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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 351 OF 1998

Gangubai Kashinath Kamble, } ...Appellant
Convict No. B-20. } (Orig. Accused)

Versus

The State of Maharashtra } Respondents
} (Orig. Complainant)

Mr. Veerdhawal Deshmukh, appointed for the Appellant.
Ms. S.V. Sonawane, APP for Respondent – State.

CORAM : PRASANNA B. VARALE &
N.R. BORKAR, JJ.

RESERVED ON : AUGUST 04, 2021.
PRONOUNCED ON : DECEMBER 22, 2021.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. Being aggrieved by the judgment and order passed by the learned Additional Sessions Judge, Pune, in Sessions Case No. 365/1994, dated 24th February, 1995, whereby Appellant herein (Original Accused) who was convicted for the offences punishable under Sections 302 of the Indian Penal Code (for short "IPC"), and sentenced to suffer imprisonment for life and also to pay fine of Rs. 100/- in default to suffer further R.I. for one year, preferred the present Appeal.

2. The case of prosecution rests on the oral and documentary evidence in the form of five witnesses examined by the prosecution in support of its case and the documents in the form of injury certificate, postmortem report, various panchnamas and CA report. The accused in her defence examined one witness. The prosecution in support of its case heavily relied on two dying declarations.

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

Accused – Appellant was residing with her husband, son Shivshankat at one tenement marked as 9/8 'B' type, Range-Hills, Khadki, Pune. Her husband Kashinath was working as labourer in the Ammunition Factory, Khadki and was receiving a meager salary of 2,000/- and this meager salary was further subjected to various deductions. After all deductions, Kashinath was getting salary of Rs. 600 cash in hands. This amount of Rs. 600 per month was wholly insufficient for the wife i.e. Appellant to run the house. On account of this disproportion namely, the requirement of money for the expenses as against the meager amount of Rs. 600 being

received by the Kashinath in which the Appellant was to run the house, was always a reason of quarrels between the couple. These quarrels also led to two complaints being lodged by the Appellant against her husband in the police station. The unfortunate incident took place on 10.06.1994.

4. The deceased-Kashinath along with his grand-daughter went to the Ammunition Factory to collect the amount of his salary. As soon the deceased came out of the factory, the accused who was waiting outside, asked the deceased for payment. The deceased replied that he received the salary of Rs. 50 only after all deductions. The couple then proceeded to market for purchasing some sweets for grand-daughter. Then they dropped grand-daughter in the matrimonial house of their daughter and returned back to their residence at about 10.00 pm. The deceased asked the Appellant to cook the food to which Appellant asked the deceased to give her money so as to make arrangements for cooking food. The deceased expressed his inability. This exchange of words led to quarrel between the couple. It is the case of the prosecution that the accused hurled

abuses and by pouring kerosene on the person of her husband and by igniting matchstick from the match box set him on fire. The deceased who was subjected to the burns started shouting. One Rakesh Pilley (PW 2) who happened to be sub-tenant of the deceased opened the door of his room and found that the deceased in flames whereas Appellant was standing. Rakesh (PW 2) asked her mother to bring blanket. Meantime, the deceased and Appellant both came on the ground floor. Rakesh (PW 2) who was having blanket also got down on the ground floor and wrapped the deceased in the blanket so as to extinguish flames. One Amol Thorat (PW 1) who had parked his handcart and was talking to one resident of the area also witnessed the incident. While Rakesh was wrapping the deceased in blanket, he told him that his wife set him on fire and ran away.

5. Meantime, mother of Rakesh made a phone call to police. Then police immediately reached on the spot and took the deceased to Military Hospital, Khadki. PSI Narayan Kamthe (PW 3) who was attached to Khadki Police Station at the relevant time on receipt of the information rushed to Military Hospital and in presence

of one D.B. Mokashi, Nursing Assistant working in the Military Hospital recorded the statement of the deceased and the same was treated as first information report and offence was registered as Crime No. 126/94 under Section 307 of IPC. As the deceased was subjected to burns and was admitted in the hospital, Shri A.R. Patil, JMFC, Khadki was requested to record the dying declaration of the deceased by Khadki Police. Accordingly, A.R. Patil, JMFC visited the Military Hospital and after ascertaining the consciousness and fit state of mind of the deceased recorded the statement i.e. dying declaration Exh. 30.

