

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.669 OF 2013
WITH
CRIMINAL APPLICATION NO.1347 OF 2018

Mahendra @ Tinku Suresh Barve
Age 22 years,
Residing at : Ramabai Ambedkar
Colony, Igatpuri, Tal. Igatpuri,
District Nashik

.. Appellant

v/s.

The State of Maharashtra
Through Igatpuri Police Station
Igatpuri, District Nashik

.. Respondent

....

Mr. Dinesh P. Adsule for the Appellant.
Ms. M. M. Deshmukh, APP for the Respondent.

....

CORAM: NITIN JAMDAR &
G. A. SANAP, JJ.

DATE : 14 SEPTEMBER 2021.

JUDGMENT (Per Nitin Jamdar, J)

The challenge in this appeal is to the judgment and order dated 24 April 2013 passed by the Additional learned Sessions Judge Nashik in Sessions Case No. 226 of 2008. By the impugned judgment,

the Appellant/Accused has been convicted for the offence punishable under Section 302 of the Indian Penal Code for committing murder of his wife, Sonam Mahendra Barve. The Appellant is sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- and in default to undergo simple imprisonment for three months.

2. The prosecution case, in brief, is as follows. The incident took place on 8 September 2008. Deceased Sonam and the Appellant got married one and half years before the incident. At the relevant time, they were residing in the house of the mother of Sonam, Babybai Anthony Jerum in a slum area at Igatpuri. The Appellant was working in a local traditional percussion band. Sonam was working as a home guard and at the relevant time posted at Ghoti police Station, Igatpuri for on duty for the Ganpati festival. The Appellant used to suspect that Sonam had an extramarital relationship. Sonam had filed an application under Section 12 of the Protection of Women from Domestic Violence Act against the Appellant in the Court of Judicial Magistrate. The matter was settled. On 8 September 2008, around 10.30 p.m., the Appellant had come home, asked Sonam whom she had gone with to Vaitarna Dam on that day though she was on duty at Ghoti. Then he poured kerosene on her, set her on fire and, ran away by locking the only door of the hut from the outside. Sonam's mother, who was sleeping in the partitioned room of the house, heard Sonam calling for help and went into the room of Sonam. She shouted for

help, whereupon the neighbour Nivrutti Gosavi opened the door after the mother gave the key to him through the gap. Sonam was taken to the hospital at Igatpuri, from where she was shifted to Civil Hospital, Nashik. Police recorded the statement of Sonam. On 9 September 2008, the dying declaration of Sonam was recorded by Special Judicial Magistrate, Nashik. The statement was treated as First Information Report to register offences punishable under Sections 307, and 342 of the Indian Penal Code with Igatpuri Police Station vide Crime No.80 of 2008. Sonam expired on 12 September 2008. The offence was converted into an offence punishable under section 302 of the Indian Penal Code. Panchanama of the scene of the offence was drawn, and articles were seized from the scene of the crime. The inquest was held. The dead body was sent for post-mortem. The Appellant was arrested on 9 September 2008. Statements of witnesses were recorded. The seized articles were sent to Forensic Science Laboratory for analysis. After completion of the investigation, charge sheet against the Appellant was filed. The case was committed to the Court of Sessions at Nashik and was tried as Sessions Case No. 226 of 2008.

3. The learned Additional Sessions Judge, after considering the evidence and the arguments advanced, convicted the Appellant for the offence punishable under Section 302 of IPC sentenced him to suffer imprisonment for life and to pay a fine of Rs.10,000/- and in default to undergo simple imprisonment for three months.

Challenging this order, the Appellant is before by this criminal appeal.

4. We have heard Mr. Dinesh Adsule, the learned Counsel for the Appellant and Ms. M. M. Deshmukh, the learned Additional Public Prosecutor.

5. The prosecution has examined nine witnesses. PW-1-Bebi Antoni Hiren, the mother of the deceased; PW-2-Anil Pandurang Ubale, panch for the Spot panchanama; PW-3-Ashok Madhu Gandhe, Assistant Police Sub-Inspector, Ghoti Police Station; PW-4-Nivrutti Yeshwant Gosavi, neighbour; PW-5-Ayyubkhan Abdulkhan Pathan, Special Judicial Magistrate; PW-6-Dr. Nilesh Shantaram Shelar, Doctor who conducted post mortem; PW-7-Dr. Dipti Dilip Vaidhya, Medical Officer in General Hospital, Nashik; PW-8-Ashok Francis Dive, Assistant Police Sub-Inspector, Sarkarwad Police Station; PW-9-Pratap Dattatraya Pawar, Investigating Officer. The Appellant examined one defence witness DW-1-Nana Dashrath Yadav. The prosecution also relied upon dying declarations at Exhibit 20 and Exhibit 26, Spot panchanama at Exhibit 17, Inquest panchanama at Exhibit 37 and Chemical Analyser's report at Exhibit 43.

6. PW-1-Bebi Hiren and PW-4-Gosavi have deposed that deceased Sonam suffered burn injuries, and she was taken to the hospital on 8 September 2008. PW-4-Gosavi also deposed that Sonam had suffered burn injuries. PW-6-Dr. Shelar, who conducted post

mortem, deposed that Sonam had suffered 54% burns. Death was caused by septicemic shock due to 54% burns. Sonam expired on 12 September 2008. That Sonam expired due to burn injuries is not seriously challenged by the defense.

7. PW-1-Bebi Hiren, the mother of the deceased Sonam, deposed that Sonam was deputed at Ghoti Police Station for Ganesh Utsav arrangements. She was working as a home guard. PW-1 deposed that on the of the incident the Appellant came to the house. Sonam opened the door, and a quarrel took place. PW-1 was in the house. She intervened in the quarrel. Thereafter they were quiet. Then after some time, she heard her daughter's voice calling for help and saw Sonam burning. She poured water on her from a jar and extinguished the fire. She tried to take Sonam out of the house, but the door was locked from outside, and she called the neighbour who came and opened the door. PW-1 deposed that the Appellant and deceased had performed love marriage. The Appellant suspected Sonam's extramarital relationship over which quarrels took place. This discord had taken place earlier also, and a case was filed in the Magistrate's Court. PW-4-Gosavi deposed that on the night of the incident, he heard PW-1 shouting. He saw the door of the house was locked from outside, and PW-1 was calling him to open the door. She told PW-4-Gosavi that Sonam was burnt and gave a key to him through the gap of the door, and he opened the door.

8. The learned Counsel for the Appellant contended that PW-1-Bebi Hiren had admitted in the cross-examination that she was against the marriage as the Appellant and the deceased belonged to different religions. The learned Counsel for the Appellant submitted that the evidence of PW-1, the mother of deceased Sonam and PW-4-Gosavi, a neighbour is untrustworthy. He submitted that PW-4-Gosavi has not stated that PW-1 gave key through the gap in the door to him in the statement before the police, and it is not made clear how the door was opened. The learned Counsel submitted that the deceased did not shout or say anything till the Appellant poured kerosene as per the prosecution case, which is unnatural. He also submitted that there was no kerosene found in the place of the incident, and therefore the theory that when the Appellant came to the house of PW-1, he poured kerosene on the deceased Sonam is false. He submitted that since PW-1 was against the marriage of the Appellant with the deceased, and the Appellant is falsely implicated. The learned Counsel submitted that the spot panchanama shows that the house had a single door and anyone can see inside, and it is not believable that the incident took place in such a situation. The learned Counsel submitted that the entire case is based on a dying declarations, and there is no evidence to show that the deceased was well oriented and merely because the deceased was stated to be conscious, it is not enough. The learned Counsel submitted that there is variance between the dying declaration Exhibit 21 given to the Police Officer and the dying declaration Exhibit 26

given to the Special Executive Magistrate. The learned Counsel submitted that both the dying declarations could not be relied upon because of such variances. The learned Counsel placed reliance on the decision of the Division Bench of this Court in *Suresh s/o Arjun Dodarkar (Sonar) vs. State of Maharashtra*¹. Learned Counsel also submitted that the Appellant was not in the town on the date of the incident, and he had gone on work to another village and defence witness DW-1-Nana Dashrath Yadav has deposed this fact.

9. The learned Additional Public Prosecutor submitted that the case is not based on dying declarations alone but also on the evidence of PW-1-Bebi Hiren and PW-4-Gosavi. The learned APP submitted that on all aspects, the depositions of PW-1 and PW-4-Gosavi corroborate the dying declarations. The learned APP submitted that there is no variance in the two dying declarations, which are consistent. It was submitted that the Chemical Analyzer's report also corroborates the dying declaration, and there is an endorsement by the Medical Officer that the deceased was well oriented. Sonam suffered 54% burns, and she expired three days after 12 September 2008 at 5.00 p.m. The learned APP submitted that the defence of the alibi taken by the Appellant is false as no details are given.

