

DDR

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 45 OF 2013
(Annexure – A-1 - Sr.81)

1. Shobha Jahangir Shinde @ Bhosale
Age 45 years, Occ. Labourer

2. Jahangir Srirang Shinde @ Bhosale
Age 50 years, Occ. Labourer

R/o. Sanjay Nagar Zopadpatti,
Vairag, Tal. Barshi, Dist.Solapur
(at present in Yervada Central
Prison, Pune)

.. Appellants

V/s.

The State of Maharashtra .. Respondent

Mr.Aniket Vagal, for the Appellants.
Mr.J.P. Yagnik, APP for the Respondent – State.

CORAM : S.S.SHINDE &
M.S.KARNIK, JJ.

DATE : JULY 29, 2020

JUDGMENT : (PER M.S. KARNIK, J.)

The appellants Shobha and Jahangir, wife and husband, have filed this Appeal challenging the judgment rendered by the Additional Sessions Judge, Solapur, convicting them for the offences punishable under Sections 302, 323, 494, read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') and sentenced them to undergo imprisonment for life and pay fine of Rs.1000/-, in default both the accused to undergo rigorous imprisonment for six months.

2. The incident in brief is that on 20 January, 2011, at around 8.00 p.m., PW-5 Sunil Gopinath Lohkare, the Investigating Officer ('IO' for short) received a phone call from PW-1 Nandu Shinde. PW-1 Nandu Shinde informed PW-5 IO that deceased Lalita, second wife of appellant No.2 Jahangir, suffered burn injuries on her person. On reaching the spot, PW-5 IO inquired with Lalita about the incident. Lalita was sitting in front of her house and had sustained burn injuries. Lalita narrated that on her

returning from the market, the appellant No.2 - Jahangir accompanied with appellant No.1 - Shobha, came with a can of kerosene. The appellant No. 2 Jahangir picked up a quarrel with Lalita saying that she is spoiling their reputation by coming home late. The appellant No.2 - Jahangir poured kerosene on the person of Lalita and Shobha lit the matchstick. Lalita further narrated that both the appellants ran away from the spot after removing the tin sheets of the house. PW-5 IO asked PW-4 Police Head Constable Burange to record the complaint. The First Information Report ('FIR' for short) -cum-complaint is at Exhibit 26. This is the first dying declaration. The deceased Lalita was referred to Primary Health Center ('PHC' for short) at Vairag. PW-4 accompanied her. On the strength of the FIR - Exhibit 26 then PSO Vairag Police Station registered the Crime No.10 of 2011 under Sections 307, 323 read with Section 34 of the IPC at 21:45 hours.

3. The spot panchanama - Exhibit 18 was prepared on 21/1/2011. The statements of the witnesses i.e. PW-1 Nandu

Shinde, PW-3 Tanaji Gavali and PW-4 Police Head Constable Burange were recorded on 21/1/2011. PW-1 Nandu Shinde and PW-3 Tanaji Gavali are the neighbours of the deceased Lalita.

4. The deceased Lalita was initially taken to the PHC, Vairag but had to be shifted to the Civil Hospital, Solapur. PW-6 Dr. Dharmendra Dagadu Gaikwad, who was on duty as a Casualty Medical Officer on 20/1/2011 deposed that at about 11.05 p.m., PW-4 Police Head Constable Burange brought Lalita for medical treatment. On clinical examination Lalita was found to have suffered burn injuries on her chest, abdomen, neck and other part of body. Lalita suffered almost 80% burn injuries.

5. PW-2 Mahadeo Gunderao Patil is the Special Executive Magistrate, who recorded the dying declaration of Lalita at Exhibit 23 in the Civil Hospital, Solapur between 11.45 p.m. on 20/1/2011 and 12:20 a.m. on 21/1/2011. This is the second dying declaration. The deceased Lalita died on 24/1/2011. The inquest

panchanama which is at Exhibit 10 was prepared on 24/1/2011. The postmortem notes are at Exhibit 20 and the opinion as to the probable cause of death is mentioned as "Septicemia due to burn injury".

6. The appellant No.1 was arrested on 4/2/2011. The charge-sheet against appellant No.1 was submitted on 26/4/2011 before the Court of Judicial Magistrate First Class at Barshi. The appellant No.2 was arrested on 5/6/2012. The supplementary chargesheet against appellant No.2 was submitted on 11/6/2012. Upon committing the case to the Sessions Court, Solapur, the trial Court framed the charge against the appellants under Section 302 and 494 read with Section 34 of the IPC on 22/7/2012. The appellants pleaded not guilty. Before the trial Court as many as six witnesses were examined.

