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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 350 OF 2010

Vishal Pralhad Gaikwad
Age 23 years, Occ: Service
Residing at Sainath Society,
Gaikwad Chawl, Sanjay Nagar,
Parksite, Vikhroli (East),
Mumbai 400 079
(At present : Nashik Road Central Prison)

.. Appellant
(Org. Accused No.1.)

Versus

The State of Maharashtra
(At the instance of Parksit Police
Station in C.R. No. 163 of 2009)

.. Respondent

Mr. Kuldeep S. Patil for appellant.
Mrs. M. M. Deshmukh, APP for State.

CORAM: NARESH H. PATIL &
NITIN W. SAMBRE, JJ.

FEBRUARY 03, 2018.

ORAL JUDGMENT [Per Naresh H. Patil, J.] :

1. This appeal is directed against the Judgment and Order dated 25/3/2010 passed by the learned 4th Ad-hoc Additional Sessions Judge, City Sessions Court, Sewree, Bombay in Sessions Case No. 541 of 2009 convicting the appellant for the offence punishable under Section 302 of

the Indian Penal Code and sentencing him to undergo life imprisonment and to pay fine of Rs.1000/-, in default to undergo S.I. for six months.

2. The appellant was married to deceased – Aarti in December, 2008. After marriage, they started residing at Parksite, Vikhroli (W), Mumbai along with parents of the appellant. According to the prosecution, on the day of the incident, the sister-in-law of the deceased was also present in the house. The prosecution case is that the incident took place in the matrimonial house of deceased – Aarti. According to the panchanama, the house was measuring 12x17 ft., out of which 48 sq.ft. area was devoted to kitchen. The parents of the appellant were occupying room having a cot and the newly married couple were using area in front of the kitchen. They used to sleep in that area. On the earlier day of the incident, the deceased and the appellant were moving in the market area. At that time somebody from the crowd looked at deceased – Aarti and smiled. The appellant got disturbed and to some extent agitated. He raised queries with his wife and it seems that on this, some quarrel took place and thereafter couple reached their house. In the night at about 1.00 a.m. deceased suffered burn injuries. The father of the appellant tried to extinguish the fire by placing a quilt (Godhadi) on the person of the

deceased. Though the appellant was present in the house, he did not intervene. On hearing shouts, the neighbours gathered. The parents / family members of the deceased, who were residing in the surrounding area reached the spot. The deceased was taken to a nearby hospital (Rajewadi Hospital) which is said to be at a distance of 5 to 6 km. from the house of the appellant. According to the medical papers placed on record, it is noticed that the deceased was admitted as inpatient with an endorsement of inpatient ward having burn injuries on 26/5/2009 at 2.10 a.m. The doctors attending at the relevant time started medical treatment. The doctor attending recorded in the register as “accidental burn” in the incident which took place around 1.00 a.m. at Vikhroli Parksite. The doctor further endorsed that there was no history of trauma / foul play and no any significant medical / surgical illness. The general condition was noted to be poor. The note shows that medicines, injections were prescribed by the Medical Officer.

3. The prosecution further suggested that on intimation given on phone from Rajewadi Hospital to PW 4 – PSI Devidas Narayan Shinde attached to Parksite Police Station, reached the hospital after taking station diary entry. The witness claims to have met the injured and doctor

and enquired whether injured was in a position to depose. According to the witness, doctor told him that victim was in a position to speak. Accordingly, he obtained endorsement from the said doctor which is at Exh. 25. Thereafter PW 4 – PSI Shinde called Special Executive Officer (SEO) in the hospital. The SEO is PW 5 – Smt. Heera Jaganath Sonawane. She reached the hospital. According to PW 4, he recorded the statement of the injured in the presences of doctors and then PW 5 – SEO Sonawane also recorded the statement of injured – Aarti in question and answer form. PW 4 – PSI Shinde identified the statement recorded by him which is at Exhibit 26. Thereafter he went to the police station and registered an offence under Crime No. 163 of 2009 under Sections 307 and 323 read with Section 34 of the IPC.