10. We have gone through the record with the assistance of the learned Counsel and considered the rival contentions.

¹ (2005) 107 BOMLR 71

11. As regards the defence of alibi is concerned the Appellant has examined DW-1-Nana Dashrath Yadav. If his evidence is read, it is bereft of any particulars. DW-1-Nana has deposed that he had his own drum party in which the Appellant used to participate. DW-1 has stated that about 4-5 years back, the Appellant, along with him, had gone to village Khadavali and they stayed there in the night at the request of one Lilabai Kadam and the next day they returned to Igatpuri. Lilabai Kadam, whose house the Appellant claimed to have stayed, was not examined to prove the alibi. DW-1-Nana has not given the month or year of the incident, let alone the date. He has admitted that he cannot tell the date, month or year of going to Khadavali. The evidence of DW-1-Nana, therefore, cannot be accepted. The learned APP also points out that the distance between Khadavali and Igatpuri is not far. The defence of the alibi of the Appellant is therefore not established.

12. PW-3-Ashok Gandhe deposed that on instructions of the superior, he had gone to the Burn ward Civil Hospital, Nashik and Doctor informed him that Sonam was in a position to make a statement. He deposed that Sonam told him about the incident and signed the statement, which is at Exhibit 21. Nothing is brought out in his cross-examination why his evidence that Sonam gave the statement at Exhibit 21 should be discarded . Regarding the evidence of PW-5-Ayyubkhan Pathan, he deposed that PW-3-Gandhe had called him to

Civil Hospital, Nashik, to record the dying declaration. He deposed that he called the doctor in the Burn ward, i.e. PW-7-Dr. Dipti Vaidhya. PW-7-Dipti Vaidhya examined the patient and told him that Sonam was conscious and gave a certificate at the beginning of the dying declaration. He then deposed that he asked the patient her name to which she gave as Sonam Mahendra Barve. Then he deposed that he asked her details of the incident, which she stated. Then he deposed that he asked PW-7-Dr. Dipti Vaidhya to give a certificate of fitness which she endorsed accordingly below the dying declaration, which is at Exhibit 26. He deposed that he had asked the persons present there to go out. Again nothing is brought out in the cross-examination that why his evidence that Sonam gave dying declaration should be disbelieved.

13. As regards the contention of the Appellant that Sonam was not in a fit condition to give a statement, the evidence of PW-7-Dr. Dipti Vaidhya and the endorsement on the dying declaration will have to be looked at. PW-7-Dr. Dipti Vaidhya has deposed in her evidence that Sonam was fully conscious and was fit to give a statement, and she had given a certificate on the dying declaration. Dr. Vaidhya also deposed that after completion of the dying declaration, Sonam was examined again and found that she was fully conscious and able to give a statement. In the cross-examination of PW-7 Dr. Dipti Vaidhya, there is nothing to discredit her version. The dying declaration Exhibit 26

contains an endorsement by PW-7-Dr. Dipti Vaidhya at Exhibit 34 and 35 at the beginning and at the end that the patient is fully conscious and well oriented.

14. The learned Counsel for the Appellant has sought to take advantage of the statement in the cross-examination of PW-5 that it is not stated in the medical certificate that Sonam was mentally and physically fit. However, on this ground, the evidence of PW-7-Dr. Dipti Vaidya cannot be disbelieved. PW-5-Ayyubkhan Pathan, who recorded the dying declaration, has also deposed that Sonam was in a condition to give the statement. PW-7-Dr. Dipti Vaidya had specifically deposed that deceased Sonam was in the position to give a statement. The statement is given under the column that states that 'the Medical Officer should examine whether the patient is conscious of the purpose of giving the statement'. Under this column, the remark is made, and a certificate is duly given. The contention of the Appellant that prosecution has failed to prove that Sonam was in a condition to give a statement therefore cannot be accepted. There is the reason why PW-5 and PW-7 will falsely depose against the Appellant.

