

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.193 OF 2013

1.Ashabai w/o. Rammurti Mendhe,
Aged about 45 years,

2.Vaibhav @ Munna s/o. Rammurti
Mendhe, Aged about 20 years,
r/o. Wadgaon Mendhe, Tq.Akot,
District Akola.

..... **APPELLANTS**

// VERSUS //

The State of Maharashtra,
Through Police Station Officer,
Police Station, Akot, District
Akola.

..... **RESPONDENT**

Mr.N.A.Badar, Advocate for the AppellantS.
Mr.A.D.Sonak, A.P.P. for the Respondent/State.

CORAM : P. N. DESHMUKH
AND
MRS. SWAPNA JOSHI, JJ.

DATED : 18th September, 2018.

ORAL JUDGMENT (Per P. N. Deshmukh, J) :

1. This appeal takes exception to Judgment passed in Sessions Case No.35 of 2010 by learned Additional Sessions Judge, Akot, dated 4th February, 2013 by which both the appellants came to be convicted for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code and each are sentenced to suffer imprisonment for life and to pay a fine of Rs.3000/- each; in default to suffer rigorous imprisonment for one year. The appellants were also convicted for the offence punishable under Section 201 r/w. 34 of the Indian Penal Code and each were sentenced to suffer rigorous imprisonment for three years each and to pay a fine of Rs.1,000/- each, in default to suffer further rigorous imprisonment for six months.

2. In brief, it is the case of prosecution that accused nos. 1 and 2 are wife and son respectively of PW-8 Rammurti Mendhe who, due to Rammurti's performing second marriage with deceased Sarika, were since prior to incident, residing separately, however, their expenses were taken care of by Rammurti who had also given some land to appellant no.2 Vaibhav. According to prosecution, due to Rammurti's performing second marriage with deceased, relations between the appellants and the deceased were strained. In the background of above facts, it is case of prosecution that, on 2.5.2010 when Rammurti was out of house in weekly market for sale of bullocks, while his mother Gokarnabai had gone to village Devalgaon and as such, as deceased Sarika and appellants were alone in the house, at around 12.00 noon, both of them having common intention set Sarika on fire causing her death.

According to the case of prosecution, at around 3.00 p.m., neighbours found that smoke was coming out from the house of Rammurti and the door was latched from outside, of which intimation was given to police at around 4.30 p.m. by one Ashok Mendhe and accordingly, police had arrived on the spot and on opening the door, found Sarika lying dead in the cattle shed on

sustaining burn injuries. On the oral report of Rammurti, initially A.D. was registered vide Marg No.22 of 2010. The dead body was forwarded for post mortem and investigation was carried out by PW-11 Subhash Makode, P.I., during the course of which, he visited the spot and drew Spot Panchanama (Exh.44) on 3.5.2010 and on the basis of report (Exh.35) of ASI Sahebrao Bhagat, offence is registered vide Crime No.72 of 2010, under Sections 302, 201 r/w. 34 of the Indian Penal Code. On the following day, father of deceased lodged report, of which Station diary entry vide No.35 of 2010 was noted and was included in the case diary. On 4.5.2010, statements of in-laws and of Rammurti were recorded. Both the appellants were absconding since the day of incident, who came to be arrested on 6.5.2010 under Arrest Panchanamas (Exh. Nos.59 and 60) and their blood samples were collected and seized under Seizure Panchanama (Exh.50). Statement of brother of deceased is recorded on 8.5.2010. On 10.6.2010, muddemal articles were seized from the spot along with viscera bottles and were sent to Chemical Analyser on 18.6.2010 while ash and bones collected from the spot were sent to Medical College hospital, Anatomy section, Aurangabad under requisition memo (Exh.112). On completion of investigation, charge-sheet is filed before the Judicial Magistrate, First Class, Akot.

During the course of time, the case came to be committed to the Court of Sessions for trial.