4. The FIR was lodged (Exhibit 26A) on the basis of the complaint-cum-statement of deceased Aarti. PW 4 – PSI Shinde then proceeded to visit the house of the deceased. He prepared panchanama of the spot, which is at Exhibit 15. He recovered one quilt (Godhadi) from the place of incident under panchanama at Exhibit 16 and thereafter he handed over the investigation to API Jadhav. PW 6 – PI Suresh Sakpal attached to Parksite Police Station, received papers in Crime No. 163 of

2009 for investigation. He thereafter conducted the investigation. He recorded the statements of mother (PW 1) and uncle (PW 2) of deceased. He recorded the statements of Dinesh Adinath Sitadkar and others. Seized articles were forwarded to Chemical Analyzer with forwarding letters which are at Exhs.32 and 33. C.A. Reports are at Exhibits 34 and 35. He collected medical papers from the hospital concerning the deceased, which are at Exh. 36. The Post-mortem report is at Exh. 23. The fitness certificate issued by the Registrar, Municipal General Hospital, Rajewadi, Ghatkopar, Mumbai, is at Exh. 25. The appellant was arrested along with his parents and the sister. PW 6 – PI Sakpal, after completing the investigation, filed charge-sheet against the accused.

5. The prosecution examined in all six witnesses. PW 1 – Smt. Indu Adinath Shitalkar is mother of deceased – Aarti. PW 2 – Shivaji Parshuram Shitalkar is uncle of deceased, before whom the deceased disclosed that the appellant poured kerosene on her person and set her on fire. PW 3 – Dr. Sunil Mohanrao Jawale, who conducted post-mortem examination of the dead body of Aarti. PW 4 – PSI Devidas Narayan Shinde, recorded the statement of the deceased, which was treated as dying declaration (Exh. 26). PW 5 – Smt. Heera Jaganath Sonawane is

Special Executive Officer, who recorded second dying declaration of the deceased, which is at Exh. 29. PW 6 – PI Suresh Sakpal carried out further investigation and filed charge-sheet.

6. The prosecution places reliance on the two written dying declarations of the deceased i.e. Exhs. 26 and 29 which were recorded by PW 4 – PSI Shinde and PW 5 – SEO Sonawane and two oral dying declarations made by the deceased in the presence of PW 1 - Indu Shitalkar, mother of the deceased and PW 2 - Shivaji Shitalkar, uncle of the deceased. The prosecution has placed reliance on the spot panchanama (Exh.15), medical papers and the statement of the accused recorded under Section 313 of Cr. P. C., wherein though the appellant was present in the house when the incident took place, he failed to explain the circumstances resulting in the death of the deceased. According to the learned APP, an adverse inference shall be drawn in accordance with the provisions of Section 106 of the Indian Evidence Act.

7. The learned 4th Ad-hoc Additional Sessions Judge, after recording the evidence and appreciating the material placed on record, acquitted rest of the accused persons i.e. Original Accused Nos.2, 3 and 4,

except the appellant – Original Accused No.1 for the charges levelled against them. The appellant – Original Accused No. 1 was convicted for the offence punishable under Section 302 of the IPC and sentenced to undergo life imprisonment. However, the appellant was acquitted of the offence punishable under Section 498-A of the IPC.

8. The learned counsel for the appellant submitted that the two written dying declarations allegedly recorded by PW 4 and PW 5 cannot be relied upon. There are inherent deficiencies due to which the dying declarations (Exhs.26 and 29) relied upon by the prosecution do not inspire confidence for accepting the prosecution case. The counsel submitted that in both the dying declarations time of recording of the statements is not mentioned. Endorsement of the Medical Officer regarding the state of mind of the deceased at the time of recording of dying declarations is also not mentioned. Though both, PW 4 and PW 5, claim that the impression of toe of the deceased was obtained on the dying declarations, there is no such endorsement made to justify the version of the prosecution witnesses. The learned counsel submitted that the deceased suffered 80 to 90% burn injuries. She must not be in a fit state of body and mind to make a lengthy dying declaration as was recorded by PW 4 – PSI Shinde. Both these

witnesses failed to ascertain themselves regarding fitness of the deceased to make statement. It is not known whether deceased was conscious enough to understand questions posed to her by these two witnesses. Merely placing reliance on the admitted spot panchanama Exh. 15, it would not be safe to place implicit reliance on the dying declarations recorded by PW 4 and PW 5 to sustain conviction and sentence the appellant to undergo life imprisonment. The learned counsel submitted that it seems that in quick succession both the dying declarations were said to have been recorded, one no sooner PW 4 – PSI Shinde arrived at the spot and thereafter on his intimation another by SEO PW 5 who reaches the spot and records the statement. Though PW 5 refers in her deposition presences of doctors, but there is nothing on record to show as to which doctor was present and what role the said Medical Officer played in ascertaining the physical and mental fitness of the deceased.

