

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1229 OF 2012

Navnath Gorakh Kamble (Lohar)
Age 31 years, Occ. Labour work,
R/at Village Nannaj, Tal.South Solapur,
District Solapur.
(At present in Judicial Custody and
lodged at Yerwada Central Prison, Pune) ...Appellant.

V/s.

The State of Maharashtra ... Respondent

Mr. D.G.Khamkar for the Appellant.
Mr. V.B.Konde Deshmukh, APP. for the Respondent State.

**CORAM : S.S. SHINDE AND
A.S.GADKARI, JJ.
DATE : 09th October, 2018**

JUDGMENT : (Per A. S. Gadkari, J.)

1. The appellant has preferred the present appeal against the Judgment and Order dated 21.3.2011 passed by the learned Ad-hoc Additional Sessions Judge, Solapur in Sessions Case No. 195 of 2009 convicting him, for the

offence punishable Section 302 of the Indian Penal Code and sentenced to under go life imprisonment and to pay a fine of Rs.5000/-, in default of payment of fine to further suffer imprisonment for three years and for offence punishable under Section 498A of the Indian Penal Code is sentenced to under go rigorous imprisonment for three years and to pay a fine of Rs.1000/-, in default of payment of fine to further suffer imprisonment for six months.

The learned Additional Sessions Judge by the said Judgment and Order has directed that both the sentences shall run concurrently.

2. Heard Shri. Khamkar, learned counsel for the appellant and the learned APP. Perused the entire record.

3. The prosecution case in brief is that, the deceased Smt. Parvati was the wife of the appellant. The date of incident is 31.3.2009 at about 9.00 a.m. The marriage between the appellant and deceased Smt. Parvati was solemnized five years prior to the date of incident and out of their wedlock two children have begotten. The appellant used to demand money for household reasons from the deceased and used to direct her to bring it from her parents. On earlier occasion the parents of the deceased had convinced

the appellant to behave properly however, the appellant used to demand money and was constantly causing harassment to the deceased. The deceased earlier had left her matrimonial house and had been to her parents house because of the said harassment. That, the appellant had brought her back for cohabitation however, he continued with ill treatment and was constantly demanding money from the deceased to be brought from her parents. The deceased had told the appellant that, her parents are very poor and unable to fulfill his demands. That, on 31.3.2009 the in laws of the deceased had been to the farm. The appellant and deceased only were at home. The appellant told the deceased to go to her parents house and bring Jawar and money to which the deceased replied that, she will not do so and will not bring anything from her parents house. As soon as the deceased replied in the negative form the appellant initially assaulted her by hand and there after brought plastic can which was in the house and poured kerosene on her person and set her ablazed. The appellant went away after setting the deceased on fire. Due to the screams of the deceased the neighbors gathered at the scene of offence and extinguished the fire. The appellant also came back. One Dattatraya Lohar and the appellant thereafter brought the deceased to the hospital. After

admission to the hospital her dying declaration (Exh.28) was recorded by P.H.C. Shri. Tatya Chandu Jadhav (PW No.8) at about 6.00 p.m. The second dying declaration (Exh.33) was also recorded by Shri. Shivraj Mangoli (PW No.10), Special Judicial Magistrate, Solapur at Civil Hospital at about 8.00 p.m where the deceased was admitted. Smt. Parvati expired on 18.5.2009 while under going treatment. After her death the offence was altered from Section 307 to 302 of the Indian Penal Code. Dr. Suryakant Kamble (P.W.12) performed the post mortem examination of the dead body of Smt. Parvati. He has given opinion as to the cause of probable death as "Shock and septicemia due to 55 % infected burns". After completion of investigation, the police submitted charge sheet in the Court of Judicial Magistrate First Class, Solapur.

4. As the offence punishable under Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the learned Magistrate committed the said case to the Court of Sessions as contemplated under Section 209 of the Code of Criminal Procedure. The Trial Court framed Charge below Exhibit-2 which was read over and explained to the appellant in Marathi vernacular language, to which he denied and claimed to be tried. The

prosecution in support of its case examined in all 12-witnesses. The Trial Court after recording the evidence and after hearing the parties to the said case was pleased to convict and sentenced the appellant by impugned Judgment and Order dated 21.3.2011 as noted herein above.

