

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.329 OF 2015

Shaikh Mazhar s/o Shaikh Haidar
Age: 32 years, Occupation : Labour,
R/o. Pingli, Tq. & Dist. Parbhani.

.. Appellant

Versus

The State of Maharashtra,
Through Nanal Peth Police Station,
at the instance of Sk. Wahab
Sk. Gulam Mohiuddin

.. Respondent

...

Ms. Sharda P. Chate, Advocate for the appellant.
Mr. A. M. Phule, APP for the respondent - State.

...

**CORAM : SMT. VIBHA KANKANWADI AND
RAJESH S. PATIL, JJ.**

**RESERVED ON : 22nd September, 2022
PRONOUNCED ON : 24th November, 2022**

JUDGMENT :- [Per Smt. Vibha Kankanwadi, J.]

. The appellant has been convicted by the learned Sessions Judge, Parbhani in Sessions Trial No.23 of 2013 on 31.01.2015 after holding him guilty of committing offence under Sections 302 and 498-A of Indian Penal Code (for short "IPC") and he has been sentenced thus :-

"1) Appellant - accused Shaikh Mazhar s/o Sk. Haidar is hereby convicted of the offence punishable under Section 302 of IPC and he is sentenced to suffer

rigorous imprisonment for life. He is also liable to pay fine of Rs.5,000/- (Rs. Five Thousand) in default of payment of fine amount he shall suffer simple imprisonment for six months.

2) Appellant - accused - Shaikh Mazhar s/o Sk. Haidar is hereby convicted of the offence punishable under Section 498-A of IPC and he is sentenced to suffer three years of rigorous imprisonment. He is also liable to pay fine of Rs.2000/- (Rs. Two Thousand) in default of payment of fine amount he shall suffer simple imprisonment for one month."

2. The learned Advocate for the appellant submitted that there is no dispute that the appellant got married to deceased Nagma Begum about one and half year prior to FIR dated 19.10.2012. At the time of incident, the appellant and deceased were the only persons, who were residing in Amin Colony at Parbhani. Her matrimonial home was at Pingli. The charge levelled against the appellant is that he had subjected deceased to cruelty by making unlawful demand of Rs.1,00,000/- for purchasing auto rickshaw since two months after the marriage till her death and on 18.10.2012, he murdered deceased by setting her to fire. The FIR has been lodged by the father of the deceased i.e. P.W.2 Shaikh Wahab. According to him, deceased Nagma had talked to him eight days prior to the incident informing about the harassment and then a day before the incident also, she had given a telephonic call to the

father informing about the threat that was given by the appellant. The incident is alleged to have been occurred around 9 to 10 p.m. on 18.10.2012. Prosecution has examined in all 11 witnesses to bring home the guilt of the accused, whereas the accused has examined two witnesses in defence. P.W.1 Salid Ahemad Khan and P.W.6 Taufique Ahmad Khan are stated to be the witnesses who had extinguished the fire and according to the prosecution, P.W.1 Salid had seen appellant - Mazhar coming out of the house while running and he had a white Can in his hand. P.W.2 Shaikh Wahab is the father of the deceased and P.W.4 Syed Abrar is the uncle of the deceased. P.W.5 Mirza Nafiz Baig and P.W.10 Taslim Begum are the husband and wife who had given one of their room adjacent to their house on rent to appellant and his deceased wife Nagma. It is also the case of the prosecution that a day prior to the incident, Nagma had given call to her parents from the mobile of P.W.5 - Mirza Nafiz Baig. P.W.8 Mohd. Afzal Abdul Wahab is the brother of the deceased. P.W.9 Mohasin Ahmad Khan is the panch witness in whose presence the appellant has given memorandum and discovered the plastic Can containing kerosene. Other witnesses are the panch witnesses or the police persons including the Investigating Officer. The defence witness D.W.1 Ayub Khan is the employer of appellant and D.W.2 Dr. Aziz Quadri is the Medical Practitioner, who runs hospital in the name as Mental Health Center

with whom deceased Nagma had taken treatment.

3. The learned Advocate for the appellant has further submitted that P.W.2 Shaikh Wahab - father of the deceased has admitted that his several relatives reside in the same colony i.e. Amin Colony. Then it is surprising as to why deceased had not conveyed about the alleged cruelty to those relatives. It has been contended that the appellant was subjecting her to cruelty by making demand of Rs.1,00,000/- for purchase of auto, however, it can be certainly said that auto rickshaw cannot be purchased only with the amount of Rs.1,00,000/-, it requires more amount. Secondly, the father of the deceased accepts that the appellant never drove auto rickshaw in the past. Then it is hard to believe that the appellant would have demanded amount for purchase of such vehicle and would have subjected deceased to cruelty. The father admits that deceased was mentally disturbed and was taking treatment. Therefore, the possibility of commission of suicide by her cannot be ruled out. P.W.1 - Salid as well as P.W.6 - Taufique have stated that they were required to break upon the zinc sheets of the house to go inside and then they had extinguished the fire. However, the spot panchanama and other documents do not support the same. The possibilities are created that when the house was closed from inside and people were required to broke upon the zinc sheets to make way for extinguishing the fire, then it is a case of suicide. None of

