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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.873 OF 2010**

Avinash Baburao Rayate

...Appellant
(original accused)

vs.

State of Maharashtra

...Respondent

Mr.Harshad Palwe for the Appellant
Mr.S.S.Hulke, APP for State

**CORAM : RANJIT MORE &
SURENDRA P.TAVADE, JJ.**

DATE : JANUARY 31, 2020.

ORAL JUDGMENT : (PER S.P.TAVADE,J.)

. The appellant has challenged the Judgment and order dated 7th October 2010 delivered in Sessions Case No.192 of 2009 by the learned Sessions Judge,Nashik whereby he has been convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay fine of Rs.1000/- in default to suffer simple imprisonment for one month.

2 The prosecution case can be summarised as under :

The appellant is husband of deceased Sarika Rayate. There was love marriage between the appellant and the said Sarika. They have two children out of said wedlock. Three-four years of their married life went peacefully. Thereafter, appellant addicted to liquor and he used to

abuse and assault deceased Sarika. Deceased Sarika used to disclose alleged treatment given by her husband to her brother Nitin Rangnath Mahale (P.W.No.2) and he used to console her. On 16th August 2008, accused had threatened Sarika that he would kill her by burning. Hence, deceased Sarika had made N.C. with Ambad Police Station.

3 In the night of 3rd November 2008 at about 8.15 p.m, the appellant and Sarika were in the house at N-2/P-94, Shivaji Chowk, CIDCO, Nashik. Appellant picked up a quarrel on petty ground and then he poured Thinner on the person of Sarika and set her on fire. She sustained 47% burn injuries. Appellant himself tried to extinguish fire by putting water on the person of Sarika. In the said transaction, he also sustained injuries. Appellant took deceased Sarika to Life Care Hospital along with neighbours. Both of them were admitted in the said hospital. Information of the said incident was given to the brother of deceased Sarika viz. Nitin who rushed to the hospital. At the advice of the Medical Officer, Sarika was shifted to Shatabdi Hospital for better treatment.

4 On the way to Shatabdi Hospital, Sarika disclosed the incident to her brother Nitin (P.W.No.2) that her husband on petty quarrel, got annoyed and he abused and threatened her. Thereafter, he poured thinner on her person and set her on fire. She also disclosed that the appellant tried to extinguish fire by putting water on her person.

5 Intimation of admission of Sarika in the hospital was informed to Ambad Police Station. Accordingly, Rafiq Mastan Shaikh (P.W.No.5) rushed to the hospital. With the permission of Doctor, he recorded

statement of Sarika which was treated as FIR wherein she also gave facts of setting her on fire by the appellant. Thereafter, police informed the said fact to Special Executive Magistrate to record the statement of deceased Sarika. Accordingly, Special Executive Magistrate Shri Shrikant Gholap (P.W.No.3) rushed to the hospital. He obtained opinion of the Medical Officer regarding health of Sarika and recorded her statement. In the said statement also deceased Sarika disclosed that she was set on fire by her husband by pouring thinner on her person.

6 On the basis of the statement of Sarika, crime bearing No.569 of 2008 came to be registered under section 307 of IPC. Investigating Officer visited the scene of offence and prepared panchnama. He also seized the clothes of deceased under panchnama. During the treatment Sarika succumbed to injuries on 30th November 2008. Post mortem was performed at the Civil Hospital, Nashik. Thereafter, offence under section 302 was added by the Investigating Officer. Appellant was admitted in the hospital till 2nd December 2008. Thereafter, he was arrested. After completion of investigation, charge sheet came to be filed against him.

7 On the appearance of the appellant, charge came to be framed under section 302 of IPC. He denied the same and claimed to be tried. Defence of the appellant was that Sarika sustained injuries due to over flame of the stove and he tried to save Sarika.

8 To prove the charge against the appellant, prosecution has heavily relied on the evidence of as many as 8 witnesses. The appellant led defence evidence in the form of evidence of Dr.Sutar.

9 On going through the evidence on record, learned Sessions Judge held the appellant guilty of offence punishable under section 302 of IPC and sentenced to suffer life imprisonment and to pay fine of Rs.1000/- in default he was also directed to undergo simple imprisonment for one month. The said order is under challenge.

