

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.819 OF 2015

Vitthal Rajaram Nimbalkar	]	
Age-37 yrs., Occu-labourer,	]	
r/a, House No.56, Wadkar Galli,	]	
Bhulabhai Chowk, Raviwar Peth,	]	
Solapur.	]	
(presently in Kolhapur Central Jail)	]	Appellant
		(Original Accused)

Versus

The State of Maharashtra	]	
Through,	]	
PSI, Jod Bhavi Peth Police Station,	]	
Solapur.	]	Respondent

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Ms. Sneha G. Sanap, Legal Aid Counsel for the Appellant.

Mr. A.A. Palkar, Additional Public Prosecutor, for Respondent-State.

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CORAM: PRITHVIRAJ K. CHAVAN, J.

DATE: 22nd JANUARY, 2020.

ORAL JUDGMENT:

Challenge in this appeal is to a judgment and order of conviction and sentence dated 11th April, 2014 rendered by the learned

Sessions Judge, Solapur in Sessions Case No.31 of 2013 wherein the appellant has been convicted under section 304, Part II of the Indian Penal Code (for short 'I.P.C') and is sentenced to suffer rigorous imprisonment for seven years with fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment for six months.

2. A set off under section 428 of the Code of Criminal Procedure, 1973 (for short 'Cr. P.C') has already been granted for the period already undergone by the appellant during investigation and trial.

3. The prosecution case, in brief, can be summarized as follows:

Deceased Shantabai was wife of the appellant. She was working as a maid servant while the appellant was a labourer. They were residing in House No.56, Bhulabhai Chowk, Ravivar Peth, Solapur. The couple was issueless. The appellant was a habitual boozier, meaning thereby, he was addicted to liquor. Ever since their marriage, the appellant and deceased Shantabai were residing separately from the parents of the appellant. Their marriage was performed in the year 2007. Since income of the appellant was meagre, deceased Shantabai was constrained to work as a maid servant. It is the case of the prosecution that six months prior to the incident, more precisely, six months before 18th September, 2012, there was

a change in the behaviour of the appellant who started suspecting the fidelity of the deceased and was prohibiting her from going for work at a particular place. He had, on several occasions, insulted the deceased Shantabai by abusing and beating her.

4. On the fateful day of 18th September, 2012, the deceased Shantabai was still in her bed when she experienced some liquid being poured on her person. When she opened her eyes, she noticed the appellant pouring kerosene on her person from a Jar. When she tried to obstruct the appellant, he put the jar on the ground and set her ablaze by igniting the match stick. Deceased started shouting which resulted in gathering of a crowd in the said vicinity. The fire was extinguished and she was taken to the Civil Hospital for treatment.

5. The Hospital Authorities had communicated the said incident to the Police. A Police Officer who was on duty at the relevant time immediately rushed to the Hospital and recorded a Dying Declaration of Shantabai. On the basis of the said statement, a Crime bearing No.125 of 2012 came to be registered at Jodbhavi Peth Police Station, Solapur. The Police Officer issued a letter of request to the Executive Magistrate for recording the Dying Declaration of Shantabai. Accordingly, the Magistrate went to the Civil Hospital Solapur, sought permission from the Doctor as to

whether the patient was in a fit state of mind to give her statement and after getting the said certificate from Dr. Alwekar, P.W.2-Special Executive Magistrate Ramesh Prahladrao Hirekeru recorded the second dying declaration of Shantabai.

6. The Investigating Officer held investigation into the crime by recording statement of the witnesses, visiting the scene of the offence and drawing Panchanama, collecting the sample earth and earth mixed with kerosene as well as burnt pieces of mattress.

7. After the investigation, a charge-sheet came to be filed against the appellant in the Court of Judicial Magistrate First-class, Solapur, who in turn, committed the case to the Sessions Court at Solapur.

8. The appellant appeared before the Additional Sessions Judge who framed a charge against the appellant under section 302 of the I.P.C below **Exhibit 7**. It was read over and explained to the appellant in vernacular to which he pleaded not guilty and claimed a trial. The defence of the appellant, as emerged from the line of the cross-examination as well as from his statement under section 313 of the Cr. P.C is simple denial of committing of the offence. No defence evidence has been adduced on his behalf.

9. To substantiate the charge, prosecution examined as many as six witnesses. The learned Sessions Judge, Solapur after going through the evidence of prosecution witnesses, more particularly, on the basis of the Dying Declarations of deceased Shantabai, found that the prosecution has though proved the offence against the appellant beyond reasonable doubts but it was not under section 302 but under section 304 Part II of the I.P.C by categorically observing that perhaps the appellant did not intend to kill his wife, for, had it been his intention to commit the murder of his wife, he would not have attempted to extinguish fire immediately after the incident. The learned Sessions Judge, in his wisdom, awarded sentence of seven years as stated hereinabove.

10. Heard Ms. Sanap, learned Counsel for the appellant appointed by this Court. She submitted that the appellant has undergone the sentence and has already been released on 4th June, 2018. She took me through the testimonies of the prosecution witnesses, more particularly, dying declarations of the deceased Shantabai and strenuously urged that since there are three Dying Declarations, it is doubtful as to whether those are genuine and acceptable and can be relied upon to place implicit reliance in order to convict the appellant even for an offence of Section 304 Part II of the I.P.C. However, the learned Counsel is fair enough to admit presence of the appellant at the time of the incident on the spot as well as attempt on his

part to extinguish the fire. The learned Counsel stressed on the point that there is not a single eye witness to the said incident and, therefore, prayed for setting aside the impugned judgment.

11. Per contra, the learned Additional Public Prosecutor supported the impugned judgment and order of conviction by contending that there is no reason to disbelieve the evidence in the form of Dying Declarations of deceased Shantabai which is quite reliable and there is absolutely no room for doubt. The learned Additional Public Prosecutor has also drawn my attention to the fact that the deceased had 99% burn injuries which is evident from Autopsy Report **Exhibit – 43**.

12. Having considered the respective submissions at bar, at the outset, it can be seen that the incident in question had occurred at 6.30 a.m and it is quite obvious that except the deceased and the appellant, there would be no question of presence of any third person in their house.

13. Coming to the first Dying Declaration of deceased Shantabai, it is quite clear as to the manner in which the incident had occurred. Admittedly, Shantabai died within seven years of her marriage. Six months prior to the incident, she was subjected to physical and mental torture by the appellant on account of suspecting her character and his reluctance to allow

her to work at a particular place. The Dying Declaration of the deceased, if considered carefully would reveal that six months prior to the incident, the appellant started suspecting her fidelity and was abusing and beating her from time to time.

14. On 18th September, 2012 at about 6.00 a.m when the deceased felt some liquid being poured on her person, she woke up only to notice the appellant pouring kerosene on her person. As she tried to obstruct him, he immediately set her on fire with a match stick. When the deceased was engulfed with fire and was shouting loudly, the neighbours in the vicinity had gathered and she was immediately taken to the Civil Hospital. Dying Declaration clearly reveals that the appellant had tried to kill the deceased because of the reasons she had stated in her statement. This Dying Declaration came to be recorded by P.W.3-Suhas Jagtap which is proved at **Exhibit 22** who was attached to Jodbhavi Police Station at the relevant time in the Anti Terrorist Cell.

15. Evidence of P.W.3-Suhas Jagtap indicates that before recording the statement of Shantabai, she was examined by the Doctor who had certified that the patient was physically and mentally fit to give a statement and thereafter he recorded her statement. There is nothing in his cross-examination from which it can be inferred that he had recorded the statement of the deceased other than what had been stated by her. There

was no reason for this witness to give false evidence as he had no axe to grind against the appellant. He further testified that after recording her statement, he had obtained her thumb impression. Contents of the said statement were read over to the victim by him before obtaining her thumb impression.

16. The second Dying Declaration which appears to have been recorded by the Special Executive Magistrate further substantiates the first Dying Declaration in material particulars. In the second Dying Declaration also Shantabai had categorically stated that while sleeping in the house on 18th September, 2012, her husband had poured kerosene on her person at around 6.30 a.m and set her on fire. She sustained burn injuries. The statement further indicates that the appellant used to suspect her character and, therefore, he had set her on fire. She further made it clear that thereafter the appellant poured water on her person in order to extinguish the fire. There is an endorsement over this Dying Declaration by the Medical Officer that the patient was conscious, oriented and in a fit state to give a statement. Even after recording the Dying Declaration, the Medical Officer had again certified that during the course of recording her Dying Declaration, the patient was conscious and well oriented and was in a state of giving her statement. It bears right thumb impression of Shantabai.

17. Column No.17 of the Autopsy Report **Exhibit 43** reveals that the deceased had sustained 91% of burn injuries. Dr. Alwekar who had examined deceased Shantabai before permitting the Police as well as the Special Executive Magistrate to record a Dying Declaration of the deceased testified that she was throughout recording of the Dying Declaration of the deceased, present beside her and was satisfied that deceased Shantabai was well oriented with time, place and person in order to give her statement. She was mentally and physically fit before and during the course of recording her Dying Declaration.

18. There is no dispute that the Investigating Agency had, while drawing the spot panchanama noticed burnt piece of mattress (chatai) and clothes which were duly seized and sent for chemical analysis. The Investigating Officer had also noticed a match box and burnt match sticks at the spot as well as a Jar of kerosene. These circumstances indeed, corroborate the version of deceased Shantabai in the form of Dying Declaration that on the day of incident, the appellant had poured kerosene on her person from a Jar and then set her on fire with a match stick.

19. Having carefully examined the Dying Declarations, **Exhibit 28** and **Exhibit 35**, the learned Sessions Judge had rightly observed that those are consistent and there is absolutely nothing by which it can be said that

those were tainted or an outcome of tutoring deceased Shantabai. Deceased Shantabai had been consistent in stating that the appellant was suspecting her character and, therefore, he set her on fire. It is quite possible that even after warning the deceased from going to attend the work at a particular place, she did not obey the fiat of the appellant and, therefore he might have been frustrated and perturbed. After pouring kerosene on her person and setting her on fire, it seems that he might have realized gravity of the offence committed by him and then perhaps due to repentance might have tried to extinguish the fire immediately by pouring water. The learned Sessions Judge, therefore, rightly considered the mitigating factor and observed about the conduct of the appellant that he in fact, did not intend to kill his wife but, in stead, wanted to frighten her to show that he can go to any extent if she refused to abide by his command. The learned Sessions Judge, therefore, instead of holding the appellant guilty under section 302 of I.P.C found him guilty of the offence of culpable homicide not amounting to murder and sentenced him to undergo rigorous imprisonment of seven years of an offence punishable under section 304, Part II of the Indian Penal Code.

20. Consequently, I do not find any merit in the present appeal and as such it stands dismissed.

21. I appreciate the sincere efforts made by Ms. Sanap. She has been appointed to represent the appellant in this appeal by this Court. She has rendered excellent assistance by pinpointing the vital aspects. I, therefore, quantify Rs.10,000/- plus actual expenses borne by the learned Counsel as the fees to be paid to her. High Court Legal Aid Services Committee is directed to disburse the said amount to Ms. Sanap within one month from today.

[PRITHVIRAJ K. CHAVAN, J.]