9. The learned counsel submitted that as regards the spot panchanama bangles and match box, containing matchsticks were seized and sent to C.A. In the both the cases, reports were negative as no traces of kerosene was found by the C. A. As regards the scene of the offence, the counsel submitted that no traces of burnt pieces of clothes worn by the

deceased were seen, much less, recovered by the Investigating Officer. As regards the issue of drawing of adverse inference against the appellant for his in-activeness when his wife was suffering burn injuries, the counsel submitted that the defence of the appellant is that he was falsely involved in the crime. He did not pour kerosene on the person of the deceased and in view of the defence taken by the appellant and considering the quality of evidence brought by the prosecution on record, the benefit must go to the appellant-accused.

10. The learned APP heavily relied upon two written dying declarations, Exhs. 26 and 29. According to the learned APP, dying declarations are not to be appreciated mechanically. It is not a mandatory rule that a fitness certificate of the doctor must be endorsed on the paper on which the dying declaration is recorded. Even if the time of recording of the statement is not mentioned on both the dying declarations, it cannot diminish the value of these dying declarations as prosecution witnesses i.e. PW 4 and PW 5 have clearly deposed in support of the prosecution as regards the time of their arrival in the hospital and recording of dying declarations. As regards the state of mind of the deceased, her consciousness, the learned APP placed reliance on the medical certificate

(Exh.25) issued by the Registrar, Municipal General Hospital, Rajewadi, Ghatkopar, Mumbai on 26/5/2009 at 2.30 a.m., which reads as under:

“Pt. Mrs. Aarti Vishal Gaikwad is in condition to give valid statement.”

This according to the learned APP is a necessary and sufficient compliance of the fitness of the deceased to make statement. The endorsement was given on the same day, when the prosecution witnesses recorded statement of the deceased. There was no need for the Investigating Officer to obtain such certificate later on as alleged by the defence. In the normal course and circumstances, the prosecution carried out investigation, collected material and placed the same for consideration of the court. The learned APP submitted that this is a serious incident where a newly married girl at a tender age of 19 years had to suffer burn injuries of 80 to 90% merely due to an incident where somebody looked at her and smiled in the crowd. It was strange on the part of the appellant to get agitated on such an issue and go to an extent to cause her bodily injuries, due to which she suffered and had to lose her life. The victim survived two more days and died on 28/5/2009. A post-mortem was conducted and

the cause of death was “shock due to burns”.

11. The learned APP placed reliance on the evidence of other witnesses i.e. mother of the deceased PW 1 and uncle of the deceased PW 2 before whom the deceased made oral statement and blamed the appellant who according to the deceased poured kerosene on her person and set her on fire. The learned APP, therefore, submits that the oral evidence of PW 1 and PW 2 supports the prosecution case and lends credence to two written dying declarations. In the submission of the learned APP this is a case where adverse inference is required to be drawn against the appellant as he had chosen not to make any statement when provided with an opportunity under Section 313 of Cr. P. C. Wife being in the custody of the appellant residing in his house, the appellant had to explain the circumstances in which the deceased died. Taking into consideration the prosecution evidence and the silence of the appellant, the onus must shift on the appellant. Therefore, it is a case of drawing adverse inference against the appellant. The learned APP supported the judgment of the trial court and prayed for dismissal of appeal.

12. We have gone through the evidence on the record with the

assistance of the learned counsel for the appellant and the learned APP. We have perused the medical papers, PM report and the findings of the trial court.

13. After perusing the two dying declarations (Exhs.26 and 29), we notice that,

- (a) on both the dying declarations the time of recording of dying declarations is not mentioned;
- (b) the endorsement of Medical Officer regarding fitness of the deceased to make statement is absent;
- (c) the impression of toe of the deceased was obtained according to the prosecution by PW 4 – PSI Shinde on these two dying declarations, but there is no such endorsement made by PW 4 and PW 5 indicating that the impression of toe was of the deceased on these two dying declarations;
- (d) PW 5 – SEO Sonwane while deposing before the court stated that while recording the dying declaration, doctors were present but it is not known as to which doctor was present and what role the doctor played;

- (e) the contents of the dying declarations were not read over to the deceased before obtaining her impression of toe.

14. It is true that by now the principle is settled that it is not mandatory in every case to have endorsement of the doctor in respect of the fitness of the person, prior to recording of dying declaration. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. It is rule of caution to have fitness certificate of the Medical Officer. Therefore, the voluntary and truthful nature of the dying declaration can be established otherwise.

15. In the present case, we find that the Registrar of the Hospital had issued certificate stating therein that the deceased was in a fit state of mind at about 2.30 a.m. On 26/5/2009. During the course of deposition PW 4 – PSI Shinde deposed that he recorded the statement of the deceased in the presence of doctors and when he made enquiry with the doctor as to whether injured was in a position to depose, doctor told that victim was in a position to speak. The deceased had suffered 80 to 90% burn injuries. PW 4 – PSI Shinde ought to have himself ascertained as to whether the deceased was in a fit state of mind or conscious enough to understand the

questions put to her and after ascertaining the same, PW 4 ought to have recorded the statement of the deceased. From the deposition of PW 4 we do not find that any such precaution PW 4 had taken before recording the dying declaration. As regards PW 5, SEO, who deposed before the court stated that doctors were present at the time when she recorded the statement of the deceased. At one stage she stated that constable and officer were present while she was recording the statement of the deceased. From the evidence of these two witnesses, we find that both of them failed to elicit as to whether the person whose dying declaration they were going to record, who suffered 80 to 90% burn injuries, was in a fit state of mind and body to make such a statement.

16. It has come on record that appellant was not the only person who was residing in the said room along with his wife. His parents were also residing with them. Therefore, the prosecution case is required to be considered and appreciated in the light of the material brought on record and the obligation of the appellant as contemplated under Section 106 of the Indian Evidence Act, 1872. The prosecution has to prove the case against the appellant beyond reasonable doubt. The State has to establish the motive on the part of the appellant to commit murder of his wife. The

conduct of the appellant is also to be looked into. He did not run away from the scene soon after the incident. He was arrested by the police on 26/5/2009 at about 1 a.m. and the arrest panchanama was drawn, which is at Exh.38.

17. The prosecution placed reliance on the two oral dying declarations made to PW 1 and PW 2. Both these witnesses are closely related to the deceased, PW 1 being mother and PW 2 being uncle of the deceased. In view of the medical condition of the deceased and the circumstances and the evidence brought on record, these oral dying declarations do not lend credence to the prosecution story. We, therefore, find it is unsafe to sustain the conviction of the appellant based on the oral dying declarations, in the absence of there being any cogent and reliable evidence on record that it was the appellant alone and none-else, who poured kerosene on the person of the deceased and set her on fire. True it is that appellant's silence is curious, but merely on that ground it would not be proper to shift onus and seek explanation from him regarding the circumstances resulting in death of the deceased.

18. It is again curious to note that Medical Officers, who attended

the deceased, were not examined by the prosecution. The medical papers which are on record are produced by PW 4 – PSI Shinde during his examination before the court. It is difficult now to ascertain as to what treatment was given to the deceased and as to in what state of mind and body she was lying for 2 to 3 days in the hospital. The prosecution, in fact, ought to have taken pains to get the Medical Officers, who attended the deceased examined them before the court.

19. The learned APP filed purshis on 11/3/2010 at Exhibit 39, wherein it was submitted that the prosecution was not able to produce Dr. Patil to prove endorsement (Exh.25) made before recording statement of victim – Aarti by the police as he was transferred to other place and was not available. In our view, Dr. Patil was one of the important witnesses of the prosecution who could have thrown much light on the condition of the deceased at the relevant time.

20. The C.A. reports do not support the prosecution as pieces of bangles, matchsticks sent to C. A. did not find any traces of kerosene on these articles. The kerosene can, having kerosene, and the quilt were sent to Chemical Analyzer. The report of the Chemical Analyzer (Exh.35) states

that kerosene was detected in Exh.1 i.e. bluish liquid in a plastic can, but the result on test for the detection of kerosene residues on Exh.2 i.e. partly burnt quilt was negative. The concerned Medical Officers were not examined by the prosecution for the reasons best known to them.

21. PW 3 – Dr. Sunil Jawale, conducted the post-mortem on the dead body of the deceased. In his opinion, the deceased died due to shock due to burns. The deceased expired on 28/5/2009 at 5.15 a.m.