10 The learned Advocate on behalf of the appellant submitted that the prosecution has heavily relied on two written dying declarations and one oral dying declaration of the deceased. He submitted that the said dying declarations are concocted. There are major flaws in recording the same. He also submitted the scene of offence panchnama and seizure panchnama of the clothes of the deceased was prepared at the one and same time by the Investigating Officer and the said fact is disclosed from the time recorded in both the panchnamas. Therefore, both the panchnamas are false and concocted. He also submits that the defence of the appellant is more probable than the prosecution theory. Therefore, he prays acquittal of the appellant. Alternatively, he also submits that Dying declarations are read as it is, it shows that alleged incident occurred due to quarrel on petty dispute. The appellant had no intention to kill his wife. The said fact is revealed from his act of extinguishing fire by pouring water to the person of his wife. Similarly, he also took the deceased along with neighbours to the hospital. He sustained injuries more than 20% on his person. Similarly, he was also admitted in the hospital for more than one and half months. So it can be said that there was no intention of the appellant to kill his wife. Therefore, case falls under section 304 Part-II of the IPC. Therefore, he may be released on

the sentence undergone by him.

11 Heard learned APP for State. He submits that the dying declarations are consistent. There are no flaws in recording the dying declarations. Therefore, the said can form the basis for conviction under section 302 of IPC. He also submits that there is also some description in the scene of offence panchnama and seizure panchnama of clothes of deceased but it is a technical flaw which can be ignored and it does not wash out the oral and documentary evidence on record. He also submits that prior to the incident the appellant had threatened to kill her by setting her on fire. Hence, the deceased had lodged N.C. Therefore, it cannot be said that the appellant had no intention to kill his wife. Therefore, case falls under section 302 of IPC and the appeal be dismissed.

12 The entire theory of the prosecution depends on the dying declarations alleged to have been given by the deceased immediately after the incident. In the first point of time, oral dying declaration is given by the deceased to her brother Nitin (P.W.No.2) when he was taking her to Shatabdi Hospital, Ambad. Brother of deceased-Nitin deposed that on 3rd November 2008 at about 9.00 p.m he received a telephone call from Life Care Hospital that her sister was admitted in the hospital, and hence, he rushed to the hospital. He saw his sister. Doctor advised him to take Sarika to Shatabdi Hospital as she was having 47% burning injuries. According him, he took Sarika to Shatabdi Hospital. On the way to the hospital, he made enquiry as to how she sustained injury. Sarika disclosed him that the appellant poured thinner and set her on fire by a match stick. She also disclosed that appellant threatened that if she

disclosed his name, he would kill her children. The said oral dying declaration is simply denied by the defence in cross examination by way of suggestions. In the cross examination, Nitin admitted that the appellant made an attempt to extinguish fire when Sarika was burning. Appellant had received burned injuries while extinguishing fire and he was also admitted in Life Care Hospital. So it can be said that the appellant had tried to save the deceased. The appellant set on fire Sarika and tried to save her by extinguishing fire.

13 First written dying declaration was recorded by Shri Rafiq Shaikh Head Constable (P.W.No.5). He deposed that on 4th November 2008, Police Officer, Ambad directed him to record a statement of a lady who suffered burn injuries and was admitted in Shatabdi Hospital. Accordingly, he went to Shatabdi Hospital. He visited the "Burn Ward" where Sarika was admitted. He met Doctor on duty and requested him to certify whether Sarika was in a fit condition to give a statement. Medical Officer examined Sarika and opined that she was in a fit condition and made endorsement on the paper accordingly. He recorded statement of Sarika. Thereafter, he gave a letter to Special Executive Magistrate for recording statement of Sarika.

14 Statement of Sarika at Exhibit-32 was treated as FIR. On the basis of the same Crime bearing No.569 of 2008 under section 307 of IPC. Rafiq Shaikh was cross examined at a length. It was suggested to him that he has not recorded statement as per her say. He obtained endorsement of Doctor as a formality but the said suggestions are flatly refuted by witness. On going through the statement, it appears that

Sarika disclosed the Head Constable that the appellant used to find faults with her work and used to abuse and assault her. On 3rd August 2011 p.m appellant quarreled with her and thereafter poured thinner on her person and set her on fire by a match stick. She sustained burn injuries. She also stated that appellant tried to extinguish fire and he sustained burn injuries to both his hands. She also stated that due to burn injuries, appellant was admitted in Life Care Hospital. She further stated that her brother shifted her to Shatabdi Hospital for treatment.

15 Sum and substance of the first written dying declaration shows that deceased disclosed the cause of the incident as quarrel over a petty count. She has specifically stated that thinner was poured by the appellant and set her on fire. So the written dying declaration corroborates the oral dying declaration given to Nitin (P.W.No.2).

16 The second written dying declaration was recorded by the Special Executive Magistrate Shri Gholap (P.W.No.3) who was serving as Officer in charge but he was also designated as Special Judicial Magistrate. On 4th November 2008, he received a letter from Ambad Police Station for recording a statement of patient Sarika. Accordingly, he received the said letter at Exh.19 and at 11.30 a.m he rushed to Shatabdi Hospital. He met Medical Officer on duty Dr. Uday Joshi. He requested Dr. Joshi to give his opinion on the health condition of Sarika. Accordingly, Dr.Joshi took him to Burn Ward. He examined Sarika and gave his opinion that Sarika was in a fit condition to give a statement. Accordingly, he recorded statement of Sarika in prescribed format which is at Exh.21. He further deposed that before recording statement, he

asked all the relatives of Sarika to vacate the ward. He introduced Sarika by his name and designation as Special Executive Magistrate. Sarika disclosed him that her husband set her on fire by pouring thinner on her person. She also stated that her husband tried to extinguish fire by pouring water on her person. After completion of statement, he requested Doctor to once again examine her condition. Accordingly, Dr.Joshi examined Sarika and found her in a fit condition to give a statement. Accordingly, he obtained endorsement of the Medical Officer on the statement.

17 The evidence of Special Executive Magistrate is also challenged on the ground that he recorded statement at the say of brother of Sarika but the said suggestion is refuted. He admitted that Doctor did not mention in the endorsement that patient was physically and mentally fit but said admission has no significance because endorsement of the Doctor shows that patient was in a fit mental condition to speak and conscious. Therefore, purport of endorsement is that patient was well oriented and able to speak. Therefore, the Special Executive Magistrate has taken care of physical and mental condition of Sarika. Even he has taken care to obtain endorsement of the Medical Officer after completion of statement.

18 On going through the oral dying declaration as well as two written dying declarations it appears that all are consistent. There is no scope for concoction because the first oral dying declaration in the point of time was oral dying declaration made by Sarika to her brother. Thereafter, Police and Special Executive Magistrate recorded statement

of Sarika with the opinion of Medical Officer regarding her mental and physical condition. So there is no lacuna in recording both the dying declarations. Nothing is brought on record to establish that the dying declarations were concocted. On going through the oral and written dying declarations, the prosecution established that deceased Sarika sustained burn injuries due to setting her on fire by the appellant. Defence has tried to establish that the death of Sarika was accidental. To substantiate defence, Dr.Sutar was examined as D.W.No.1. According to him on 3rd November 2008, he was in his Nursing Home. Between 8.00 to 8.30 p.m he received a call from the appellant and asked him to visit his house. Accordingly, he rushed to the house of the appellant. He noticed many persons from the locality were gathered there. The wife of the appellant was lying on the floor with burn injuries and she was conscious. He made enquiry with her. She disclosed that the burn injuries were due to blast of the stove. She also informed that the appellant poured water on her person. He went to the police station but his statement was not recorded. In the cross examination he admitted that he advised the appellant to take the deceased to Life Care Hospital. He had given calls to Doctors at Life Care Hospital. He had been to the Hospital in the same night at about 11.30 p.m but he did not disclose alleged history of accidental burn to Sarika to anybody. He also admitted that he did not disclose to the police that Sarika had sustained burn injuries due to blast of stove. The evidence of Dr.Sutar is not inspiring confidence to believe it to be true. On the other hand, there are consistent oral as well as written dying declarations of Sarika which established the case of sustaining burn injuries to her. Unequivocally, Sarika sustained injuries due to setting on her on fire by the appellant. Therefore, the evidence of Dr.Sutar is not

significant.

19 The prosecution has led evidence of panch witness Sanjay Khade (P.W.No.1) to prove the seizure panchnama of clothes of deceased. There is no dispute about the seizure of clothes of deceased. It is not the case of the appellant that the clothes of deceased were partly burnt after the incident. So, there is nothing in the evidence of Khade to disbelieve him.