5. The prosecution case is based on two dying declarations given by deceased Smt. Pravati which are at Exhibits 28 and 33, both dated 31.3.2009 recorded by Head constable Shri. Tatya Chandu Jadhav (P.W.8) and Shri. Shivaraj G. Mangoli (P.W.10) Special Judicial Magistrate respectively. There are three oral dying declarations allegedly given by the deceased to Nagnath B. Chafekarante (P.W.5), father of the deceased, Usha R. Ankush (P.W.6) sister of the deceased and Balbhim N. Chafekarante (P.W.7), brother of the deceased.

6. It is to be noted here that on both the dying declarations which are at Exhibits 28 and 33 respectively, Dr. Dinesh Bhoje (P.W.11) has put an endorsement that after examining the patient she was found to be conscious and oriented to give her statement and accordingly police Head Constable Tatya C. Jadhav (P.W.8) and Shivraj G. Mangoli (P.W.10) Special Judicial Magistrate recorded the said dying declarations.

7. As far as dying declaration recorded by Tatya C. Jadhav (P.W.8) is concerned, in the dying declaration itself, it is stated that, the same was recorded in presence of the mother and father of deceased Smt. Parvati by the said witness hence, there is every possibility that, Smt. Parvati was tutored by her parents at the time of recording of the said statement and therefore, the said dying declaration needs to be kept aside from consideration.

8. The other dying declaration which is at Exh33 has been recorded by Shri. Shivraj G. Mangoli (P.W.10) in compliance with the various provisions of law. In the said dying declaration the deceased Smt. Parvati has categorically stated that, the appellant used to cause undue harassment to her by demanding money. That, on the date of incident the appellant asked the deceased to bring money from her parents to which she refused. There was hot exchange of words which ensued in a quarrel. That appellant and deceased were only two persons at the house. In the said quarrel the appellant poured kerosene on her person and ignited fire. That, after hearing her screams, the neighbours came at the spot and dowsed the fire, Her husband came subsequently and with the help of neighbours he admitted her

in the hospital.

The oral dying declarations given to Nagnath B. Chafekarante (P.W.5) father of deceased, Usha R. Ankush (P.W.6) sister of deceased and Balbhim N. Chafekarante (P.W.7) brother of the deceased are stereo type statements and mentions only the fact that, on enquiry the deceased told them that, her husband set her on fire, because she did not bring Jawar from her parents.

9. As noted earlier the dying declaration of the deceased Smt. Parvati recorded by the Special Judicial Magistrate, Shri. Shivraj G. Mangoli (P.W.10) was recorded in compliance with the provisions of law and is reliable and trust worthy.

In the said dying declaration deceased Smt. Parvati had categorically mentioned that, it is after exchange of hot words which ensued in a quarrel, the appellant poured kerosene on the person of the deceased and thereafter ignited it. Mr. Khamkar submitted that the fact that the incident occurred during a sudden quarrel would bring the case under Exception 4 of Section 300 of the Indian Penal Code.

10. To bring the case under Exception 4 of Section 300 of the Indian Penal Code all the ingredients mentioned in it must be found. Heat of passion

requires that, there must be no time for passion to cool down. In the present case the evidence shows that after the deceased refused to fulfill the demand of the appellant to bring jawar from her parents, a quarrel took place between them and during the said quarrel and in the heat of passion the appellant committed the said act. It is to be noted here that, the appellant did not come to the spot armed with a weapon with premeditation or pre-planning and the incident had occurred on the spur of the moment in the fit of anger.

Taking into consideration all the aforestated facts, we are of the considered opinion that, the present case would fall under Section 304 Part II of the Indian Penal Code.

11. Considering the evidence on record we are of the view that, Exception 4 to Section 300 applies to the facts of the present case and the appropriate conviction would be under Section 304 Part II of the Indian Penal Code. Hence, the conviction of the appellant under Section 302 of the Indian Penal Code is set aside and instead the appellant is convicted under Section 304 Part II of the Indian Penal Code and the appellant is sentenced to suffer rigorous imprisonment for nine years and to pay a fine of Rs.5000/-, in default of payment of fine to further suffer rigorous imprisonment for one

year.

The appellant is entitled for set off under Section 428 of the Code of Criminal Procedure.

12. Appeal is partly allowed in the aforesaid terms.

(A.S.GADKARI, J.)

(S.S. SHINDE, J.)