3. Charge is framed against the appellants vide Exh.2 for the offences punishable under Sections 302, 201 r/w. 34 of the Indian Penal Code to which they pleaded not guilty and claimed to be tried. Defence of accused is of total denial and of false implication. Though they have also taken defence of abili, there is nothing to substantiate said defence. Appellants have not examined any witness in support of their defence.

4. To substantiate the charge levelled against the appellants, prosecution in all examined eleven witnesses and had commenced its evidence on examining PW-1 Sahebrao Bhagat API who reached the spot first in point of time; PW-2 Gopal Mendhe, Inquest and Spot panch, PW-3 Umatai Thakare, mother of deceased, PW-4 Vishwas Mendhe and PW-5 Vinod Mendhe on circumstantial evidence; PW-6 Gopal Mendhe and PW-7 Rajkumar Mendhe on the alleged theory of last seen; PW-8 Rammurti Mendhe, husband of deceased; PW-9 Gajanan Mendhe again on circumstantial evidence; PW-10 Dr.Ramesh Ingle who has performed post mortem and proved

the same on record at Exh.99 and concluded evidence on examining PW-11 Subhash Makode, the Investigating Officer.

5. Heard Mr.N.A.Badar, learned Counsel for the appellants and Mr.A.D.Sonak, learned Additional Public Prosecutor for respondent/State. It is submitted on behalf of appellants that evidence of material witnesses is by way of improvement while evidence of PW-6 Gopal Mendhe and PW-7 Rajkumar Mendhe, who are relied by prosecution as witnesses on the theory of last seen, by no stretch of imagination can be said to be witnesses on the said aspect as their evidence is silent if, at any point of time, they have seen deceased in the company of appellants immediately prior to her death. It is, therefore, submitted that as homicidal death of deceased is not disputed, since there is nothing on record to establish involvement of appellants in the present crime, merely because deceased Sarika happens to be second wife of Rammurti, of whose appellant no.1 Ashabai is first wife and appellant no.2 Vaibhav is son, by itself is not sufficient to establish that the appellants are in any manner guilty for commission of murder of Sarika. It is, therefore, submitted that the appeal be allowed. Learned Additional Public Prosecutor had supported the impugned Judgment.

6. In the background of facts and submissions of defence as aforesaid, perusal of evidence of PW-1 Sahebrao Bhagat, API would reveal that when he was on duty on 2.5.2010, at 6.30 p.m., he received information on phone that smoke is coming out of house of PW-8 Rammurti Mendhe and therefore, he with P.C. Suraj (not examined) visited the spot and on entering the house on opening door, found that deceased Sarika was burning and therefore, he extinguished fire by pouring water and has proved Inquest Panchanama (Exh.34) claimed to be drawn on the spot. However, this piece of evidence of PW-1 Sahebrao Bhagat, API is not reliable as, according to his evidence, he appears to have drawn Inquest Panchanama even before confirming if Sarika was dead as from his evidence what has come on record is that, on his entering house, he saw Sarika burning in the cattle shed and therefore, he by pouring water extinguished fire and prepared panchanama of her condition which he claims to be Inquest Panchanama (Exh.34) and thereafter, he sent deceased to Rural hospital, Akot. No explanation is putforth by prosecution on this part of investigation. In fact, from his evidence, it remains mystery if Sarika was dead when PW-1 Sahebrao Bhagat visited the spot or otherwise.

In his further evidence, PW-1 Sahebrao stated that, at the spot he made inquiry with people, from whom he learnt that both the appellants after pouring kerosene set deceased on fire and upon receiving such information, he came back to Police Station and lodged his report (Exh.35), upon which offence was registered by PW-11 Subhash Makode, P.I. The doubtful evidence of PW-1 Sahebrao if deceased Sarika was found dead on the spot when he visited the same, has been clarified by PW-11 Subhash Makode, Investigating Officer when he has stated that, after arrival of PW-1 Sahebrao Bhagat on the spot, he noticed that dead body of deceased was burning in the cattle shed, of which he extinguished fire and then drew Inquest Panchanama.

