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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.345 OF 2018

Chandrashekhar s/o Babarao Madavi,
Aged about 37 years, occupation : labourer,
R/o Tamaswada, Tahsil Seloo,
District Wardha. **Appellant.**

:: V E R S U S ::

State of Maharashtra,
Through PSO Seloo, Tahsil Seloo,
District Wardha. **Respondent.**

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Shri Mahesh Rai, Counsel for the Appellant.
Shri V.A.Thakare, Addl.P.P. for the Respondent/State.

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**CORAM : VM.DESHPANDE, &
AMIT B.BORKAR, JJ.**
DATE : AUGUST 25, 2021

ORAL JUDGMENT : (Per : VM.Deshpande, J.)

1. In Sessions Case No.40/2014, learned Sessions Judge, Wardha framed charge against the appellant for offence punishable under Section 302 of the Indian Penal Code. As per the charge, on 29.9.2013, at about 9:30 hours, at mouza Tamaswada, appellant committed murder of his wife by name Meena by pouring kerosene on her and setting her ablaze. The appellant abjured his guilt and claimed for his trial.

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2. In order to prove the charge against appellant, prosecuting agency examined in all 7 (seven) witnesses and also relied upon various documents duly proved during course of trial. After a closure pursis was filed by learned prosecutor, who was in charge of brief, learned Judge examined appellant under Section 313 of the Code of Criminal Procedure. Learned Sessions Judge, Wardha, after hearing learned Additional Public Prosecutor for the State and learned defence counsel, delivered judgment on 27.3.2018 holding that the prosecution was able to prove the charge against the appellant and, therefore, convicted him for offence punishable under Section 302 of the Indian Penal Code and directed him to suffer imprisonment for life and to pay fine Rs.3000/- and in default of payment of the fine amount to suffer simple imprisonment for six months. The said judgment and order of conviction and sentence is assailed before us in this criminal appeal.

3. We have heard learned counsel Shri Mahesh Rai for the appellant and learned Additional Public Prosecutor Shri V.A.Thakare for the respondent/State.

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4. According to learned counsel Shri Mahesh Rai for the appellant, evidence of Sakshi (PW1) is not reliable inasmuch as according to him, she was in custody of her maternal uncle and she is tutored witness. He also submitted that maternal uncle of Sakshi by name Lokesh Thakre (PW3) is conspicuously silent in his testimony to effect that Sakshi disclosed him about the incident. He submitted that even hands of the appellant were burnt and the appellant was required to be admitted in a hospital. According to him, this is a pointer of his innocence. He, therefore, prays that the appeal be allowed.

5. *Per contra*, learned Additional Public Prosecutor Shri V.A.Thakare for the respondent/State submitted that Sakshi (PW1) is daughter of the appellant as well as the deceased. There was no reason for her to implicate her father falsely. He also submitted that the deceased received 100% burnt injuries that clearly shows that kerosene was poured on her. He also submitted that Chemical Analyzer's Report clearly proved presence of the appellant at house, which is also not otherwise denied by the appellant, and

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kerosene was found on pant of the appellant. He, therefore, submitted that the appeal be dismissed.

6. The incident in question occurred inside house of the appellant on 29.9.2013 in night hours at about 9:30. From evidence of Sakshi (PW1) and also evidence of Nitesh Madavi (PW2), it is clear that Meena, the deceased, was immediately shifted to hospital.

7. Record shows that Meena succumbed to injuries on 30.9.2013 at about 7:16 hours in morning. The said date and time are reflected at Exhibit-41, the merg report.

8. Till death of Meena, there was no complaint against the appellant and even after her death also, initially, Police Station at Wardha registered merg report (Exhibit-41).

9. Record shows that during inquiry of the said accidental death, spot panchnama was recorded on 30.9.2013 between 1:30 p.m. and 2:00 p.m.. The said spot panchnama is at Exhibit-42. Similarly, at the time of executing the spot
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panchnama, police officer, who was inquiring with the accidental death, also seized certain articles scattered on spot of the incident under seizure panchnama (Exhibit-43). The dead body was sent to hospital for conducting postmortem. Postmortem report is at Exhibit-44. From left hand column at Exhibit-44, it is clear that during course of trial the said document was admitted, resultantly autopsy surgeon was not examined. Exhibit-44, shows that on 30.9.2013 at about 8:00 a.m. dead body of Meena was received in hospital and autopsy surgeon started conducting postmortem at 11:45 a.m. and it was completed at 12:45 p.m. (inadvertently written as 12:45 a.m.). As per opinion of autopsy surgeon, probable cause of death was hemogenic shock due to 100% superficial burn.

10. From record, it appears that on 1.10.2013 statement of Sakshi (PW1) was recorded by Assistant Sub Inspector Sanjay Padole (PW6). The said statement of Sakshi is at Exhibit-37. Her statement was treated as First Information Report. Printed First Information Report is at Exhibit-38. A crime was registered

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against the appellant vide Crime No.140/2013 for offences punishable under Sections 307 and 302 of the Indian Penal Code.

11. As per the First Information Statement, Sakshi is having an elder sister whose name is Khushbu and she resides with her maternal grandfather at Ladgad for taking education and at Tamaswada and she used to stay along with her parents. Her statement shows that at the relevant time she was student of primary school. As per the statement, on day of the incident at 9:00 p.m., she came to house after having dinner hosted as “Prasad” for Lord Genesha. That time, her mother was sitting at front door of house. Thereafter, her father came and he picked up a quarrel with her mother. Thereafter, all of them went inside the house. Thereafter, the appellant closed door from inside; poured kerosene on her mother; tore calendar which was hanging on wall; he then ignited fire to the said, and then set her mother ablaze. Therefore, as per the statement, Sakshi raised shouts to invite attention of others, resultantly neighbours one Arun Mama and Hitesh Kodape (PW4) came and extinguished the fire. As per the

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statement, even her father received burnt injuries and her father took her mother in hospital in an auto-rickshaw.

12. Sakshi, during trial, when was examined as prosecution witness No.1, deposed exactly and identically what she had narrated in the First Information Statement. It is really astonishing to note that even not a slightest thing she missed in her evidence from what was stated in her First Information Report. Still the Trial Court is giving all credit to Sakshi for deposing exactly on the line of the First Information Statement. We are of view that the evidence of Sakshi is required to be discarded since she is completely a tutored witness. Reasons as to why she is a tutored witness are as under:

(a) Sakshi came to police station on 1.10.2013.

Prior to that, she was at her place at Tamaswada. Evidence of her maternal uncle Lokesh Thakre (PW3), shows that on day of the incident itself he reached Tamaswada. Though this prosecution witness claims in his

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examination-in-chief that when he had been to hospital his sister Meena gave an oral dying declaration to him, but he himself admitted in his cross-examination that he did not state before police when his statement under Section 161 of Cr.P.C. was recorded about oral dying declaration made to him by his sister. It is rather difficult to accept that the brother who lost his beloved sister and who made dying declaration to him will not disclose such an important aspect and fact to police when his statement was recorded. In this view of the matter, we have no hesitation to reject the claim of Lokesh Thakre about the dying declaration. It is important to note that his evidence is conspicuously silent about disclosure on the part of Sakshi to him about the incident and alleged overt acts on the part of her father resulting into death of her mother. It is really difficult that the girl will

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not disclose overt acts on the part of her father to her material uncle.

(b) Another reason is, as we have observed, that evidence of Sakshi is word to word identical with her First Information Statement (Exhibit-37). The First Information Statement shows that she came to police station along with her grandfather; grandmother, and maternal uncle Lokesh Thakre (PW3), as it could be seen from answer which she gave to Investigating Officer. Further, Assistant Sub Inspector Sanjay Padole (PW6), who recorded her statement, admitted from witness box that Sakshi came along with her grandfather and material uncle. He admitted that initially information of the incident was given to him by maternal uncle and grandfather of Sakshi. That shows that initially the maternal uncle and the grandfather made statement before

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Investigating Officer and, thereafter, statement of Sakshi was recorded, which was treated as First Information Report.

