and investigation was entrusted to Navale, PSI, within whose jurisdiction the offence had taken place.

C) PSI Navale on 13th April, 2001 has drawn the panchnama of place of offence, Exhibit 8, under which articles like plastic can of kerosene, burnt pieces of sari and blouse, etc. were attached. On 15th April, 2001 he received the MLC Exhibit 28 from the Medical College Police Chowki, Aurangabad that the patient Nirmalabai expired in

the hospital. On 16th April, 2001 he conducted the inquest panchnama Exhibit 9 on the dead body of Nirmalabai. He recorded statements of some witnesses. On 18th April, 2001 he sent the attached property and viscera, preserved by the medical officer, to the Chemical Analyst, Aurangabad. Due to his transfer on 6th May, 2001, PSI Navale had entrusted the investigation to his successor PSI Thakare. After completing the investigation, PSI Thakare has submitted the charge-sheet before the Court of Judicial Magistrate, First Class, Aurangabad. By the order dated 14th May, 2002 the learned Judicial Magistrate, First Class, Aurangabad committed the case to the Sessions Court.

D) A charge Exhibit-4 for an offence punishable under Sections 302 of the I.P. Code was framed against the accused, for intentionally causing the death of Nirmala by setting her on fire, and the same was explained to him. The accused pleaded not guilty and claimed to be

tried, with the defence of total denial.

3. After recording the evidence and conducting full fledged trial, the trial Court convicted accused for the offence punishable under Section 302 of the I.P. Code and sentenced him to suffer imprisonment for life and to pay a fine, as afore-stated. Hence this Appeal by the accused.

4. Learned counsel appearing for the Appellant submits that Appellant never married with Nirmalabai and she was not his legally wedded wife. He submits that Appellant was not present in the house of Nirmalabai when the incident took place. Appellant was not at all residing in the house of Nirmalabai. Appellant was residing separately with his wife Jyoti, daughter Rohini and son Rahul. He further argued that both the dying declarations are not reliable and trustworthy as the doctor who examined Nirmala, had clearly stated that Nirmalabai sustained 95% burns. Therefore he submits that Nirmalabai was

not conscious, fit and well oriented to give such dying declarations and the convictions cannot be based upon such dying declarations. He further submits that dying declaration recorded by PW-4 PSI Ghuge is also not reliable and trustworthy as on the dying declarations itself there is no endorsement of the doctor stating that patient was fit and well oriented to give such dying declaration. He submits that before recording evidence no oath was administered to the child witness and therefore reliance cannot be placed upon his evidence. Learned counsel further submits that conviction based only on dying declaration is not proper. In support of his submissions, the counsel placed reliance upon the exposition of law in the case of P. Mani vs. State of T.I.¹ He further submits that PW-3 Ravi stated that he heard from his wife Lata about the alleged incident, however, said Lata is not examined.

5. Learned counsel further submits that it

¹ AIR 2006 SC 1319

is not conclusively proved by the prosecution that at the time of incident the Appellant and child witness namely Arun (PW-5) were present in the house of Nirmalabai and only strong suspicion cannot be the basis of conviction. In support of his submissions, learned counsel placed reliance upon the exposition of law in the case of Dasari Siva Prasad Reddy vs. Public Prosecutor, High Court of A.P.² He therefore submits that by giving benefit of doubt to the Appellant, the Appeal deserves to be allowed.

6. On the other hand, learned A.P.P. submits that child witness Arun, son of deceased Nirmalabai was present in the house when the incident took place and he has categorically deposed to that effect. Learned A.P.P. invites our attention to the dying declarations recorded by PSI Ghuge and Special Executive Magistrate Bharatsing and submits that both the dying declarations are trustworthy and reliable. He

² AIR 2004 SC 4383

further invites our attention to the evidence of complainant Ravi Jagtap and PW-6 Kesharbai to whom oral dying declarations given by deceased Nirmalabai. He further submits that after considering the entire evidence on record the trial Court has convicted the accused and the findings recorded by the trial Court are in consonance with the evidence brought on record. He therefore submits that the Appeal may be dismissed.