7. Evidence of PW-1 Sahebrao Bhagat does not bring on record as to who are the persons from whom he claims to have received vital information involving appellants as assailants and of their setting Sarika on fire. Similarly, Ashok Munde, from whom telephonic message about smoke coming out of house of PW-8 Rammurti was alleged to be received by PW-1 Sahebrao, is not examined. In the circumstances, we find the evidence of PW-1 Sahebrao Bhagat to be not reliable at all when he admits that on the

spot he received information from some persons that appellants have assaulted Sarika and on pouring kerosene, set her ablaze and went away on closing door. However, no explanation in any manner is putforth by prosecution as to what prevented Investigating agency in not recording statements of such persons, though PW-1 Sahebrao Bhagat immediately after the incident claims to have received such information from them on the spot. He has in fact admitted to have not recorded statements of any of such persons from whom he got said information nor has given any reason for not recording statements except for saying that at that point of time it was necessary for him to provide medical treatment to Sarika and therefore, he did not record statements of such witnesses. Explanation as such, does not appear to be satisfactory at all for the reason that from the evidence of PW-11 Subhash Makode, P.I., it has come on record that on PW-1 Sahebrao arriving on the spot he found dead body of deceased being in flames of which fire was extinguished by Sahebrao and thus, there was no reason for providing medical treatment to the deceased and secondly, there is nothing to show that after 2nd May, 2010 any attempt is made by this witness or Investigating Officer to record statements of such persons.

In view of above discussed evidence and reasons therefor, case of prosecution creates doubt in it since its inception.

8. Similarly, on perusal of report of PW-1 Sahebrao at Exh.35, it has come on record that he entered in the house after unchaining outside main door and thereafter, by entering in the house, he opened the door of courtyard which was latched from outside and on opening latch, noticed Sarika in the cattle shed in burning condition. As such, it cannot be said that doors were locked from inside. From the report, it is noted that both the appellants are involved or suspected only as they were informed by some person of the house that, at 12 O' Clock in the noon, both of them were present in the house and it is only because of such persons that the appellants are involved as assailants of the deceased who, after assaulting her on pouring kerosene, set her person on fire and left the house by closing door. However, there is nothing on record to satisfactorily establish said case as putforth by prosecution on the basis of report (Exh.35) which came to be lodged by PW-1 Sahebrao after investigating Marg No.22 of 2010. Contents of report are contradictory to itself as from the earlier part of report as already referred, it is stated that after his reaching to the spot he opened the

outside main gate and entered in and then opened the northern side door of the courtyard and on entering in the cattle shed, found Sarika burning; while in the last para of report he stated that, on investigation in A.D. No.20 of 2010, it is revealed that appellant no.1 being first wife of PW-9 Rammurti and appellant no.2 being step son of Sarika, both assaulted her and by setting her person on fire, killed her and thereafter, closed all the doors of house from inside and went out of the house. No explanation is putforth by prosecution on such contradictory contents of report (Exh.35).

9. Evidence of PW-3 Uma Thakare, mother of deceased is by way of material improvements when she has deposed that Sarika was married to Rammurti and whenever she used to come home, she used to tell that appellants and her son Vaibhav used to beat her and had also extended threats to set her person on fire by pouring kerosene. Said witness, however, is unable to state any reason as to why no such facts are mentioned in her statement, which omissions have been duly proved on record from evidence of PW-11 Subhash Makode, Investigating Officer where he has admitted that, on his recording statement of PW-3 Uma Thakare as per her say, she has not stated said facts.

10. Evidence of PW-4 Vishwas Mendhe, who is relied by prosecution as a witness on circumstantial evidence, who was knowing appellant no.1 Asha as well as deceased Sarika being labour Contractor and as those families had worked as labours with him, had stated that appellant Asha used to tell him that one day she may finish Sarika, upon which he used to pacify her saying that she should live happily together with her and also had deposed that deceased used to tell him that appellants used to abuse, beat and ill-treat her. However, above evidence is by way of material improvement when he claims to have stated so in his statement recorded by police. However, he is unable to state any reason why it is not so recorded. Defence has also got said omission duly proved by PW-11 Subhash Makode, P.I. Evidence of both these witnesses as such is by way of material omissions not reliable to be acted upon.

