

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 638 OF 2014

Sudam s/o Sarangdhar Rajguru
Aged 37 years, Occ; Labour,
R/o; Kerhala, Tq. Sillod,
District; Aurangabad.

Appellant
(Original accused)

Versus

The State of Maharashtra
Through Police Station Officer,
Waluj, Taluka Gangapur,
District Aurangabad.

Respondent
(Original Complainant)

.....
Mr. R.R. Imale, Advocate for the Appellant.
Mr. S.G. Karlekar, A.P.P. for respondent
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**CORAM : S.V. GANGAPURWALA &
M. G. SEWLIKAR, JJ.**

DATE : 4th August, 2020.

ORAL JUDGMENT :

The present appellant/accused is prosecuted for the offence punishable under Sections 302 and 498-A of the Indian Penal Code.

2. The Sessions Court has convicted the appellant/accused under Section 302 of the Indian Penal Code and

sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 10,000/-, in default to undergo further imprisonment for five months.

3. The appellant accused is also convicted for the offence punishable under Section 498-A of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs. 2,000/-, in default to undergo further imprisonment for two months.

4. The case of the prosecution is that the present appellant/accused and the deceased Ratnamala entered into a wedlock on 12.5.1998. Initially they were residing at Kerala and then at Palshi. Thereafter, they started residing at Sharda Colony, Waluj, Aurangabad. From the wedlock of the appellant/accused and the deceased, they have two sons and a daughter. It is further the case of the prosecution that on 5th February, 2013, the appellant/accused was annoyed on the ground that the deceased did not provide sweets and meals to the mother of the appellant/accused. The appellant accused abused and assaulted her on that count. The accused poured petrol on her person and set the deceased on fire. The neighbours extinguished the fire and

carried her to the hospital. Eventually, she succumbed to the burn injuries on 14th February, 2013.

5. Mr. Imale, the learned counsel for the appellant/accused submits that the dying declaration recorded by the Executive Magistrate cannot be relied upon. He further submits that the Executive Magistrate in his evidence has specifically admitted that the deceased was not clearly talking to some extent and there was difficulty to understand as to what she was talking about. It was not possible to touch her body. The learned counsel for the appellant accused submits that, the deceased was not in a position to talk properly and the Executive Magistrate could not understand as to what she was conveying. Such a dying declaration could not be relied upon and made the basis of conviction. The learned counsel for the appellant accused further submits that there was no need for the Investigating Officer to record another dying declaration after five minutes, of the dying declaration recorded by the Executive Magistrate. Additions are made in the dying declaration recorded by the Investigating Officer. The oral dying declarations relied upon by the prosecution, alleged to have been made before PW 1, PW 3 and PW 4, cannot be relied upon. PW 1 and PW 4 are the real brothers of the deceased

and PW 3 is the real uncle of the deceased. PW 1 and appellant/accused are on inimical terms. There was transaction with regard to the plot and both were not getting along well.

6. The learned counsel submits that the evidence contradict themselves. In the evidence of PW 4 it has come on record that he did not meet anybody in the hospital after talking with the deceased. However, PW 1 and PW 4 also came in the hospital at the same time. All these facts show that the story of the prosecution is cooked up and belies on the probabilities. The learned counsel further submits that the deceased gave reason that the gas cylinder was empty and that on refilling of gas cylinder, she would prepare sweets for her mother-in-law. However, there is no evidence to show that there was gas stove. The learned counsel submits that presence of appellant at the scene of offence is also not proved. On the basis of shaky evidence appellant is convicted for the offence punishable under Sections 302 and 498-A of the Indian Penal Code. The prosecution could not prove homicidal death of the deceased and it is the case of the accidental death of the deceased.

7. Mr. Karlekar, the learned A.P.P. submits that mere

isolated admission or stray sentences would not impeach the consistent evidence on record. The medical officer has been examined. The medical officer has given endorsement that the deceased is in fit condition to give her statement. The evidence of medical officer is not impeached. The doctor has opined fit state of mind of the deceased to give statement and the statement has been recorded by the Executive Magistrate and thereafter by the Investigating Officer, the statements are consistent. In such circumstances no error can be found in the judgment of the Sessions Court placing reliance on the dying declarations. The learned A.P.P. further submits that only because PWs 1, 3 and 4 are related to the deceased the same is not sufficient to discard their evidence. All three witnesses are consistent in their statements about the act of the accused setting the deceased on fire. The conduct of the appellant is also relevant. If the deceased had accidental burns, naturally the conduct of the appellant would have been to douse the fire. However, the appellant accused did not come forward to douse the fire. This action shows the guilt of the accused. The learned A.P.P. submits that considering the totality of evidence on record the offence under Sections 302 and 498-A of the Indian Penal Code has been proved beyond reasonable doubt. No other conclusion can be drawn except that the accused is guilty

of the offence punishable under Sections 302 and 498-A of the Indian Penal Code.

8. We have considered the submissions canvassed by the learned counsel for both parties. We have also gone through the evidence on record.

9. The prosecution, to prove the charge against the appellant accused, is heavily relying upon the dying declaration recorded by PW 2 the Executive Magistrate, the dying declaration recorded by the Investigating Officer PW 9 and the oral dying declarations said to have been made before PWs 1, 3 and 4.

10. The dying declaration, if is properly recorded and the same inspires confidence can be made the sole basis of conviction of the accused. Prior to recording of the dying declaration the medical officer has given endorsement that the deceased is in fit state of mind.

11. Perusing the evidence of PW 2 (Special Executive Magistrate), regarding the dying declaration, the Special Executive Magistrate has very categorically admitted as under :

“Patient was suffering pains and thereafter she was screaming. However she was not clearly talking to some extent and there was difficulty to understand at what she was talking about. It was not possible to touch her body. Doctor was taking care of her to avoid infection.”

Again PW 2 in her evidence in para 4 has stated as under :-

“I saw that she was talking but it was not understandable.”

12. Five minutes after the Executive Magistrate had recorded the dying declaration, the Investigating Officer recorded the dying declaration again. The necessity to record the dying declaration by the Investigating Officer five minutes after the Special Executive Magistrate had recorded the dying declaration is not spelt out. In dying declaration recorded by the Investigating Officer, some more additions are made. Five minutes prior to that the dying declaration was recorded by the Special Executive Magistrate. According to Special Executive Magistrate, while recording dying declaration, the deceased was not in a position to talk and that one could not understand as to what the deceased was talking about. After five minutes, one fails to understand, as to how the deceased would give her statement in the manner the person would understand what she was saying.

13. The oral dying declarations said to have been made to PW 1 the real brother, PW 3 the real uncle and PW 4 the real brother do not inspire confidence. PW 1 the real brother is on inimical terms with the deceased. Same is spelt out from the evidence of PW 1. PW 3 in his evidence says that he had been to the hospital after he received information at 9.30 p.m. and that time PW 1 was also present in the hospital, according to evidence of PW 1, but PW 3 in his evidence says that he did not meet anyone after talking with the deceased.

14. PW 4 another real brother of the deceased states that when he went to the hospital, he met PW 1 and one Sunanda, but he does not say that he met PW 3. These are the interested witnesses and their evidence will be sacnned with great caution.

15. The other circumstances are also relevant and required to be considered. If the accused was instrumental in burning the deceased, then the clothes of the accused ought to have been seized and sent for chemical analysis. The same does not appear to have been done. The presence of the accused at the time of the alleged incident in question has not been brought on record by the

prosecution. Not a single witness has stated about the presence of the accused at the time of commission of offence. In the dying declaration the deceased has said that she was residing along with her two sons and one daughter and the daughter is 13 years of age. She has attained the age of understanding. However, the children are not examined.

16. It is also not brought on record that the accused had burn injuries and was treated by doctor for the burn injuries. None of the witnesses examined speak about the presence of the accused on the scene of the offence. The prosecution has miserably failed to prove the presence of the accused on the scene of the offence.

17. Considering the totality of the evidence on record, we find that the evidence is short to bring home the guilt of the accused for the offence punishable under Sections 302 and 498-A of the Indian Penal Code. No evidence has been brought on record about the ill-treatment of the deceased at the hands of the accused. PW 3 has stated that he had told the accused to treat the deceased properly, except solitary vague statement on the part of the brother of the deceased, no evidence worth the name is

brought on record to establish offence punishable under Section 498-A of the Indian Penal Code. Fifteen years had passed since the marriage of the deceased with appellant accused, however, not a single complaint of ill-treatment is made at any point of time against the appellant accused by the deceased or her relatives.

18. In the light of the above, we conclude that the prosecution has not proved the guilt of the accused for the offence punishable under Sections 302 and 498-A of the Indian Penal Code.

19. In the light of the above, appeal stands allowed. The appellant accused is acquitted for the offence punishable under Sections 302 and Section 498-A of the Indian Penal Code. His bail bond stands cancelled. Appeal is accordingly allowed. Accused shall be set free immediately, if not required in any other case.

(M. G. SEWLIKAR)
Judge

(S.V. GANGAPURWALA)
Judge