7. Heard learned counsel appearing for the Appellant and learned A.P.P. appearing for the State at length. With their able assistance, we have carefully perused the entire notes of evidence so as to find out whether the findings recorded by the trial Court are in consonance with the evidence brought on record or otherwise.

8. To prove its case, the prosecution has examined as many as ten witnesses. PW-1 Dr. Kailas Ukhardaji Zine deposed that on 16th April, 2002 a

dead body of one Nirmalabai Jadhav was received and on that day between 9 to 10 a.m. he himself and Dr. Jinturkar conducted the post-mortem. The dead body had following external burn injuries:

1- Head, neck and face	9%
2- Chest and Abdomen	18%
3- Back	18%
4- Right upper limb	9%
5- Left upper limb	9%
6- Right lower limb	16%
7- Left lower limb	16%

In all 95%.

. PW-1 Dr. Kailas Zine further deposed that the burns were superficial to deep and were ante mortem. On internal examination, meninges, brain matter, both the lungs, liver, splin were found congested. Accordingly, they have prepared post-mortem report Exhibit 10.

9. Thus, it is clear from the evidence of

PW-1 Dr. Kailas Zine, that Nirmalabai had received 95% burn injuries.

10. Now we will examine the evidence of PW-4 PSI Ghuge who recorded the dying declaration Exhibit 18, and PW-9 Dr. Vithal s/o Nathujai Rodge, a medical officer who examined whether the patient was conscious to give such statement Exhibit 18 and accordingly he gave his opinion on letter Exhibit-17, in writing.

11. PW-4 Parshuram Bhikaji, Ghuge, PSI, deposed in his examination-in-chief that on 13th April, 2001 he was on duty at City Chowk police station as PSI. On that day at about 3.55 a.m. MLC from Medical College Police Chowki was received and he had taken cognizance of that MLC and has started the inquiry. He then visited Ghati Hospital and has given letter to medical officer to know if the patient is conscious to give statement. He has proved the office copy of said letter Exhibit 17, which bears endorsement of the

medical officer that the patient was conscious. He further deposed that medical officer told him that the patient was conscious and he could record her statement. So he went to patient Nirmalabai and recorded her statement Exhibit 18. After recording the statement, he had secured the impression of right tow of Nirmalabai. He further deposed that he had then given a letter to Special Executive Magistrate for recording dying declaration of Nirmalabai. Then he returned to police station. Thereafter complainant Ravi Jagtap lodged a complaint Exhibit 14 and thereafter offence bearing No.77 of 2001 was registered. Thereafter he entrusted the investigation of the crime to Nawale PSI in whose jurisdiction the offence had taken place.

. During the course of cross-examination, PW-4 Ghuge PSI admitted that on the statement of Nirmalabai he has not mentioned the time of its commencement and when it was completed. He has denied the suggestion that Nirmalabai was not

conscious and she has not stated before him any such thing as contained in Exhibit 18. He further admitted that he had not ascertained when he delivered letter to Special Executive Magistrate to record the dying declaration, as to whether said Bharatsing Chavan was actually functioning as Special Executive Magistrate. He however stated that as per the record of police station Bharatsingh Chavan was the Special Executive Magistrate.

12. PW-9 Dr. Vitthal s/o Nathuji Rodge deposed in his examination-in-chief that on 13th April, 2001 he was on duty as a medical officer at Ward Nos. 22/23 of Ghati Hospital. On that day PSI Ghuge came to him and inquired with him about the conscious condition of the patient by name Nirmala Jadhav. PSI Ghuge has given him a letter, copy of which is at Exhibit 17. He had also brought original of the said letter. He examined the patient and found her to be conscious and oriented. Accordingly, on the letter Exhibit 17 he

has given his opinion, in writing, that patient was conscious, oriented and her statement may be recorded. During the course of cross-examination, PW- Dr. Vitthal Rodge admitted that it is not mentioned in his opinion that he had actually examined the patient.