11. Evidence of PW-5 Vinod Mendhe, neighbour is also not reliable as he claims that appellant Asha used to come to his flour mill for grinding grains and during such visits, used to tell that deceased being second wife of her husband Rammurti, she will not allow her to stay with him and some day she will finish her. This piece of evidence is not reliable in view of evidence of PW-8

Rammurti, who has admitted that in fact appellant Asha was having flour mill in her house which was in running condition. In that view of the matter, as Asha was having flour mill of her own in her house, there was no reason to her to visit to flour mill of PW-5 Vinod for grinding grains.

12. Similarly, it is also claimed by PW-5 Vinod Mendhe that, on the day of incident, on learning about the incident at around 6.00 to 6.30 p.m., he visited the spot and found police person present there. However, it is not his case that he had informed said fact to police. As per his evidence, on the following day, police visited his flour mill and made inquiry and recorded his statement. Had there been any substance in this fact, there is nothing for PW-5 Vinod to not to disclose fact of appellant Asha telling him as aforesaid to police immediately on his finding police present on the spot. Prosecution has not putforth any explanation on this ground also.

13. Though prosecution has examined PW-9 Gajanan Mendhe also as a witness on circumstances, his evidence does not substantiate case of prosecution in any manner as his evidence is that he knows PW-8 Rammurti as well as both the appellants and on the

day of incident, he saw police at the house of Rammurti and suspected foul play in the death of Sarika. Except for this, he has not deposed anything which can be considered in favour of prosecution.

14. After considering evidence of above witnesses, we are now left with the evidence of PW-6 Gopal Mendhe and PW-7 Rajkumar Mendhe who, according to learned Additional Public Prosecutor, are examined to establish that deceased was lastly seen in the company of accused immediately prior to incident. Evidence of both these witnesses on the alleged theory of last seen is similar. We have, therefore, considered the same together when, apart from deposing that there used to be quarrels between the appellants and deceased Sarika, they have deposed that, on the day of incident, at around 3.00 p.m., on feeling burnt smell from the house of Rammurti when they came out of their house, who were residing as neighbours, saw appellant no.1 Asha putting latch to their house from outside and proceeding on motor cycle with appellant no.2 Vaibhav. Merely on the basis of said piece of evidence prosecution claims them to be witnesses to establish theory of last seen which case of prosecution by no stretch of imagination can be relied for the said reason that in the evidence of neither of these witnesses it is

their case that they had seen deceased in the company of appellants in any point of time before they claim to have seen appellants running from the spot hurriedly on motor cycle. In that view of the matter, we do not find evidence of these two witnesses also to be useful to be relied upon in favour of prosecution much less then to establish appellant's involvement in the case on the theory of last seen as putforth by prosecution.

15. After considering the evidence of all the material witnesses, we thus find that prosecution has miserably failed to establish the charges levelled against the appellants. From the evidence of PW-10 Dr. Rajesh Ingle, it has come on record that deceased had sustained 99 % burns which were ante mortem and cause of death was shock due to burns and has issued post mortem report (Exh.99). Said Expert had reserved final opinion as to cause of death for want of C.A. and histopathy reports. The Medical Officer has admitted that he has reserved opinion as to cause of death of deceased for want of above documents as deceased was brought dead and for that reason, above reports were necessary. However, no such reports are on record. In that view of the matter, from the case of doctor, it is found that deceased died on sustaining

burn injuries. But, there is nothing on record to establish that appellants are in any manner instrumental in causing death of deceased by setting her person on fire.

16. For the above reasons, we find that appeal is liable to be allowed. Same is allowed. The impugned Judgment is quashed and set aside. Both the appellants are acquitted of the offences punishable under Sections 302, 201 r/w. 34 of the Indian Penal Code.

Fine amount, if any, paid be refunded back to the appellants.

JUDGE

JUDGE

[jaiswal]

Suraj
Satyanarayan
Jaiswal

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