them have made a specific statement that there was ladder put to the house from outside. The husband and wife i.e. the landlord and the landlady have tried to contend that on telephone call Nagma had informed about the ill-treatment to her father, however, the police have not collected the call details, mobile numbers etc. to support the oral contention. From the testimony of D.W.2 Dr. Quadri, it can be seen that deceased was taking treatment for her mental illness. The learned Trial Court ought to have considered properly the effect of such treatment and the substance in the defence that has been raised. Only interested witnesses have been examined by the prosecution and, therefore, the conviction awarded to the appellant is illegal and it deserves to be set aside.

4. Per contra, the learned APP has submitted that the defence that has been taken by the accused is twofold. One is *plea of alibi* and second is suicidal death due to mental health. As per the statement of accused under Section 313 of the Code of Criminal Procedure (for short "Cr.P.C."), he was working with D.W.1 Ayub Khan on the day of incident, however, that evidence appears to be unbelievable. He does not, in specific words, say that the accused was with him at the relevant time i.e. when deceased found got fired. In the normal course even if we accept that deceased was working with P.W.1 Ayub Khan at Hingoli, then the appellant would have returned to his house within a reasonable time, at Parbhani.

When the incident is alleged to have taken place around 9 to 10 p.m., the appellant's return from Parbhani to Hingoli was possible. D.W.2 Dr. Quadri rather in his cross-examination accepts that he had not seen the suicidal tendency in the mind of deceased. Therefore, both the defences of the appellant goes away.

5. It has been further pointed out by learned APP that P.W.1 Salid has categorically stated that he had seen the present appellant running out of the house with white Can. He also states in his examination-in-chief that he entered the house of the deceased from the open door i.e. front door. No doubt, he later on says that the zinc sheets were broken, but here even if we brush aside the testimony of P.W.1 Salid, yet the other evidence on record would support the prosecution story. The illegal demand of money has been proved by P.W.2 - the father of the deceased and P.W.8 - the son of the informant. There is also evidence in the form of the landlord and the landlady that prior to the incident deceased Nagma had gave call to the father and informed him about the threat that has been given by the appellant to her. The discovery of Can under Section 27 of the Indian Evidence Act is from the place, which is to the backside of the house of the appellant. The said Can was taken from the bushes around Babool tree. Independent witness has been examined to prove the said discovery. Though he has stated that he is knowing some of the relatives of the informant, yet that

cannot be a ground to brand him as interested witness. Learned APP submitted that he is supporting the reasons given by the learned Trial Judge and prayed for the dismissal of the appeal.

6. It is to be noted from the testimony of P.W.2 Shaikh Wahab - father of the deceased that the marriage of deceased with accused had taken place about three years prior to his deposition i.e. as per the FIR, it was one and half years. He states that after the marriage, she had gone to reside with her in-laws and after spending good days for a couple of months there, according to him, the appellant started ill treating her. He states that the appellant used to tell her that she should fetch amount for purchasing auto rickshaw. At the first point of time, he has not stated as to how much amount was demanded by the appellant. He says that then he went to Pingli along with his relatives and told appellant that he should not harass his daughter. Interesting point to be noted is that he has not given the details as to what were the acts of harassment/cruelty, those were told by his daughter to him, those were given by the appellant to the deceased. P.W.2 - Shaikh Wahab further says that after staying at Pingli for some days and before the incident, he had taken amount of Rs.10,000/- and given to appellant. Thereafter, the appellant and deceased came to Parbhani and started staying at Amin Colony. Thereafter, deceased gave phone call to her brother 8-10 days prior to the incident informing

that the appellant has given threat that "fetch Rs.1,00,000/- otherwise you would be killed by setting fire". Deceased informed on phone that she is being ill treated and beaten. Thereafter, he says that his daughter had called upon him on phone, but since he had kept his mobile for charging at the neighbours place, he could not talk. Then around 9.00 to 10.00 hours at night, one Israrkhan Pathan from Parbhani gave phone call to him and informed that his daughter has been killed by appellant by pouring kerosene and setting fire. Interesting point to be noted is that most of his examination-in-chief has been taken in question and answer form by the learned Presiding Officer. No doubt, it is the prerogative of the concerned Judge as to how he should record deposition of a person, however, only in respect of clarifications etc. such question and answer form can be adopted. It cannot be for many questions. Rather it shows that the witness is not willing to tell all the facts to the Court, but then it has been so extracted. Testimony of such person rather loses credibility. A very lengthy cross-examination has been taken on behalf of the defence and it can be found that most part of it, is irrelevant. Going into the minute details may not be acceptable. What remains in this case is the father is not sure as to when exactly the amount of Rs.1,00,000/- was demanded. Initially, when alleged demand was made, there was no specification and when specific amount was demanded, it was only