6. The appellant came to be arrested on 11.06.1994 and was sent for medical examination. On 17.06.1994 at about 05.00 pm the deceased succumbed to burn injuries and on receipt of this information, PSI Dhone (PW 4) visited the Military Hospital and had drawn inquest panchnama. The dead body of the deceased was referred to Sassoon Hospital for postmortem. Dr. Mahajan attached to Sassoon Hospital conducted the postmortem on 18.06.1994 and issued the postmortem report and advanced death certificate. The cause of

death opined in these documents was due to shock and result of burn injuries. In view of the postmortem report and advanced death certificate as well as an information received by Khadki Police Station about the death of Kashinath, the offence under Section 307 was altered to an offence under Section 302 of IPC. The investigating agency which was set in motion on registration of FIR took further steps in the investigation such as, drawing necessary panchnamas, recording statement of witnesses and after completion of the investigating filing of charge-sheet in the court of JMFC, Khadki. As the offences being exclusively triable by the Court of Sessions, the learned JMFC committed case to the Court of Sessions.

7. The charge was read over and explained to accused, to which accused pleaded not guilty and claimed trial. The defence of the accused was of total denial and false implication. Learned Sessions Judge on the basis of material before him in the form of evidence, framed the following points for consideration:

1. Does the prosecution prove that the death

of deceased Kashinath on 17.6.1994 at 5-00 p.m. as indoor patient, was unnatural homicidal?

2. Does the prosecution prove that the accused on 10.6.1994 at about 10.30 p.m. in her residence caused burning injuries to deceased Kashinath by setting him on fire after pouring kerosene and committed his homicidal unnatural death?

3. Whether there was motive on the part of the accused to commit the murder of her own husband Kashinath?

8. Learned Sessions Judge, on appreciation of evidence, answered all the points in affirmative and by judgment and order awarded the conviction and sentence to the Appellant.

9. The prosecution in support of its case examined as many as 5 witnesses.

10. Firstly, we may refer to the evidence of PSI Narayan Kamthe (PW 3), Investigating Officer, who recorded the dying declaration first in point of time. This witness in examination-in-chief deposed that he was attached to Khadki Police Station as PSI at the

relevant time. He was on duty in Bopodi Police Chowky on 10.06.1994. At night round about 11.00 pm when he was on duty, he received information of burning of one Kashinath Tayyappa Kamble. Therefore, he came to Range-Hills, police chowky. In the police chowky, he learnt that the burnt patient sent to Military Hospital, Khadki. Therefore, he went to the said Hospital. The burn patient Kashinath was admitted in ICU Ward No. 5. He was conscious. Then this witness made inquiry with him. He was in talking condition. AS per his narration, this witness recorded his statement. While recording his statement, Nursing Assistant of that Hospital, Shri. P.B. Mokasi, was present. After recording the statement, it was read over to the patient and he admitted it to be true and correct. This witness further stated that after he obtained his thumb impression on the said statement. Nursing Assistant Shri. P.B. Mokashi, also put his signature and this witness also put his signature on it. Thereafter, he sent the said statement to Khadki Police Station along with his report for registration of offence. Then this witness visited the scene of offence and prepared the

spot panchnama.

In the cross-examination, this witness stated that dying declaration at Exhibit 22 is not in his handwriting and his writer scribed it as per his dictation and there is no mention in Exhibit 22 that it was scribed by his writer as per his dictation. Then certain suggestions were given to effect that as per declaration made by patient, this witness did not dictate to his writer, then thumb mark of patient was obtained on blank paper, doctor orally told him that patient is conscious, then without obtaining oral permission, he directly went to the hospital, all these suggestions were denied. This witness admitted that when this witness visited the patient, doctor was sitting in his chamber and not near the patient. Doctor did not examine the patient in his presence.

11. Now, we may refer to another important witness i.e., Ashok Patil (PW 5), who recorded the second dying declaration. In examination-in-chief, this witness deposed before the Court that he received request letter from Khadki Police in the night in between 10.06.1994 and 11.06.1994 around 01.20 a.m. for

recording dying declaration of injured Kashinath Kamble. Accordingly, immediately after receipt of the said letter, he went to Military Hospital, Khadki. He further deposed that the patient Kashinath was admitted in the hospital having burn injuries. He was conscious and in a position to speak. He himself ascertained the fact of his consciousness and state of mind, by putting question to the patient, whether he is able to speak. Then the patient replied in the affirmative. Thereafter, as per his narration, he recorded his dying declaration at about 02.00 a.m. Then he obtained the thumb impression of the patient on the said dying declaration. Doctor on duty of the said hospital was present during the period of recording dying declaration. The name of the doctor is Lahiree and he also put his signature on the dying declaration recorded by this witness.

In the cross-examination, this witness stated that at the time of recording the dying declaration, police were not present. For recording the dying declaration police took this witness to the hospital only. Then a suggestion was given that at the time of

recording the dying declaration at Exhibit 30, patient was unconscious, this suggestion was denied.

12. Now we may refer to another set of witnesses i.e., Amol Thorat (PW 1) and Rakesh Pilley (PW 2), the eye witnesses, as claimed by the prosecution.

13. Amol Thorat (PW 1). This witness in his examination-in-chief, stated that he deals in vegetables on handcart in Jwala Mitra Mandal square. He was knowing the deceased Kashinath Kamble. He was residing at B type 9/8, Range-hills, Pune and the said building is near to the spot, where he used to deal in vegetables at square. He resides in B type 9/3 building on the ground floor, whereas the deceased was residing on the upper story on the said building. This witness further deposed that on 10.06.1994, as usual he was managing the business of vegetables in the square. At night at about 10.30 p.m after his business, he went to keep his handcart to the house of one Raju. After parking the said cart, he was talking with one Dolas. In the meantime, Kashinash Kamble came from the upper story of his residence in burnt condition. Then Rakesh

Pilley extinguish the fire by putting blanket on the person of Kashinath. He wrapped Kashinath with blanket. At that time, Kashinath Kamble was shouting and was saying that his wife set him on fire and she ran away. Then this witness disclosed the said fact to Raju Kamble. This witness further stated that people of that locality sent phone message to the police. Then police and ambulance came there.

In the cross-examination, this witness stated that he never visited to the house of accused. He learnt from the people that deceased, his wife and son were residing together. The deceased alone came from his house. He was unable to tell the distance between him and deceased Kashinath while he was coming from upper story. This witness admitted that he was standing at such distance that the voice of man cannot reach.

14. Rakesh Pilley (PW 2) is another eye witness. This witness in examination-in-chief deposed before the Court that in the month of June, 1994, he was residing at B Type 9/8, Range-hills, Pune as sub-tenant of deceased. Deceased was residing by the side of his house. This witness deposed that on the day of incident

i.e. on 10.06.1994 at night, he himself and his sister were seeing the T.V. program and his mother was sleeping. At about 10.30 somebody knocked the door. He opened the door and saw appellant was standing in front of Kashinath, who was burning. In the meantime, his mother also came there and said that she will bring water. But he asked her do not bring water, bring Kambal. This witness further deposed that meantime, Kashinath and his wife went towards the ground floor. He then went along with blanket and wrapped around the body of Kashinath and extinguished the fire. The appellant was standing by the side. Then his mother sent phone message to police. At that time, Kashinath made declaration that his wife set him on fire.

In the cross-examination This witness stated that the deceased Kashinath used to consume liquor and was quarrelsome person.

15. Now, we may refer to the injuries found on the person of Kashinath, as referred in postmortem conducted by Dr. Mahajan on 18.06.1994. During the postmortem following injuries were found on the dead body:

1. *Superficial to deep burn injuries present involving complete face and neck.*
2. *Superficial to deep burn injuries present involving right upper limb complete upto tips of fingers.*
3. *Superficial to deep burn injuries involving left upper limb complete upto tips of fingers, on dorsal aspect, upto palm on flexer aspect. Ink mark seen over left thumb.*
4. *Superficial burn injuries involving complete chest wall and abdominal wall upto 2" below the level of umbilicus completely.*
5. *Superficial burn injuries over right lower limb complete upto base of toes.*
6. *Superficial burn injuries over left lower limb sparing only antero-catenal aspect of thigh upto knee.*
7. *Superficial to deep burn injuries involving complete back and buttocks. Pus like material seen on places.*
8. *Superficial wound or venesection over left cubital fossa, 3 sutures seen.*
9. *Surgical wound of venesection over left ankle, 3 sutures seen.*

As per his opinion, total percentage of burns were about 90%.