13. On conjoint reading of the evidence of PW-4 PSI Ghuge and PW-9 Dr. Vithal s/o Nathujai Rodge, a medical officer, it is clear that before recording dying declaration Exhibit 18, PSI Ghuge gave a letter to PW-9 Dr. Vithal Rodge to examine whether the patient was conscious enough to give such declaration, thereafter medical officer PW-9 Dr. Vithal Rodge, examined the patient and endorsed on the said letter Exhibit 17 to the effect that "Patient is conscious, oriented and may give statement at present." Below the said endorsement the medical officer has put his signature, date, time and also written his name. Thus it is clear that after completing all formalities, the dying declaration Exhibit 18 has

been recorded by PSI Ghuge and therefore the same can be read in evidence.

14. We have perused the dying declaration Exhibit-18, recorded by PSI Ghuge, wherein Nirmalabai has stated that prior to 5 to 7 years her marriage was solemnized with Vinayak Jadhav and she has a son, aged about 5 years and her husband was serving in police department. She further stated that during the night time on 12th April, 2001 when she herself, her husband and her son were in the house, a domestic quarrel took place between her and her husband. She further stated that 2-3 days prior to the said incident also her husband quarreled with her and and beaten her with slaps and fists. She further stated that in the night of 12th April, 2001 she demanded money from her husband for purchasing household articles, her husband has not given money and quarreled with her and beaten her with slaps and fists. Thereafter her husband Vinayak Jadhav brought a plastic can from the house and from the

said can, poured kerosene on her person and set her on fire with the match stick. Due to burns she raised noise and her husband ran away from the house. She sustained burn injuries and her sister Kesarbai brought her to the hospital at N-11, Hudco for treatment and from there she was brought to Ghati Hospital for further treatment. It is further mentioned by Nirmalabai in statement Exhibit 18 that on 12th April, 2001, in her residential house at Bharatnagar, Hudco between 11.00 to 11.30 p.m., as she demanded money from her husband Vinayak Jadhav, for purchasing household articles, her husband quarreled with her and beaten her with slaps and fists, and poured kerosene on her person from the plastic can and ignited match stick and set her on fire, and committed an attempt to kill her and therefore she received burn injuries to her hands, mouth, chest etc. She has further stated that necessary action may be taken against her husband Vinayak Jadhav.

15. Though it is argued on behalf of the

Appellant that Nirmalabai was not his wife, Appellant had no concern with her, he was not present in the said house at the relevant time, after careful reading the dying declaration Exhibit 18 which is duly proved by the prosecution, Nirmalabai has stated in clear words that Vinayak Jadhav, Appellant was her husband, he quarreled with her in the concerned night and on trifling issue, he poured kerosene on her person and set her on fire and ran away from the house. Thus it is clear from the dying declaration Exhibit 18 that it was the only Appellant who poured kerosene on the person of Nirmalabai and set her on fire.

16. If we peruse the evidence of PW-6 Kesarbai Kundlik Tangde, sister of deceased Nirmala, this witness in clear words stated that Nirmalabai met her death about two years back from the date of recording her evidence and date was 12th. She further deposed that, on that day at about 11.00 to 11.30 p.m. accused Vinayak had come

to her house with his son Arun. Accused Vinayak asked her to accompany him to his house as Nirmalabai had sustained burns. Thus, it is clear from reading the evidence of PW-6 Kesharbai that accused himself visited house of Kesharbai and told her that Nirmalabai sustained burn injuries. Now, we will peruse the evidence of PW-5 Arun Vinayak Jadhav, who is child witness, who was at the relevant time studying in Class-III and therefore his age was near about 9 years. No doubt before recording his evidence, oath was not administered to this child witness and therefore his oral testimony cannot be read as substantive piece of evidence, but for the purpose of corroboration his evidence can be considered. He deposed that his father poured kerosene on the person of her mother and burnt her alive. He further deposed that when his mother was shouting, his father took him on Luna vehicle and both of them went to the house of his maternal aunt, i.e. Kesharbai. Thus the version of Kesharbai is corroborated by the evidence of this child witness

Arun.

17. Further, the dying declaration Exhibit 18 gets corroborated from two oral dying declarations. PW-6 Kesharbai, in her evidence deposed that when she went to the house of her sister Nirmalabai, she inquired Nirmala as to how the incident happened. Kesharbai further deposed that Nirmala told her that husband of Nirmala quarreled with her, poured kerosene and with the help of match stick, set her on fire. In this respect, the complainant - PW-3 Ravi s/o Dashrath Jagtap, deposed that after knowing the incident when he visited to the hospital, he inquired Nirmalabai as to how she sustained burns, and Nirmalabai told that her husband Vinayak Jadhav had poured kerosene on her person and with match stick, she was set on fire. Thus, apart from dying declaration Exhibit 18, the prosecution has proved that deceased Nirmala had given oral dying declarations to PW-6 Kesharbai and PW-3 Ravi.

18. Though prosecution has examined PW-7 Bharatsing s/o Arunsing Chavan, a Special Executive Magistrate, who recorded another dying declaration Exhibit 26, the trial Court has refused to rely upon said dying declaration. We have perused the cross-examination of PW-7 Bharatsing. He stated that he did not get himself ascertained by asking any questions to the patient if she was conscious to give the statement. It is further clear from his examination-in-chief that before recording dying declaration, he has not asked the medical officer to examine whether the patient was fit, conscious and well oriented to give such statement. Therefore, we find that the trial Court has rightly discarded the evidence of PW-7 Bharatsing.

19. Complainant PW-3 Ravi Dashrath Jagtap deposed in his examination-in-chief that the incident had occurred on 12th April, 2001. On that day he returned to his house at HUDCO Corner, Aurangabad from Gangapur at about 11.30 p.m. When

he reached to his house, he was informed by his wife Lata that wife of accused Vinayak received burn injuries and her name was Nirmalabai. He further deposed that Nirmalabai is his cousin mother-in-law in relation. When he reached to the house of Nirmalabai he came to know that she was taken to a private hospital of Dr. Patel in Hudco area. Accordingly he went to hospital of Dr. Patel. At that time Dr. Patel was dressing the burns of Nirmalabai. In the hospital of Dr. Patel only he inquired Nirmalabai as to how she sustained burn injuries and she told that her husband Vinayak Jadhav had poured kerosene on her person and with match stick, she was set on fire. He further deposed that Nirmalabai then told him that her husband should not be allowed to get free and the witness should lodge complaint with the police against her husband. He further deposed that the accused Vinayak Jadhav was also present in the hospital of Dr. Patel. Dr. Patel told them that unless the information of the incident was given to police, he will not admit the patient in

the hospital. However accused Vinayak stated that he will not report the matter to the police and therefore the patient Nirmalabai was brought to Ghati Hospital for treatment. Thereafter he lodged complaint Exhibit 14.

20. During the cross-examination, PW-3 Ravi has stated that Balu Himmatrao Ubale was the first husband of Nirmalabai and since 8 to 10 years prior to the incident they were living separately due to strained relations. He further stated that Nirmalabai had a son namely Arun, from her first husband Balu Himmatrao Ubale. He further stated that the marriage between Nirmalabai and accused Vinayak took place before 7 to 8 years but personally he had not attended the said marriage. He further stated that he knows that accused Vinayak has another wife by name Jyoti but he does not know if she had daughter by name Rohini and son Rahul. According to him marriage of accused Vinayak with Jyoti had taken place after the marriage with Nirmalabai. During his further

cross-examination some omissions in respect of his police statement were brought on record but those are of no importance.

21. In respect of oral dying declaration, we have already considered the evidence of this witness PW-3 Ravi. Thus, from the evidence of PW-3 Ravi it is clear that though Nirmalabai was already married with one Balu Ubale, 8 to 10 years prior to the incident they were living separately. Though prosecution has not conclusively established that Nirmalabai was legally wedded wife of accused Vinayak, through the evidence of this witness, prosecution has brought on record that Nirmalabai and accused Vinayak were living together as husband and wife since considerable long period. Thus there is no substance in the contention of the counsel appearing for Appellant that Nirmalabi was not wife of Appellant.

22. Though the Appellant has denied that he was present at the spot of incident in the

concerned night, the prosecution has brought on record that for 8 to 10 years prior to the incident Nirmala and Appellant were living together as husband and wife. Assuming that the evidence of child witness is not reliable, in that case the prosecution has brought on record that at the time of incident the Appellant was present in the house. Even otherwise during night time it is presumed that the house members are bound to be there in the house unless any plausible explanation is offered for absence. The appellant did not offer any explanation in this regard. Therefore the onus lies on the Appellant to explain how Nirmala caused burn injuries.

23. The Supreme Court in the case of State of Rajasthan Vs. Thakur Singh³ while explaining the scheme of provisions of Sections 101 to 106 of the Evidence Act, 1872, and its scope in para 22 to 24 held thus:

3 2014(12) SCC 211

"22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.

23. Applying this principle to the facts of the case, since Dhapu Kunwar died an unnatural death in the room occupied by her and Thakur Singh, the cause of the unnatural death was known to Thakur Singh. There is no evidence that anybody else had entered their room or could have entered their room. Thakur Singh did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred nor did he set up any case that some other person entered the room and caused the unnatural death of his wife. The facts relevant to the cause of Dhapu Kunwar's death being known only to Thakur Singh, yet he chose not to disclose them or to explain them. The principle laid down in Section 106 of the Evidence Act is clearly applicable to the facts of the case

and there is, therefore, a very strong presumption that Dhapu Kunwar was murdered by Thakur Singh.

24. It is not that Thakur Singh was obliged to prove his innocence or prove that he had not committed any offence. All that was required of Thakur Singh was to explain the unusual situation, namely, of the unnatural death of his wife in their room, but he made no attempt to do this."

24. In the present case also, the prosecution has discharged its burden of firmly establishing that the deceased Nirmala was last seen in the company of the Appellant. The Appellant did not offer any explanation how Nirmala received such extensive burn injuries of 95%. The said facts were within the special knowledge of the Appellant and therefore it was obligatory on the part of the Appellant to explain how Nirmala received such burn injuries. In these circumstances the dying declaration of Nirmala that Appellant poured kerosene on her person and set her on fire has to be accepted, as the same is corroborated by oral

dying declarations given to complainant PW-3 Ravi Jagtap and PW-6 Kesharbai and other circumstantial evidence brought on record.

25. After considering entire evidence on record, the trial Court, in Para 28 of the Judgment observed that the prosecution has proved that for 5 to 7 years prior to the incident, Nirmala was staying with the accused in Bharatnagar as his wife, though she had no such legal status. It is further observed that the prosecution has also proved that in the fateful night of 12th April, 2001, only the accused, Nirmala and witness Arun Jadhav were present in the house, the accused had quarreled with Nirmala, poured kerosene on her person from a plastic can and set her on fire. The trial Court has further observed that, it is also proved by the prosecution that 95% burns caused to Nirmala in her house in the night of 12th April, 2001 have resulted in her death on 15th April, 2001. Considering the extensive burns of 95% it is to be

held that the same were caused by the accused with a clear intention to commit the murder. After considering the entire evidence on record the trial Court has convicted and sentenced the accused as afore-stated.

26. In the given facts and circumstances, and the evidence brought on record by the prosecution the only possible view is guilt of the accused. Though except child witness Arun there is no eye witness to the incident and the prosecution case is based upon circumstantial evidence, the chain of circumstances has been established beyond reasonable doubt by the prosecution, and all the facts established are so consistent with the only hypothesis of the guilt of the accused.

27. In the light of discussion herein above, on independent and in-depth scrutiny of entire evidence, we are of the opinion that the trial Court has considered all the evidence brought on record in its proper perspective and recorded the

findings which are in consonance with the evidence on record and has rightly convicted the Appellant-accused. The conclusions reached by the trial Court are in consonance with the evidence brought on record by the prosecution. There is no perversity as such.

28. In the light of discussion herein above, we are of the opinion that there is no merit in the Appeal. The Criminal Appeal stands dismissed. Bail Bonds of the Appellant stands cancelled. The Appellant shall forthwith surrender before the trial Court to undergo remaining sentence. The Appellant-accused be given set-off vide Section 428 of the Criminal Procedure Code.

[S.M. GAVHANE, J.]

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[S.S. SHINDE, J.]