7. The defence of the accused is of total denial. In the explanation during the course of examination under Section 313

of the Code of Criminal Procedure, the appellant No.1 - Shobha stated that on the day of the alleged occurrence she was at her parental home. According to the appellants, a sum of Rs.50,000/- was withdrawn from Osmanabad Janata Co-operative Bank Ltd. and paid to deceased Lalita two days before the alleged incident. The deceased Lalita was a folk dancer. The amount of Rs.50,000/- was paid to clear the outstanding debt of her master – owner of the folk dance troupe (Tamasha Owner). Lalita committed suicide as she was frustrated due to non payment of hand loan which she had taken from her master - Tamasha Owner. The defence is of false implication. So is the defence of appellant No.2. Upon trial, the trial Court convicted the appellants as aforestated. The prosecution case is based mainly on these two dying declarations.

8. First dying declaration is recorded by PW-4 Police Head Constable Burange. The second dying declaration is recorded by PW-2 Special Executive Magistrate.

9. With the assistance of the learned Counsel for the appellants we have gone through the evidence. Learned counsel for the appellants assailed the dying declarations as untrustworthy and contended that in the facts of the present case it is highly unsafe to rely upon the dying declarations.

10. Learned APP for the respondent - State argued in support of the findings of the trial Court and prayed for dismissal of the Appeal.

11. The incident is of 20/1/2011. The first dying declaration is treated as FIR. The version of deceased Lalita in this dying declaration is that she married appellant No.2 Jahangir two years prior to the incident. Lalita started residing with Jahangir at the matrimonial home when she learnt that appellant No.2 Jahangir was already married and has a first wife by name Shobha - appellant No.1. All of them started residing in the matrimonial home. After a few days appellant No.1 Shobha started quarreling

with deceased Lalita and therefore, Lalita started residing separately in a tin shed in the neighbourhood. The appellants doubted the character of Lalita and started quarreling with her. On the date of the incident, when Lalita came back home from market at 8.00 p.m., the appellants came to the tin shed where Lalita was residing. The appellant No. 2 - Jahangir had a kerosene can in his hand. The appellants asked her why she returned home so late and with whom she had gone. The appellants started saying that she is spoiling their reputation. Appellant No.1 Shobha started assaulting Lalita. Appellant No.2 Jahangir said that Lalita should not be kept alive. He poured kerosene on her. The appellant No.1 Shobha lit up the matchstick and set her on fire. The appellants, thereafter ran away. Lalita raised hue and cry. The neighbours extinguished the fire.

12. The said dying declaration was recorded by PW-4 Police Head Constable Burange. On the dying declaration the thumb impression of the right leg of Lalita was obtained. PW-4 Police

Head Constable Burange in his deposition has stated that the version of Lalita which was stated in his presence was reduced by him in writing. As the deceased Lalita sustained injuries on her chest, abdomen and both hands, PW-4 obtained right leg thumb impression on her complaint. As a result of burn injuries on both hands, it was not possible to obtain thumb impression of the hands of Lalita. PW-4 deposed of being informed that the appellants locked the house of the deceased from inside.

In cross examination, PW-4 stated that after receiving telephonic call from PW-1 Nandu Shinde, on the oral directions of PSO Deshmukh he proceeded to the spot. PW-4 denied having met PW-1 Nandu Shinde on reaching the spot. PW-4 stated that Lalita was sitting adjacent to the shed of her house. He further stated that PW-3 Tanaji Gavali and Tupere, who extinguished the fire on the person of Lalita, were present at the spot. PW-4 inquired as to how Lalita came out of the house despite the door locked from inside. PW-4 was informed that the appellants had fled from the spot after removing the tin sheets and Lalita came