16. Now the last witness of prosecution is, PSI

Dhone (PW 4), the investigating officer. This witness stated that on 11.06.1994, he received the case papers of crime no. 126/94 under Section 307, 504 of the IPC from PSI. Kamthe, for further investigation. This witness further stated about the steps taken by him in the process of investigation such as, effecting arrest of accused, recording the statement of witness, drawing seizure panchnama, collecting CA report, drawing inquest panchnama, etc.

17. The defence in his support examined Shivshankar Kashinath Kamble (DW 1), son of deceased. In examination-in-chief this witness stated that his deceased father was suffering from T.B. He was always consuming a liquor and Ganja. He was doing work in Ammunition factory at Khadki. He further stated that he was in debt. He further stated that the tenant Smt. Pilley, told him to go as you are called by your sister. When he was going to his sister, he saw her parents who were quarreling on the road. Then he pacified them and went to his sister. While returning back, when he was purchasing a pan, his friend disclosed him that his father set on fire. Then he sent

phone message to Ammunition Factory. Then her mother had been to police chowky.

In the cross-examination, this witness admitted that appellant was angry with his father as he was consuming liquor, so also, giving less money to her. He further admitted that complaint was made by appellant against the deceased to the police that he used to beat her under the influence of liquor. As his father was always beating to appellant, appellant was fed up. He further stated that in the year 1988, appellant tried to commit suicide by setting herself on fire, as appellant was fed up with the harassment by deceased.

18. Learned Counsel Mr. Deshmukh appointed for the Appellant vehemently firstly submitted that the evidence brought by the prosecution before the Court in support of its case cannot be accepted. The witnesses examined by the prosecution cannot be termed as eye witnesses to the incident, is the submission of learned Counsel for the Appellant. Learned Counsel for the Appellant further submitted that it would be unsafe to rely on the dying declaration to award conviction and

sentence to the Appellant. Learned Counsel further submitted that even assuming the version of witnesses and dying declaration, this material show that the act of the Appellant was not an act with premeditation. Learned Counsel further submitted that the evidence brought on record by the prosecution clearly show the sequence of events such as, the Appellant asking her husband about the salary and husband then replied that he received only Rs. 50 after all the deductions, thereafter the husband of the Appellant asked her to cook food and she expressed her inability on account of non-availability of the sufficient amount. Learned Counsel further submitted that admittedly the exchange of words between the Appellant and her husband led to a quarrel and hurling abuses. Learned Counsel further submitted that as the Appellant was constantly subjected to the harassment by her husband who was unable to take care of family expenses and the Appellant was running her house for the entire month with a meager amount of Rs. 600, led to sudden provocation.

19. Learned Counsel for the Appellant further

submitted that the evidence of defence witness clearly show that the deceased husband of the Appellant was carrying vices of i.e. he was addicted to liquor and consuming Ganja. The evidence would also show that two complaints were lodged at the instance Appellant against her husband in the police station for harassment and ill-treatment. Thus, learned Counsel submitted that as act of the Appellant was not an act of intention or premeditation. Learned Counsel further submitted that the evidence brought on record clearly show that the Appellant was fed up due to the poverty suffered by her on account of meager earnings of the husband and this meager earning was result of vices of her husband. Learned Counsel further submitted that the evidence clearly show that the dying declaration – Exhibit 22 recorded by Narayan Kamthe (PW 3) is not in his writing and in the cross-examination, the witness admits that the statement was recorded by his writer under his dictation. Learned Counsel further submitted that though prosecution has placed reliance on oral dying declarations, the oral dying declarations cannot be relied upon for the reason that the said dying

declarations were made in the presence of police. Thus, learned Counsel for Appellant submitted that the case against the Appellant would not fall under Section 302 of IPC but at the most would fall under Section 304(I) of IPC.

20. *Per contra*, learned APP vehemently submitted that the prosecution has brought on record clinching evidence against the Appellant. Learned APP submitted that no fault can be found in the dying declarations, as the dying declarations comply with all the requisite criteria. The dying declarations are recorded by ascertaining fitness and the consciousness of the the deceased. The first dying declaration was immediately recorded by PSI Narayan Kamthe (PW 3) after ascertaining the fitness of the patient. Similarly, the second dying declaration is also reliable and truthful. Learned APP submitted that the other independent witnesses namely, Amol (PW 1) and Rakesh Pilley (PW 2) who are the independent witnesses, have supported the case of prosecution. Learned APP further submitted that apart from the dying declarations recorded by Narayan Kamthe (PW 3) and PSI Patil (PW 5), there is an oral

dying declarations to Amol (PW 1) and Rakesh (PW 2). Hence, learned APP prayed that the Appeal may be dismissed.

21. With the assistance of both the learned Counsel appearing for the respective parties, we have gone through the record.

22. On hearing the learned Counsel appearing for the respective parties, as well as on going through the record, we are of the opinion that there is no reason to disbelieve the witnesses and more particularly P.W.1 and P.W.2.

23. Now the question which falls for our consideration is to whether the act of Appellant would fall under Section 302 of IPC or under Section 304-I as submitted by learned Counsel appearing for Appellant.

24. On perusal of the evidence brought on record, we find considerable merit in the submissions of learned Counsel for the Appellant.

25. The evidence brought on record would show that the deceased Kashinath who was working in the

Ammunition Factory and though his salary was Rs. 2,000, he was receiving a meager salary of Rs. 600 after various deductions. The record also shows that Kashinath was subjected to vices. The evidence further shows that due to the insufficient funds, it was difficult for the Appellant to run her house.

26. The perusal of record would further show that on the day of incident when the Appellant asked her husband as to amount he earned as salary and the husband replied that it was only Rs. 50 after all deductions. The sequence of events further show that the couple then purchased some sweets for their granddaughter and after going to home the deceased asked the Appellant to prepare the food and then appellant expressed her inability on account of non-availability of money. Admittedly, this exchange of words led to an quarrel and abuses and then led to the commissions of crime at the hands of the Appellant.

27. There is also considerable merit in the submission of learned Counsel for the Appellant that it was an sudden provocation by the act of deceased

Kashinath. It was also the submission of learned Counsel for the Appellant that the case of accused would fall under the exceptions to Section 300 of IPC.

28. To consider the above submission, for our ready reference, we may reproduce the Section 300 of IPC and exceptions as under:-

300. Murder

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly -If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly -If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly -If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk

of causing death or such injury as aforesaid.

Exception 1. When culpable homicide is not murder

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First —That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly —That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly —That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation: Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2 : Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3 : Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4 : Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation : It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5 : Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

29. It may be useful for our purposes to refer to the observations in the judgment of the Hon'ble the Apex Court in the case of K.M. Nanavati vs. State of Maharashtra¹. While dealing with the term sudden and grave provocation, the Hon'ble the Apex Court observed in para 84 & 85 as under:

(84) Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc. in short, the cultural, social and emotional background of the society to which an accused belongs.....

(85) The Indian law, relevant to the

¹ AIR 1962 SC 605

present enquiry, may be stated thus: (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to section 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time or otherwise, giving room and scope for premeditation and calculation. (Emphasis supplied).

30. As observed by us, in the present matter the Appellant wife of deceased was forced to run family with wholly insufficient money in the form of a meager amount of salary of the deceased husband. A demands of

money, a quarrel between the couple, and hurling of abuses was a routine. Appellant accused on two occasion lodged complaint in the police station. Shivshankar Kamble (DW 1), son of deceased and Appellant, in cross-examination admitted that deceased was beating appellant under the influence of liquor and Ganja. Thus, it can be safely be said that the Appellant was fed up with a miserable life and the sequence of events dated 10.06.1994 turned out to be the last straw that broke the camel's back.

31. Considering the aforesaid principles so also the judgment of the Apex Court, we are of the opinion that the case of prosecution against the accused would fall under Section 304 (I) and not in Section 302 of IPC. Hence, we pass the following order:

:ORDER:

1. Criminal Appeal is partly allowed.
2. The conviction recorded by learned Additional Sessions Judge, Pune by his order dated 24th February, 1995 in Sessions Case No. 365 of 1994 is altered from Section 302 of IPC to Section 304(I) of the IPC.

3. The Appellant – Gangubai K. Kamble is held guilty for the offence punishable under Section 304(I) of IPC and sentenced to suffer rigorous imprisonment of 07 years. The order of the learned Sessions Judge in respect of fine and, in default of payment of fine amount, is confirmed.
4. We appreciate the assistance rendered by the learned Counsel Mr. Deshmukh appointed to prosecute the Appeal on behalf of the Appellant. We quantify the fees payable to him at Rs. 10,000/- (Rupees Ten Thousand only). The High Court Legal Services Committee, Mumbai is directed to pay the fees to learned Counsel Mr. Deshmukh within four weeks from today.

(N.R. BORKAR,J.)

(PRASANNA B. VARALE,J.)