15. The next contention of the learned Counsel for the Appellant is that there is a variance between two dying declarations, i.e. Exhibit 21 and Exhibit 26. In the statement given to PW-3-Gandhe

at Exhibit 21, Sonam stated that she had been staying with her mother PW-1 for one month. On 8 September 2008 she came back home at 9.00 p.m. from home guard duty. At that time, her mother was at home. Both had dinner and slept. Thereafter at 10.30 p.m., the Appellant came and asked her that with whom she had gone to Vaitarna and taking suspicion like this he poured kerosene on her took out match stick, set her on fire and locked the door from outside and ran away. She stated that when she shouted, PW-1 came running. She poured water on her and extinguished the fire. Because of her mother's shouting, PW-4-Gosavi came there and opened the door and thereafter, she was taken to the hospital. In the dying declaration to PW-5-Pathan at Exhibit 26, which was in a format, to the question as to what time the incident took place, she deposed that it was at around 10.15 p.m. Then asked about how the incident took place, she deposed that the Appellant came to her started talking sweetly, thereafter, he took out the kerosene bottle poured kerosene on her, lit matchsticks, set her on fire, and ran away. Thereafter the mother came and took her to the hospital. According to the learned Counsel for the Appellant, there is variance in these two dying declarations to the effect that the dying declaration at Exhibit 26, Sonam stated that the Appellant was talking sweetly, while in Exhibit 21, Sonam stated that he was taking suspicion on her, is fatal to the prosecution.

16. It is not the legal position that in the case of multiple dying

declarations, they have to be exactly the same; otherwise, both must be discarded. When there are multiple dying declarations, they have to be consistent on the material aspect of the incident. When there are multiple dying declarations and acceptance of one dying declaration falsifies the other, then the dying declarations have to be rejected. The version of how the incident happened is the same in both the dying declarations. Even the narration that the Appellant poured kerosene is the same. That both had a talk is also consistent. The only difference as to perception regarding the manner of the talk that is taking suspicion and talking sweetly. Inconsistency is not of such a degree to reject both the dying declarations. In the case of *Suresh s/o Arjun Dodarkar* relied by the Appellant there were multiple dying declarations. In the first dying declaration, the victim has deposed that she was sleeping when the accused poured kerosene on her and set her ablaze. In the second dying declaration, she deposed that there was a quarrel between her and the accused, and the accused went out of the house returned with a can of kerosene, and when the victim asked the accused to make dinner, he poured kerosene on her and set her ablaze. The Court found that though the act of setting the victim on fire was the same, there was a clear variance between the two versions. There is a total difference between the act of setting a person on fire when the person is sleeping and setting on fire when the person is awake and interacting. It was in the case of such an inconsistency that the Division Bench held that the evidence could not be relied upon. Therefore this

decision cannot be made applicable to the facts of the present case. We, therefore, do not find any reason to discard these dying declarations.

17. Further, the dying declarations are also corroborated by the evidence of PW-1, the mother of deceased Sonam. She had deposed that there were quarrels between Sonam and the Appellant. There were earlier instances where she had filed a complaint that clearly established the motive. Sonam had come to reside with PW-1, and the Appellant had come there when he poured kerosene. PW-1 was in the house when the incident took place and is a natural witness to the incident. PW-1 had stated that she had called neighbour PW-4-Gosavi who opened the door. PW-1 also deposed that the door was locked from the outside, which fact is also confirmed by PW-4-Gosavi. This evidence corroborates the version of Sonam in the two dying declarations. The Chemical Analyzer's report showed that the bottle found at the spot had traces of kerosene. This also corroborates the dying declarations that the Appellant took out a bottle of kerosene and poured it on deceased Sonam. Deceased Sonam was 54% burnt because PW-1 immediately came running and poured water on her.

18. The argument of the Appellant that Sonam did not shout till she was set on fire cannot make the evidence untrustworthy. Reactions would be different from person to person, and as per the prosecution, the incident was entirely unexpected.

19. Thus we find that the evidence led by the prosecution establishes the guilt of the Appellant.

20. The learned Sessions Judge, after considering the evidence in totality, has rightly concluded that the Appellant is guilty of committing murder of his wife Sonam and has rightly convicted the Appellant for the offence punishable under Section 302 of the Indian Penal Code.

21. The Appeal is dismissed.

(G. A. SANAP, J.)

(NITIN JAMDAR, J.)

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