out of the house from this access. PW-4 deposed that the tin was not torn and that it was removed. He further deposed that Lalita herself came out of her house and sat near the shed. PW-4 denied the suggestion of having created a false story. PW-4 further denied the suggestion that he is deposing falsely at the behest of PW-1 Nandu Shinde. He admitted that it is after recording the complaint-cum-dying declaration (Exhibit 26), the ambulance was called. PW-4 says that initially the deceased Lalita was treated at PHC, Vairag. The ambulance was stationed for five minutes in PHC, Vairag. Thereafter, it took them 1 hour 45 minutes to reach the Civil Hospital, Solapur. PW-4 says that he obtained the case papers around 11.00 to 11.30 p.m.. He further deposed that relatives of deceased Lalita came to the hospital at around 1.30 to 2.00 a.m. He deposed that he did not call Special Executive Magistrate. He admits that he was present in the hospital till 2.00 a.m. PW-4 deposed that he does not know who recorded this dying declaration of deceased Lalita. PW-4 denied that Exhibit 26 is reduced in writing at the instance of PW-1. PW-4 further stated

that he is not aware whether Krishna Nagnath Pawar eloped with the wife of Anil, the brother of PW-1 Nandu Shinde and that in this respect, a crime is registered at Vairag police station. PW-4 says that he is not aware whether a criminal case under Section 307 of the IPC is registered against PW-1 Nandu Shinde and his brother for causing grievous injury and attempt to murder the appellants' son Sachin. PW-4 denied the suggestion that PW-1 Nandu Shinde and PW-3 Tanaji Gavali are informants of the police. PW-4 further deposed as not true the suggestion that the appellants are falsely dragged in this case to please PW-1 Nandu Shinde and his brother Anil Shinde.

13. From the evidence PW-4 it is seen that though PW-4 says that he has deposed as per the version of deceased Lalita recorded in the first dying declaration, however, his deposition that the door was locked from inside, is not a part of the version of deceased in the first dying declaration. Considering the critical condition of Lalita, it is surprising that the ambulance was called only after

recording the detailed dying declaration. Moreover, PW-4 has deposed that it was not possible for him to obtain the left hand thumb impression as the hands of the deceased were badly burnt, in such circumstances it was prudent for him to call for the ambulance first and then proceed further.

14. Admittedly, the deceased suffered at least 80% burn injuries. PW-4 nowhere stated that he satisfied himself if deceased Lalita was in a conscious state to give a statement. PW-4 has admitted that the deceased Lalita was illiterate. Further, he has obtained thumb impression of the right leg on the statement-cum-dying declaration at Exhibit 26 as she was badly burnt. The second dying declaration would however reveal that the left hand thumb of deceased Lalita was intact as the thumb impression of the left hand had been obtained on the second dying declaration. As there was no occasion to obtain the endorsement of M.O. on the D.D., the same will have to be scrutinized carefully. The D.D. was not read over and explained by PW-4 to Lalita which would make the first

dying declaration suffer from a serious infirmity. He did not make any effort to find out whether Lalita was in a fit mental state to give the statement. He has further not deposed that the same was read over and explained to the deceased for being satisfied that it was as per her say. This makes the D.D. doubtful and infirm.

15. Before we consider the evidence of PW-1 and PW-3 it would be material to refer to the spot panchanama at Exhibit 18. The spot panchanama records that the tin shed where the incident occurred has the main door facing East. The door is latched from inside and affixed with a lock. Three tin sheets on the Southern side of the room have been removed after cutting the same and pushed outside. The room is admeasuring 7 ft. x 8 ft. There are burnt pieces of clothes on the floor. On the Western side of the room there is a white colour plastic can containing a small quantity of kerosene. On the floor there is a match box with matchsticks scattered around. Inside the match box there are two half burnt matchsticks. The tin roof has become blackish. The height of the

tin shed is 7 ft. On the Northern side essential household articles like stove, utensils were seen.

16. The version leading to the act of setting deceased Lalita on fire is completely different in the two dying declarations. As per version of the deceased Lalita in the first dying declaration, the appellants picked up a quarrel as they suspected her character and questioned her about coming home late. A specific role is attributed to the appellant No.2 that he poured kerosene and it is the appellant No.1 who set her on fire. It is further her version in the first dying declaration that when the appellants came to the house of Lalita, they were having kerosene can in their hand. The version in the second dying declaration is about the insistence on the part of appellants that the case registered against the brother of deceased not to result in his acquittal. The appellants therefore picked up a fight and set her on fire. The versions are thus completely different.

17. The spot panchanama reveals that there was a stove in the house and only one kerosene can with small quantity of kerosene was found. Further, in the first dying declaration there is no mention that the appellants made good their escape by removing the tin sheets. The first dying declaration does not find a mention that the appellants latched the door and locked it from inside after they entered the house of deceased Lalita. The spot panchanama reveals about the lock on the door from inside. PW-4 and PW-5 having deposed that Exhibit 26 is recorded as per the version of the deceased Lalita, the deposition to the effect that the door of the house was locked from inside is an improvement, obviously to ensure that their deposition is consistent with the spot panchanama which finds a mention about the door being latched from inside and locked. As Lalita was using a stove for cooking, it is but natural that a kerosene can would be found in her house. The version about appellant No.2 entered the house with a kerosene can appears to be concocted. For all these reasons the evidence of P.W.4 who recorded the D.D. will need very close

scrutiny as P.W.4 was all along with the deceased Lalita and in the company of P.W.1 & P.W.3 at the spot. That P.W.4 does not say anything about the presence of P.W.1 at the spot and so also the version of P.W.1 which is contradictory to the version of P.W.3 on some vital aspects, lends credence to defence version about deceased falsely implicating appellant at the instance of P.W.1. The probability of a false implication cannot be ruled out in the light of analysis of deposition of P.W.1 & P.W.3 in the later part of the judgment.

18. Deceased Lalita in the second dying declaration has a different version to offer. According to her, the appellants picked up a quarrel with her over a criminal case which was registered against her brother Krishna Nagnath Pawar. The appellants wanted that the brother of Lalita should not be acquitted in the said case and therefore picked up a quarrel. Having assaulted her, they poured kerosene from the can which was kept in the house and set her on fire with a matchstick. Thus, the version of the deceased Lalita in the second dying declaration leading to the

appellants pouring kerosene on her person is completely different from the first dying declaration.

19. Let us now consider the evidence of PW-1 and PW-3 who were present at the spot. PW-1 Nandu Shinde resides at a distance of 5 minutes from the house of the accused. He has deposed that initially the appellants and deceased Lalita stayed jointly. Thereafter, there were quarrels between the appellant No.1 and deceased Lalita whereafter deceased Lalita started residing separately in a room which is at a walking distance from the house of the appellants. PW-1 in his evidence has stated that after hearing hue and cry coming from the house of Lalita, people rushed and gathered at the spot. Even PW-1 rushed at the spot and saw smoke coming out of the house of the deceased Lalita. The appellants came out of the said room by breaking the tin sheets and made good their escape on a motorcycle. PW-3 Tanaji Gavali and other neighbours extinguished the fire. PW-1 informed the incident to Vairag Police Station on telephone.

In cross examination PW-1 admitted that the appellants had lodged criminal case bearing No. 137 of 2008 under Section 307 of the IPC against PW-1 and his family members. He denied that he and his family amputated the thumb of Sachin, son of the appellants and also assaulted both the appellants which resulted into filing of the criminal case under Section 307 of the IPC. He admitted that the Sessions Case ended in an acquittal before 5 to 6 months prior to the incident. He deposed that he does not know as to whether his wife Rohini lodged a complaint against Sachin, son of the appellants, with Mohol police station under Section 376 of the IPC, after 4-5 months from the alleged occurrence in Sessions Case No. 137 of 2008. He further deposed that he does not know whether Sachin is arrested in rape case. PW-1 further admitted that Krishna Nagnath Pawar, brother of the deceased Lalita eloped with the wife of PW-1's brother Anil. PW-1 admitted that the deceased Lalita is the daughter of Nagnath Pawar. PW-1 stated that his maternal uncle Nagnath is resident of Barshi. (We have referred to the deposition of PW-1 recorded in vernacular

language before the trial Court which is a part of the record and proceedings.) He further admitted that Nagnath has two daughters and three sons. He denied the suggestion that the deceased Lalita was working as a folk dancer in a Tamasha Company. He was not aware as to whether the deceased Lalita has taken a loan from the owner of the Tamasha Company or that she worried as she was unable to clear the debt. PW-1 denied the suggestion that his family is on cross terms with that of the appellants prior to the incident. He admitted that even before he reached the spot, 10 to 15 persons were present from his locality. He admitted that PW-3 Tanaji Gavali, his wife and some of his workers were present. PW-1 admitted that deceased Lalita used kerosene for cooking purposes. He further admitted that articles like stove, plastic can and matchstick were available in the place of Lalita. He further admitted that the room of Lalita is very tiny and narrow. He further says as not true that until the alleged occurrence, the appellant No.2 Jahangir and Lalita had good relations. PW-1 says that he did not sustain any burn injuries on his person while

extinguishing the fire. He further admits that even these 10 to 15 persons who had gathered on the spot did not sustain burn injuries on their person while extinguishing the fire.

20. PW-3 Tanaji Gavali in his evidence stated that he rushed to the house of Lalita after hearing noise of quarreling. He saw smoke coming out of the house of Lalita. The appellants made a dent in the tin sheet and came out of the house of deceased Lalita. PW-3 noticed that Lalita had caught fire. PW-3 poured water and attempted to extinguish the fire. He deposed that neighbours gathered on the spot and thereafter the police came.

In cross examination he admits that right hand thumb of Sachin, son of the appellants, was amputated. PW-3 stated that he is not aware whether wife of PW-1 Nandu Shinde lodged the complaint against Sachin, son the appellants, for rape. He further states that he is not aware as to whether the brother of the deceased Lalita had eloped with the wife of Anil. Anil is the brother of PW-1 Nandu. PW-3 states that he came to the spot

before Lalita was set ablaze. PW-3 states that he and PW-1 came rushing to the spot. PW-3 further states that there was no one else except him and PW-1 on the spot. PW-3 put a bed-sheet on the body of Lalita after extinguishing the fire with water. PW-3 admitted that the condition of deceased Lalita was serious. He then says that it is PW-1 who was present inside the house. PW-3 says that he did not enter the house. PW-3 further states that it is PW-1 who brought Lalita out of the house and then put bed-sheet on her person. PW-3 deposed that he did not know whether the door of the house was latched from inside. PW-3 further deposed that he did not make any efforts to open the door. PW-3 states that the tin sheets were removed.

21. Thus, from the evidence of PW-1 it is revealed that the appellants had filed criminal case under Section 307 of the IPC against PW-1 and his family which resulted in acquittal about 5 to 6 months prior to the incident. PW-1 further states that he was not aware about the criminal case for rape filed against Sachin, son of

the appellants, 2 to 3 months after filing of the case under Section 307 by the appellants. There is, thus, every possibility and every reason for PW-1 to have an axe to grind against the appellants. It is obvious that PW-1 is on inimical terms with the appellants.

22. The evidence reveals that the father of the deceased Lalita is a maternal uncle of PW-1. PW-1 has further admitted that Krishna Nagnath Pawar, brother of the deceased Lalita had eloped with wife of PW-3's brother Anil. Even from the evidence of PW-1 Nandu Shinde it is seen that the deceased Lalita was staying separately due to tussle and discord which she had with appellant No.1. The deceased Lalita obviously was not happy with the appellant No. 1. Even according to the version of the deceased Lalita in the first dying declaration, she was not aware that the appellant No.2 was married to appellant No.1. It is only after she started residing in the matrimonial home that she came to know the appellants are married. It is in evidence that due to quarrel between deceased and appellant No.1 she started living separately. The deceased Lalita was unhappy with the appellants, hence the

dying declarations even from that angle have to be scrutinised very carefully and needs corroboration in the present case.

23. Even the version of PW-1 and PW-3 is inconsistent and contradictory in as much as that PW-1 has stated that 10 to 15 persons had already gathered at the spot before PW-1 reached, whereas, PW-3 has stated in his evidence that it was only PW-1 and PW-3, who were present at the spot and nobody else. PW-3, in fact, admitted that upon hearing the quarrel he reached the spot even before the deceased Lalita was set on fire. PW-3 further deposed that it is PW-1 who entered the house of Lalita and brought her out of the house. If what is being deposed by P.W.3 is true, then obviously the attempt of P.W.1 to conceal this aspect about P.W.1's presence in the house along with Lalita and then bringing her out whereafter the statement of Lalita is recorded by PW.4, gives credence to the defence case about possibility of falsely implicating appellants at the instance of P.W.1 as the evidence suggests that P.W.1 and appellants are on inimical terms.

24. The spot panchanama shows that the door was latched and locked from inside. If the version of the prosecution is to be believed then the appellants made good their escape by removing three tin sheets. In the first dying declaration Lalita says that the appellants brought a can of kerosene. Though the first dying declaration in an exhaustive narration of what deceased Lalita informed PW-4, there is no mention that upon entering the house, the appellants latched the door from inside and locked it. The appellants having entered the house from the door as per Lalita's version, it is highly improbable that the appellants would then escape by cutting three tin sheets instead of using the door if at all the appellants had latched and locked it.