(c) First Information Statement, shows that two important questions were put suggesting what Sakshi should say, namely:

(i) तुझ्या घरी आई-बाबांचे दररोज भांडण होत होते काय?

(ii) तुझे वडील तुझ्या आईला नेहमी मारहाण करतात काय?

In our view, these types of questions are presumptive questions in themselves.

(d) We have already seen that spot panchnama (Exhibit-42) and seizure memo (Exhibit-43) were executed on 30.9.2013 in first half of the day in house of Sakshi. So, police were there. Still, nothing was disclosed to police by Sakshi about alleged overt acts on the part of the appellant. Further, from cross-examination of

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Sakshi it is clear that after the incident she was staying with her maternal uncle. After the incident, in morning, maternal uncle came to take her to hospital. It is also revealed in her evidence that her maternal uncle and his parents with her at the time of lodging of report and she admitted that they are maintaining her. In cross-examination of Sakshi, it was suggested to her that there took a quarrel between her parents because her father was intending to invite guests for dinner for 'Lord Ganesh Festival.' She denied the said meaning thereby there was no quarrel between her parents on day of the incident.

13. For the aforesaid reasons, we are of view that it would be dangerous to place reliance on evidence of Sakshi (PW1), aged about eight years at the time of lodging of the report and twelve years at the time of her deposition from witness box, since she was residing with her maternal uncle and, therefore, possibility that

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she was under influence of her maternal uncle is not completely ruled out.

14. Here, we would like to observe that though Meena, the deceased, was immediately admitted in hospital, the prosecution case is completely silent about steps, if any, taken by the prosecuting agency for at least making an attempt to record dying declaration. For reasons best known to the prosecution, the prosecution has not examined Police Sub Inspector R.R.Chaudhari, who executed spot panchnama (Exhibit-42) and seizure panchnama (Exhibit-43). Through Investigating Officer Laxman Hande (PW5), the defence could prove sana Entry No.2 which was recorded on 30.9.2013 at about 00:50 hours. The said sana entry is at Exhibit-77. The said sana entry shows that Meena, the deceased, received burnt injuries due to explosion of gas cylinder. The sana entry further shows that the said was informed to Police Sub Inspector R.R.Chaudhari and he immediately proceeded on the spot. In the background of this, it was much essential on the part of the prosecution to examine Police Sub Inspector R.R.Chaudhari for disclosing attempts made by him to record

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dying declaration. It would have been a different aspect that Meena was not in a position to give dying declaration. From the examination-in-chief of Lokesh Thakre (PW3), it appears that Meena was in a position to give dying declaration because he claims that she gave oral dying declaration to him. It is a different fact that we have rejected the alleged dying declaration for different reasons but fact remains that as per claim of her brother Meena was in a position to speak. Therefore, it was for police to verify at that point of time as to whether Meena was in a condition to give her dying declaration or not.

15. As per First Information Statement (Exhibit-37) and evidence, Sakshi (PW1) did state that her father closed door from inside; poured kerosene; tore calendar hanging on wall; then he ignited fire to the said, and then set her mother ablaze. Evidence of Investigating Officer Laxman Hande (PW5) would show that he was required to admit during his cross-examination that Police Sub Inspector R.R.Chaudhari did not seize the calendar from house of the victim. Not only that, he also could not notice the calendar in house of victim. This is an additional ground for discarding

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evidence of Sakshi because absence of calendar dents her testimony because as per her version by that mean her mother was set ablaze.

16. Learned Additional Public Prosecutor for the respondent/State, submitted that the prosecution case is fully proved because of Chemical Analyzer's Report (Exhibit-62). According to learned Additional Public Prosecutor, seizure panchnama (Exhibit-43) shows that from the spot Police Sub Inspector R.R.Chaudhari seized half burnt pieces of saree; can of kerosene having 50 ml kerosene in the same; simple as well as kerosene smeared earth, and a half burnt full pant emitting kerosene smell. Learned Additional Public Prosecutor, submitted that the Chemical Analyzer's Report shows that partly burnt full pant was detected with kerosene residues. He, therefore, submitted that the case of the prosecution is supported by the scientific evidence. At the first blush, though submissions made on behalf of learned Additional Public Prosecutor are very attractive, on a closure scrutiny of the entire record we have no hesitation in our mind to reject said submissions.

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17. Seizure memo (Exhibit-43) was executed on 30.9.2013 between 2:00 p.m. and 2:10 p.m. by Police Sub Inspector R.R.Chaudhari. We have already seen that said Police Sub Inspector Chaudhari was not examined. Even, panch witnesses, who were present, were also not examined. Probably, the said document was admitted by the defence. Be that as it may, since it was a very important document, it was obligatory on the part of the prosecution to prove the said fact irrespective that the defence has admitted the same. This is because the contemporaneous document is conspicuously silent about “sealing” after its seizure. Therefore, it was obligatory on the part of the prosecution either to examine the officer who executed that document or panchas in whose presence the said document was executed and throw light as to whether at the time of seizure articles were properly sealed.

18. The law in respect of ‘sealing’ is well crystallized by coordinate bench of this Court in the case of Lalchand Cheddilal Yadav vs. State of Maharashtra, reported at 2000(3) Mh.L.J. 438.

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19. Further, there is no link evidence at all as to what happened to seized articles between 30.9.2013 to 7.11.2013. On 7.11.2013, Investigating Officer sent muddemal articles to Chemical Analyzer under Exhibit-58. There is no evidence on record of malkhana incharge to show that muddemal was kept in proper custody. Even, none of Investigating Officers, who were three in numbers, did state that from 30.9.2013 to 7.11.2013 muddemal articles were properly preserved and they were in a sealed condition. In this view of the matter, we are not giving much importance to Chemical Analyzer's Report which is otherwise a corroborative piece of evidence and not a substantive piece of evidence.

20. In this judgment, we are discarding evidence of Sakshi (PW1). Therefore, merely because there is a Chemical Analyzer's Report that cannot be the sole basis for recording conviction.

21. From the evidence of Sakshi (PW1) and admitted position, it is clear that the appellant's hands were also burnt. Not only that, he was also admitted in hospital. Further, from First

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Information Statement (Exhibit-37) itself, it is clear that it is the appellant who took Meena, the deceased, in an auto-rickshaw in hospital. Though the prosecution examined Hitesh Kodape (PW4) for proving fact that there was a quarrel between husband and wife on the day of the incident, in cross-examination he admitted that due to 'Lord Ganesh Festival' there was a noise in village and the said program was continue, till 11:00 p.m.. The incident occurred prior to that. Further, this witness in the cross-examination stated as under:

"It is correct to say that today police told me about my evidence in the Court. It is correct to say that when I came to the Court for giving my evidence at that time also police told me about my deposition. It is correct to say that accordingly I gave my evidence."

From the aforesaid, we have no hesitation in our mind to reject his evidence and the claim of the prosecution that due to incident of quarrel the appellant set Meena on fire.

22. Conspectus of the aforesaid discussion, allows us to record a finding that the prosecution has not proved its case beyond reasonable doubt that the appellant was author for the
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burnt injuries, resulting into death of his wife. Resultantly, we pass following order:

ORDER

- (1) The criminal appeal is allowed.
- (2) Judgment and order of conviction dated 27.3.2018 passed by learned Sessions Judge, Wardha in Sessions Case No.40/2014 is hereby quashed and set aside.
- (3) The appellant is acquitted of offence punishable under Section 302 of the Indian Penal Code.
- (4) The appellant who is in jail shall be released forthwith, if not required in any other case.

The criminal appeal is allowed and disposed of accordingly.

JUDGE

JUDGE

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