on phone that was given to the son of the informant about 8-10 days prior to the incident. The testimony of P.W.2 - father of the informant then does not say as to what he had immediately done after hearing that the daughter has been so harassed. The testimony of P.W.8 Mohd. Fazal - son of P.W.2 - Shaikh Wahab would rather show that the amount of Rs.1,00,000/- was demanded by the appellant after one and half months after the marriage. The chronology is totally changed by him and then he says that after the said demand of Rs.1,00,000/- for purchasing auto rickshaw, the father had given Rs.10,000/- to the present appellant. That means on the ground of cruelty, in fact, there is no concrete evidence. Another fact that appears to have not been considered by the learned Sessions Judge is that whether there was detailed inquiry by either P.W.2 or by P.W.8 as to whether an auto-rickshaw can be purchased even in 2012 for an amount of Rs.1,00,000/- or whether appellant was having some amount and he was short of amount of Rs.1,00,000/- and, therefore, he was demanding it. It was also not considered by the learned Sessions Judge that there was absolutely no direct dialogue between these two witnesses and the appellant on the said point. Therefore, when there was no substantial conclusive evidence, the appellant could not have been convicted for the offence punishable under Section 498-A of IPC. It appears that the learned Sessions Judge relied on the testimony of

P.W.5 Mirza Nafiz Baig and his wife P.W.10 Taslim Begum, however, from the testimony of P.W.5 - Mirza Nafiz Baig, it can be seen that he had only lend his mobile to deceased so that she could make a call to her parents. He might have heard what deceased was saying and on the basis of same, he is saying that deceased told her parents that the husband is torturing her and therefore, they should come and take her to the house. P.W.10 Taslim Begum says that deceased Nagma told to her parents on phone that they should take her back to the house otherwise husband would do something to her life. That means on phone this couple had not heard as to what was the reason for which deceased was allegedly harassing Nagma. They had not even attempted to extract from her the reason. Such kind of evidence cannot be believed which can be said to be not complete evidence at all. Therefore, testimony of these two witnesses also could not have led the learned Sessions Judge to award conviction for the offence punishable under Section 498-A of IPC. P.W.5 further says that he rushed to the house after it was made known to him about the fire in the house of Nagma. In his examination-in-chief itself he has stated that two tins were found broken and Nagma was lying in the door in dead condition after sustaining burns. The persons who extinguished the fire told him that her husband had ablazed her and fled from the house cannot be accepted, as it amounts to hear say. P.W.10 Taslim Begum also

says that she heard noise from the outside and, therefore, she came out. The noise was of breaking of the tin and pouring water. She then found that Nagma was lying dead near door and she also heard the same thing from the people, who extinguished the fire. Interesting point to be noted is that these two witnesses reside in the adjacent room. Still, when people from outside gathered, started breaking the tin, these two persons had not gone outside to see what has happened. The learned Trial Judge ought not to have relied upon the testimony of these two witnesses. P.W.2 - Shaikh Wahab and P.W.8 Mohd. Afzal - son of P.W.2 had reached the spot at much late time and, therefore, they cannot be said to be the appropriate witnesses on the point of offence under Section 302 of IPC.

7. P.W.1 - Salid, P.W.6 - Taufique are the persons who had extinguished the fire. They went to the said spot after they were informed by a boy. Both of them have stated that they had seen appellant going away from the house with a Can in his hand. In fact, what the boy had informed these two persons was that there is fire in the house of the appellant. P.W.-1 Salid has used word running whereas P.W.6 Taufique does not say that. That means, out of them one had seen that the accused was running with Can. They have not given the distance, nor they say that they shouted and asked the appellant to stay there to see what has happened in his

house. How they could have allowed the appellant to flee away from the place, is a question. Another glaring fact that has to be noted is that both these witnesses have not stated that there was a lock that was put to the main door of the room occupied by the deceased and the appellant. When the examination-in-chief of P.W.1 Salid had started on 22.11.2013, he had stated that the house/room occupied by the appellant and his wife had zinc sheet boundary and its door was open. They had entered through that open door. Thereafter, the recording of evidence was deferred on the submission of learned APP and, thereafter, it appears that it was not taken up on the same day. The examination-in-chief then continued on 25.11.2013 and then the same witness has stated that they extinguished the fire and at that time they had broken a tarnished zinc sheets and had entered the house. That means two contrary things were brought on record by the prosecution itself and then there was no clarification from the witness as to how he has made those statements on the earlier occasion. Such attitude and approach is not expected from prosecution. Why they were required to broke upon the zinc sheets for entering the house has not been asked at all. In his cross-examination, which is again a lengthy, he has stated that they had broke upon the zinc sheets. The fact about breaking the zinc sheets has also been brought on record through cross-examinations of P.W.2 Shaikh Wahab, P.W.5 Mirza Nafiz, P.W.6