25. Having regard to the marital discord prevailing between the appellant No.2 and deceased Lalita and further that deceased Lalita started residing separately because she was not getting well along with appellant No.1 would clearly be indicative of the grudge deceased Lalita nurturing towards the appellants. Further in the light the animosity which PW-1 had towards the appellants,

the possibility of tutoring of deceased Lalitha by PW-1 cannot be ruled out.

26. Now coming to the second dying declaration at Exhibit 23 recorded by the Special Executive Magistrate PW-2. PW-2 started recording the dying declaration at around 11.45 p.m. In his evidence he has stated that he met PW-4 Medical Officer on duty and inquired with him about the conscious orient of the patient. The Medical Officer told that the patient was conscious oriented. The deceased Lalita disclosed that her husband – appellant No.2 and appellant No.1 - first wife of her husband poured kerosene on her and set her ablaze by lighting the matchstick. PW-2 Special Executive Magistrate denied that the police officer escorted him to the hospital and informed him about the incident.

In the cross examination, he admits that the patient was in critical condition. He further admits that the police told him that the patient was initially treated at PHC, Vairag. He denied the suggestion that the dying declaration was recorded at the instance

of the police. PW-2 further denied the suggestion that the police accompanied him while recording the dying declaration.

27. If the second dying declaration at Exhibit 23 is perused, deceased Lalita narrated that the appellants took up a fight with her as the appellants wanted the criminal case which was filed against Krishna Nagnath Pawar, the brother of deceased Lalita should not result in an acquittal. She then says that the appellants poured kerosene on her from the can which was kept in her house and set her on fire.

28. Coming back to the evidence of PW-4 in the context of second dying declaration Exhibit 23, PW-4 deposed that the relatives of the deceased Lalita came to the hospital between 1.30 a.m. to 2.00 a.m. PW-4 further stated that he was present in the hospital till 2.00 a.m. PW-4 further says that he is not aware as to who had recorded the dying declaration of deceased Lalita. PW-4 also denied the suggestion that he has falsely dragged the

appellants in the present case so as to please PW-1 Nandu Shinde and his brother Anil Shinde.

29. Here again the evidence of P.W.4 needs to be analysed carefully. PW-4 has recorded the first dying declaration Exhibit 26. Thereafter, he accompanied deceased Lalita in an ambulance firstly to the PHC at Vairag and thereafter to the Civil Hospital at Solapur. He states that it took him 1 hour and 45 minutes to reach the Civil Hospital. He admitted his presence in the hospital till 2.00 a.m. Though it is expected that he should not remain present when the Special Executive Magistrate records the dying declaration so that the statement of the declarant is free and voluntary, we find it difficult to believe that he is not aware as to who recorded the dying declaration of deceased Lalita in the Civil Hospital. PW.4 was with Lalita right from 8.00 p.m. till 2.00 a.m..

30. We also find the version of P.W.4 that he did not meet PW.1 at the spot is highly doubtful. PW.1 had a case registered

against him at Vairag police station and there are suggestions about his wife having filed a criminal case against the son of appellants. P.W.1 even admits to a case registered against the brother of deceased. P.W.4 is stationed at Vairag police station for more than 6 years. It is therefore improbable that P.W.4 would not meet P.W.1 at the spot though it is P.W.1 who had informed the police about the incident. The manner in which the first D.D. is recorded, also considering that P.W.4 was with the deceased Lalita from 8.00 p.m. till 2.00 p.m. during which time the second D.D. is recorded having a mention about the case filed against the brother of the deceased by the P.W.1, is indicative of the possibility of tutoring the deceased at the instance of P.W.1. It is highly unsafe to rely upon the second D.D. for convicting the appellants.

31. The inconsistencies and contradictions in the evidence of PW-1 and PW-3 coupled with the circumstances hereinabove mentioned would render the evidence of PW-1 and PW-3 unreliable. The inconsistencies in two dying declarations as regards

the version leading to the incident of deceased Lalita being set on fire is also one of the circumstance which would render the dying declarations doubtful and unsafe to rely upon. The evidence of PW-5 IO and PW-4 Police Head Constable Burange that the door of the house was locked from inside is obviously with a view to make the dying declaration Exhibit 26 consistent with the spot panchanama.