20 The prosecution has also relied upon evidence of Dr.Pradeep Malu Wagh (P.W.No.7) to prove the post mortem report. Dr.Pradeep Wagh deposed that on 3rd November 2008 Sarika was admitted in his hospital. She was treated. She had sustained 47% burn injuries. Thereafter, discharged on 15th November 2008 from the hospital. He produced on record a Medical Certificate issued by the hospital (Exh.45). The prosecution has also relied upon evidence of Dr.Swapnil Pagar (P.W.No.8). He deposed that he is attached to Shatabdi Hosital as a Medical Officer. On 3rd November 2008, between 11.00 to 11.15 p.m. patient by name Sarika was admitted in his hospital. She was treated as Out Door Patient and thereafter, she was admitted in the hospital as indoor patient. At the time of admission, Sarika was conscious and well oriented. He also deposed that police visited his hospital and recorded statement of Sarika. He had given endorsement on the statement of Sarika after examining her. He proved his endorsement Exh.51 and statement of Sarika Exh.32. So it can be said that the witness was examined to prove mental and physical health of Sarika at the time of recording statement.

21 The prosecution relied upon the evidence of Dr.Mangala Tungar (P.W.no.4) to prove the post mortem report. She deposed that she is attached to Civil Hospital, Nashik as a Medical Officer. On 30.11.2008, a dead body of Sarika was brought to Civil Hospital for post mortem examination. She performed the post mortem on dead body of Sarika between 11.30 p.m to 12.00 p.m. The death of the deceased was due to burn injuries sustained on the deceased on upper and lower part of body and chest and abdomen. The total percentage of burn injuries was of 47%. She issued advanced death certificate and after that issued final cause of death certificate vide Exhibits-28 and 29. Nothing worth has come in her evidence. It can be said that death of deceased was due to burn injuries.

22 On the basis of the oral dying declaration as well as written dying declarations, the prosecution has established that on the fateful day, there was a quarrel between appellant and his wife. The appellant poured thinner on the body of deceased and set her on fire but subsequently he felt remorse of his act and tried to extinguish fire by pouring water on the person of Sarika and thereafter, taken her to the hospital. Learned counsel for the appellant submitted that the case does not fall under section 302 but under section 304 Part II of IPC. He also summarize that subsequent act of the appellant show that he had tried to save deceased Sarika by pouring water on her body and thereafter took her to the hospital. He also submits that the appellant also got injured while saving Sarika and while extinguishing fire on the person of Sarika. He has also sustained 20% burn injuries on his both hands. He has

admitted more than one and half months in the hospital. All these facts show that the appellant had no intention to kill his wife. Therefore, this case falls under section 304 Part-II of IPC.

23 To substantiate his submission, he relied upon the decision of the Apex Court in the case of Kalu Ram Vs. State of Rajasthan¹ wherein wife of the appellant had two wives. One of them died due to burn injuries. On the date of incident, appellant under the influence of liquor demanded ornaments from his second wife Vimla. But Vimla refused to part with her ornaments and that infuriated the appellant. He doused her with kerosene and wanted her to die and supplied a box of match-sticks to her. As she failed to ignite the match-stick appellant collected the match-box and lit one match-stick and set her ablaze. It was held that the conduct cannot be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not alerted his senses to bring water in an effort to rescue her. All that the accused thought of was to inflict burns to her and to frighten her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. Therefore, the offence has to be brought down from first degree murder to culpable homicide not amounting to murder. Therefore, conviction is altered from Section 302 to Section 304 Part-II IPC.

24 In the present case also it is established on record that due to quarrel between the appellant over very pretty count appellant poured

¹ (2000)10 SCC 324

thinner on the person of Sarika and set on fire. Subsequently, he tried to extinguish fire and took her to the hospital. Taking into consideration, it can be said that the appellant out of control did act of setting his wife on fire but subsequently, he extinguished fire by showing his remorse towards the act of setting fire of her wife. Therefore, it can be said that the appellant was not intended to kill his wife by setting her on fire. Therefore, act of the appellant cannot fall into purview of section 302 of IPC but it squarely falls under the provisions of Section 304 Part-II.

25 In view of the ratio laid down in the case of Kalu Ram (supra), the same squarely apply on the facts of the present case. Therefore, we incline to brought down the conviction punishable under section 302 to section 304 Part-II of IPC. We alter the conviction under section 302 to section 304 Part-II of IPC and sentenced appellant RI for 10 years. Sentence of fine is maintained. It is for the Jail Authority to count whether the period he had already undergone sentence would be sufficient to complete the period of sentence, and if so, Jail Authority shall release the appellant from jail, otherwise he shall be released after completion of the sentence of 10 years.

26 Appeal is accordingly disposed.

27 The Jail Authority shall release the appellant from jail after considering the provisions of set off and remission.

[SURENDRA P.TAVADE, J.]

[RANJIT MORE, J.]