22. The learned trial Judge while appreciating the evidence observed in paras 18 and 19 as under :-

“18. The versions of the deceased Aarti are certainly to be accepted in view of Section 82 of Indian Evidence Act i.e. her statement about cause of death when she was under death bed. The deceased was alive for “3” days after receiving burn injuries and her statement and Dying Declaration came to be recorded very soon after she was taken to hospital on 26/5/2009 and therefore deceased cannot be said to be in situation of not speaking. Apart from this, mother of the deceased has also stated that when she rushed to the house of the accused after being reported about the incident by sister of accused no.1 after coming to her house, then she taken deceased to the hospital and then deceased in the hospital told

her that accused no.1 had set her at fire. Same are the facts are stated by the witness PW 2 – Shivaji Shitalkar, who is uncle of the deceased. Therefore, this corroborative evidence also supporting the evidence of deceased and there appears no doubt to go against accused no.1.

19. It was suggested from the side of accused that against the T.I. that has been obtained proposed to be that of deceased on complaint-cum-statement Exh. 26 and on Dying Declaration Exh. 29, there is no signature of person who obtained it against T.I. nor there is mention against that T.I. as to whose T.I. it was. No doubt, there is no mention like that against the T.I. But for such minor discrepancy, this valuable evidence cannot be thrown away. Because once the statement shows that it has been recorded that of deceased by both Police Officer Mr. Shinde (PW- 4) and witness Smt. Heera (PW-5) in question and answer form and it pertains to cause of the death of deceased, then certainly the T.I. must be belongs to deceased or the person making the statement. Therefore, for this reason statement and Dying Declaration of the deceased cannot be impeached.

In para 20, the learned trial Judge observed that the accused had to explain the reason of cause of death, failing which adverse inference can be drawn against him. In para 21, it is observed that, “in-activeness

and conduct of the accused no.1 certainly helps to draw adverse inference against him”. As regards the ill-treatment and harassment, the learned trial Judge did not find any evidence against the accused because whatever suggested by the prosecution related to incident regarding cooking etc.

23. The Question Nos.11 and 14 with answers thereto, recorded under Section 313 of Cr. P.C. of the appellant, read as under:

“11. It has come in the evidence of PW 5- Heera Sonawane, she works as SEO and on 25/05/09 she went to Rajawadi Hospital as per call of police and then recorded statement of Aarti as per her version in which she stated that out of you Vishal had poured kerosene on her person and then set her at fire. What have you to say about it?

Ans. It is false.

14. Do you want to say anything about the case?

Ans. I am deceived by filing false complaint. I am innocent.

24. We have perused the judgments of the Supreme Court in the case of Laxman vs. State of Maharashtra [(2002) 6 SCC 710] and in the case of Shaikh Bakshu and ors. vs. State of Maharashtra [2007) 11 SCC 269]. We have also perused the judgment of this court in the case of Ramesh s/o Gyanoba Kamble vs. The State of Maharashtra [2011 ALL MR (Cri) 3536 (F.B.)].

25. It is true that each case has to be considered in its peculiar factual background and on the basis of the evidence produced before the court. It is certainly painful to notice that a young life was lost. She was newly married girl of a young age of 19 years. She suffered severe burn injuries. Doctors could not save the deceased and ultimately she succumbed to the injuries. It is informed by the learned counsel for the appellant that during the relevant period, the appellant was working as a peon in a theater. At the time of the incident, his age was 22 years. He was denied bail during trial and since then he is in jail. In the facts, we observe that the appellant ought to have explained circumstances while he was provided opportunity before the court in accordance with the provisions of Section 313 of Cr. P. C. being husband of the deceased and in view of the prosecution case that such a serious incident took place in the house of the appellant. The conduct of the appellant – husband in such cases has to be looked into with caution. But at the same time, because the appellant pleaded not guilty and denied the allegations made against him and chose not to give explanation under Section 313 of Cr. P. C., in the facts of the case, it would not be reasonable and proper to shift entire burden on the appellant by taking recourse to Section 106 of the Indian Evidence Act.

The cardinal principles still holds that the prosecution is required to prove the case beyond reasonable doubt. We would, therefore, grant benefit of doubt to the appellant in the facts of this case.

26. For the reasons stated above, the appeal is allowed. The impugned Judgment and Order dated 25/3/2010 passed by the learned 4th Ad-hoc Additional Sessions Judge, City Sessions Court, Sewree, Bombay in Sessions Case No. 541 of 2009 is quashed and set aside and the appellant – original accused no.1 – Vishal Pralhad Gaikwad is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be set at liberty forthwith, if not required in any other case.

(NITIN W. SAMBRE J.)

(NARESH H. PATIL,J.)