32. It is nobody's case that the appellants had any animosity towards Krishna. PW-1 has categorically deposed that the deceased Lalita's brother eloped with wife of PW-1's brother Anil and that a case has been registered against Krishna. There is nothing on record to indicate why the appellants wanted the case against Krishna to result in his conviction. On the contrary, it is PW-1 and his brother who having filed the case against Krishna would want Krishna to be convicted. PW-1 Nandu admitted that they filed a complaint against Krishna who enticed Sunita, wife of his brother Anil. This being the case, it is beyond comprehension, as to why

the appellants would want the case against Krishna not resulting an acquittal. It is therefore probable and as is the defence case that the appellants are implicated at the instance of PW-1.

33. It is no doubt a settled principle of law that a conviction can be recorded on the basis of the dying declaration alone if the same is wholly reliable. The circumstances narrated above raise a suspicion as regards the correctness of the dying declaration. The evidence brought on record suggests that the dying declaration does not reveal the truth. The circumstances on record and the evidence adduced, in our opinion, clearly indicate that what have been stated in the dying declaration may not be correct. The deceased Lalita was obviously unhappy with the appellant No.2 as he had married appellant No.1 which fact she came to know only after her marriage. Deceased Lalita started residing separately as she was not getting along well with the appellants. The evidence on record is sufficient to indicate that she has been nurturing a grudge against the appellants. The possibility of deceased Lalita

committing suicide and while doing so she has implicated the appellants to make their life miserable cannot be ruled out. This is supported by the circumstance that the door of the house was locked from inside and therefore the possibility of the deceased being brought out after cutting three tin sheets cannot be ruled out. There is also a strong possibility of a false implication at the instance of PW-1.

34. The dying declarations at Exhibit 23 and Exhibit 26, according to us, do not appear to be truthful and voluntary to make a foundation for sustaining the conviction.

35. In this context, it would be profitable to refer to the decision of the Apex Court in the case of **P. Mani v. State of Tamil Nadu**¹.

In paragraph 14 Their Lordships held thus :

“14. Indisputably conviction can be recorded on the basis of dying declaration alone but therefor the same must be wholly reliable. In a case where suspicion can be raised as regard the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on records

1 2006 Cri.L.J. 1629

suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on records clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the Appellant has been charged under Section 302 of the Indian Penal Code, the presumption in terms of Section 113A of the Evidence Act is not available. In absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused.”

36. The trial Court was of the view that initiation of Sessions Case No.137 of 2008 by the appellants against PW-1 Nandu and his family members is not *ipso facto* reason to doubt the version of PW-1 Nandu Shinde. The trial Court was impressed with the deposition of PW-1 that the trial had come to an end 5 to 6 months before the incident. The trial Court was of the opinion that there is no question of prompting or tutoring by PW-1 Nandu Shinde as the dying declaration Exhibit 26 has been recorded as per the version of the deceased Lalita by PW-4 Police Head

Constable Burange. The trial Court was further of the view that though the second dying declaration Exhibit 23 is not as detailed as the first dying declaration Exhibit 26, as the act of pouring kerosene by the accused is attributable to the appellants, the version of the deceased Lalita contained in second dying declaration has to be regarded as additional facts disclosed by the deceased Lalita. We are unable to subscribe to this view of the trial Court for the reasons we have already discussed.

37. We find that the appreciation of the evidence by the trial Court is erroneous. We find that there is no convincing evidence for sustaining the conviction of the appellants for the offence punishable under Section 302 of the IPC.

38. For the reasons hereinabove stated, we pass the following order :

ORDER

- i) The Appeal is allowed.

ii) The impugned judgment and order dated 31st July 2012 passed by Additional Sessions Judge, Solapur in Sessions Case No. 123 of 2011 to the extent of sentencing the appellants for the offence punishable under section 302 read with section 34 of Indian Penal Code and sentencing them to suffer life imprisonment and to pay a fine of Rs.1,000/- in default to suffer rigorous imprisonment for six months is quashed and set aside.

iii) The appellant No. 1- Shobha Jahangir Shinde @ Bhosale and appellant No.2 – Jahangir Srirang Shinde @ Bhosale are acquitted of the offence punishable under section 302 read with section 34 of Indian Penal Code. They should be released forthwith unless required in any other case.

iv) The fine amount, if any, shall be refunded to the accused – appellants.

v) So far as acquittal of accused for the offence punishable under section 494 read with 34 of Indian Penal Code vide section

235(1) of Code of Criminal Procedure by trial Court stands confirmed.

vi) This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(M.S.KARNIK, J.)

(S.S.SHINDE, J.)

Urmila
P.
Ingle
Digitally
signed by
Urmila P.
Ingle
Date:
2020.08.31
13:54:12
+0530