Taufique Ahmad, P.W.10 Taslim Begum. Interesting point to be noted is that the spot panchanama does not mention that zinc sheet was broken from any side. Rather it makes a mention that the door of the room was open. This glaring fact ought to have been considered by the learned Trial Judge. When the witnesses referred above were speaking against the fact situation, then they are not believable.

8. No doubt from the inquest panchanama, postmortem report and overall evidence of all the witnesses it is not in dispute that Nagma died because of the 100% burn injuries. Three possibilities would arise one is accidental, second is suicidal death and third is homicidal death. Here, the appellant has tried to take defence that it was a suicide and, therefore, he also examined D.W.2 Dr. Quadri. Though it has come on record that Nagma had taken treatment for mental stress from him, in his cross-examination he has admitted that he had not seen the suicidal tendency in Nagma. That means the said witness is not supporting the theory put-forth by the accused. Yet, it is to be noted that the burden that is on the accused to prove his defence is not equivalent to prove a fact beyond reasonable doubt. Therefore, even if the accused failed to bring it on record that it was a suicidal death, yet the prosecution is not relieved of ruling out the possibility of accidental death as well as suicidal death if it intend to prove that it was homicidal death

only. Taking into consideration the testimony of the above referred witnesses, it cannot be said that there was any reason for Nagma to commit suicide. Even if we rule out the possibility for suicidal death, the prosecution was supposed to rule out the possibility of her accidental death also. Here, at this stage, it can be noted that the accused had taken the *plea of alibi* and had also examined his employer, but his testimony does not rule out a fact that even after doing the work on that day, the appellant could not have reached Parbhani from Hingoli. We cannot assume that the accused would have been in the house itself at that point of time. The testimony of P.W.1 Salid and P.W.6 Taufique cannot be accepted on the point that they had seen appellant running away from the house unless there would have been a concrete evidence that the accused was in the house at the relevant time and he can be the only author of the crime. Now, the prosecution has tried to connect the said fact with the discovery of the Can which has been tried to be proved through P.W.9 Mohasin. He has deposed that the accused made voluntary statement before him and the police that he would discover the plastic Can and then he had taken them to the place which was in the Amin Colony and took out the Can from the bushes which was thereafter seized. The first and the foremost fact that comes in mind is, if the accused had poured kerosene on his wife and ablazed her and then had the intention to flee away from the spot, then why

he would go along with Can. The natural conduct on the part of any accused would be to leave the Can at that place itself. Now, in order to bring the case within that ambit, it appears that such evidence is led. The said discovery is in fact not inspiring confidence. One more fact that ought to have been taken note of is that neither P.W.1 Salid, nor P.W.6 Taufique had tried to give a distance from the place where they are standing to the house of accused and within how much minutes, they could reach the said place after they were informed. If the said fact about information to them and then they proceeding towards the house of the accused would have matched, then only there was a possibility that they would have seen the accused running with plastic Can. Another fact in the cross-examination of P.W.1 Salid is that he has clearly admitted that he has not told police on the day of incident that he had seen the accused running with Can.

9. The other evidence on record can be said to be formal in nature and needs no discussion. Therefore, taking into consideration all these aspects, the learned Trial Judge ought to have arrived at a conclusion that the offence against the appellant is not proved beyond reasonable doubt. This is not a case where merely because a second possibility is shown; this Court is considering the second possibility. From the aforesaid reasons, it can be seen that the learned Trial Judge had not appreciated the

evidence properly. When there is no proper appreciation of evidence, there is no question of Appellate Court taking a second possible view while reversing the decision. The appeal deserves to be allowed. Hence, we proceed to pass the following order :-

ORDER

- i) The appeal stands allowed.
- ii) The judgment and conviction against the appellant in Sessions Trial No.23 of 2013 by learned Sessions Judge, Parbhani on 31.01.2015, stands set aside.
- iii) The appellant stands acquitted of the offence punishable under Sections 302 and 498-A of IPC.
- iv) He be set at liberty forthwith if not required in any other case.
- v) Fine amount paid, if any, be refunded to the appellant after the statutory period.
- vi) It is clarified that there is no change in the order regarding disposal of Muddemal.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm