

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 585 OF 2016

Gorakh Waman Kamble
Age: 37 years, Occu.: Lecturer,
R/o Kharba, Tq. Manwat,
Dist. Parbhani,
Presently R/at Panchpimpli

..APPELLANT

VERSUS

State of Maharashtra

..RESPONDENT

**WITH
CRIMINAL SU-MOTO REVISION APPLICATION NO. 2 OF 2016**

The Registrar,
High Court Judicature at Bombay,
Bench at Aurangabad

..APPELLANT

VERSUS

Gorakh Waman Kamble

..RESPONDENT

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Mr. G.A. Kulkarni, Advocate for appellant (appointed through Legal Aid)
Mr. R.V. Dasalkar, A.P.P. for respondent - State

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**CORAM : R.G. AVACHAT AND
R.M. JOSHI, JJ.
RESERVED ON : 29th NOVEMBER, 2022
PRONOUNCED ON : 05th DECEMBER, 2022**

JUDGMENT (R.G. AVACHAT, J.) :

1. Both, the criminal appeal and suo-moto criminal revision application are being decided by this common judgment since the challenge therein is to one and the same order of conviction and consequential sentence.

2. The appeal has been preferred taking exception to the order of conviction and consequential sentence of imprisonment for a period of ten years for the offence punishable under Section 302 of the Indian Penal Code ('I.P.C.'). While it is a suo-moto criminal revision application for enhancement of sentence of imprisonment. The trial Court erred in imposing the sentence of ten years for the offence punishable under Section 302 of the I.P.C. since the minimum sentence prescribed therefor is of life imprisonment.

3. The facts giving rise to the present proceedings are as follows :-

The appellant was a medical practitioner. He was a lecturer at a medical college as well. Deceased – Savita was his wife. He would suspect her character and, therefore, used to ill-treat her. On 30th March, 2012, the appellant abused and beat up his wife – Savita(deceased) over suspecting her character. He was drunk at that time. The appellant dragged her out of the home with a view to push her in front of a running vehicle for committing her murder. The passersby, however intervened and sent both of them back home. The appellant again picked-up quarrel with Savita by 05:00 in the evening. He poured kerosene and set her ablaze. On hearing her cries, the neighbours gathered. She was rushed to Civil Hospital, Nanded. The police officer (P.W.7) on duty recorded her statement at hospital. Based on the same, crime vide C.R. No. 31 of 2012 came to be registered against the appellant.

4. During investigation, the Executive Magistrate (P.W.6) recorded statement of Savita. On the following day, she passed away. Section 302 of the I.P.C., therefore, came to be invoked in place of Section 307. Scene of offence panchanama (Exh.8) was drawn. Statements of the persons acquainted with facts and circumstances of the case were recorded. On completion of investigation, the appellant was proceeded against by filing the charge-sheet.

5. The trial Court framed charge. The appellant pleaded not guilty. His defence was of false implication. The prosecution examined nine witnesses to bring home the charge and produced in evidence certain documents. On appreciation of evidence in the case, the trial Court convicted and consequently sentenced the appellant as stated above. Hence, the present appeal.

6. Learned counsel for the appellant would submit that the deceased had suffered more than 93% of burns. Same itself suggests that she was not conscious oriented to make a dying declaration. It was the deceased, who wanted to commit suicide. She, therefore, left home and came on the road with a view to come under a moving vehicle. The appellant too suffered injuries. The prosecution did not offer any explanation in that regard. It is, therefore, to be inferred that the prosecution has suppressed genesis of the incident. He would further submit that P.W.8 – Vaibhav (medical officer)

was examined in proof of certification regarding consciousness of the deceased. It is revealed that the appellant had moved an application for adjournment. The trial Court compelled the appellant to cross-examine P.W.8 – Vaibhav. As such, the appellant did not have an opportunity of being represented by a legal practitioner to cross-examine the material witness. A miscarriage of justice has thus resulted. No fair opportunity can be said to have been offered to the appellant. In all these circumstances, the appeal deserves to be allowed was the submission made by learned counsel for the appellant.

7. Learned A.P.P. would, on the other hand, submit that the case is based on three dying declarations, one oral and two written. All these dying declarations are consistent in material particulars. The appellant was a medical practitioner. The cross-examination conducted by him in person suggests he was no less competent than the advocate of good standing. Had really he been prejudiced, the advocate representing him in the case could have preferred application for recall of the said witness. The same has not been done. According to learned A.P.P., the trial Court has given a well reasoned order. It held the appellant to be guilty of offence punishable under Section 302 of the I.P.C. The minimum sentence prescribed for the said offence is of life imprisonment. He, therefore, urged for allowing the revision application and enhance the sentence of imprisonment from ten years to life imprisonment.

8. Considered the submissions advanced. Perused the evidence on record and the authorities relied on.

9. Deceased – Savita was the wife of the appellant. Both of them were residing together. There was no third person in their family. On the given day, i.e. on 30th March, 2012, Savita suffered extensive burns at her home. She succumbed thereto on the following day. P.W.5 – Dr. Khan conducted postmortem examination. The postmortem report (Exh.24) suggests the deceased died of shock due to burns.

10. P.W.1 – Sandeep was a witness to the scene of offence panchanama (Exh.8). His evidence indicate a kerosene can, a match box and burnt pieces of *sari* and shirt were seized from the scene of offence. P.W.2 – Gangadhar was a neighbour of the appellant. It is in his evidence that on hearing cries, he rushed to the home of the appellant to find a lady to have suffered burns. The lady told him the appellant to have set her ablaze. He, therefore, made a telephone call to the police. The police arrived. During his cross-examination, P.W.2 testified that the appellant had tried to extinguish fire and in the process, he too suffered burns to his hands. P.W.3 – Ramji was another neighbour of the appellant. He did not stand by the prosecution. P.W.4 – Bhujang was father of the deceased. It is in his evidence that the appellant would beat up his daughter suspecting her character. It is further in his evidence that Savita informed him to have been set on fire by the

appellant. He admitted the appellant would leave his home early in the morning and return late night. The appellant, however did not dispute his presence at the home at the material time since the evidence in that regard of P.W.2 - Gangadhar has not been taken exception to.

11. P.W.6 – Pramod Dehmukh was the Executive Magistrate–cum–Nayab Tahasildar. It is in his evidence that he went to the hospital in response to a call by Vazirabad Police Station. P.W.8–Dr.Vaibhav was on duty at Civil Hospital, Nanded on 30th March, 2012. He requested Dr. Vaibhav to examine the patient and certify whether she was conscious oriented to give a statement. Dr. Vaibhav, accordingly examined and certified her fit to make the statement. It is further in his evidence that he then recorded statement-cum-dying declaration (Exh.29). He identified doctor's signature below the certification appearing on the dying declaration itself.

12. P.W.8 – Dr. Vaibhav testified that on the request of Nayab Tahasildar, he examined the patient. He found her conscious oriented and mentally fit to make the statement. He made endorsement to that effect (Exh.35). It is in his evidence that after recording of her statement, he again examined the deceased and gave similar certification (Exh.36).

13. It is true that the appellant was represented by a legal practitioner before the trial Court. On the day the evidence of P.W.8 was recorded, the

concerned advocate had moved an application seeking adjournment. Since the witness had come a long way from Kolhapur, the trial Court asked the appellant to cross-examine P.W.8. It appears that the appellant, being a medical practitioner, extensively cross-examined P.W.8 - medical officer. The record indicates that the appellant had made no attempt to recall the witness for further cross-examination before the trial was concluded. Taking into consideration the entire evidence on record, we do not find the appellant to have been prejudiced in his defence.

14. P.W.7 – Syed Shafioddin was an Assistant Sub-Inspector of Police attached with Civil Hospital Police Chowki, Nanded. His evidence indicate that he recorded the statement-cum-dying declaration (Exh.31) of deceased – Savita. Before and after recording the statement, P.W.8 – Dr. Vaibhav examined Savita and gave his certification in writing confirming she was conscious oriented and mentally fit to make the statement.

15. As such, the dying declarations of the deceased recorded by the Executive Magistrate and the police officer have been duly proved. The deceased was conscious oriented and mentally fit to make the statement has also been proved by P.W.8 – Dr. Vaibhav. Both the dying declarations are consistent with each other. P.W.3 – neighbour of the appellant too testified consistent with the evidence of these two witnesses. There is nothing to indicate he had any reason to falsely depose against the appellant. As such,

the prosecution has proved that the deceased had made dying declarations to P.W.2 - Gangadhar, P.W.6 – Executive Magistrate and P.W.7 – Police Officer as well. Thus, the prosecution has proved the appellant to have set his wife ablaze. The appellant thus, proved to be an author of the crime.

16. The question is whether it was an offence of murder punishable under Section 302 of the I.P.C. or any other lesser offence. The deceased herself stated in her dying declaration to P.W.6–Executive Magistrate that the appellant attempted to extinguish fire. Admittedly, there was a quarrel between the appellant and the deceased for over 2-3 hours before the incident. The trial Court in last paragraph of his judgment has observed thus:-

“23. Keeping in mind the facts and circumstances of the case before me, I appreciate that as per the evidence and statement of accused, the quarrel took place at 4 p.m. and incident of receiving burn injuries occurred at 5 p.m. This timing is very material at the time of awarding sentence. In this one hour period, the quarrel took place. The deceased tried to run away, but accused chased her, he called back her, some public intervened the quarrel. Thereafter, incident of burning was there. It means, within one hour, when the quarrel was started and come to an end, it was not an intention of accused to commit the murder of his wife but it happened in the event and on sudden provocation due to use of exchange of some hot words and therefore that is the ground to be considered while awarding the sentence.”

17. The aforesaid reasoning given by the trial Court indicates that it came to the conclusion that it was not an offence of murder. It, therefore, appears to us that conviction for offence under Section 302 of the I.P.C. came to be recorded in Clause 1 of the operative order mistakenly. We are, therefore, also of the view that evidence on record lead us to infer appellant to have had not intended to kill his wife, since he attempted to extinguish fire and even rushed her to the hospital. He too suffered burns. As such, the offence proved against the appellant is culpable homicide not amounting to murder, punishable under Section 304 of the I.P.C. We thus, propose to replace offence punishable under Section 302 by Section 304 in the operative order passed by the trial Court. Since the appellant stands acquitted of the offence punishable under Section 302 of the I.P.C., in exercise of revisional jurisdiction, no order of acquittal can be converted into conviction. For this reason and on merit as well criminal revision application fails.

18. In view of above, the following order :-

ORDER

- (I) Criminal appeal is partly allowed.
- (II) The offence punishable under Section 302 of the I.P.C. appearing in Clause 1 of the operative order is replaced by Section 304 of the I.P.C.

- (III) We do not propose to make any interference with the impugned order of quantum of sentence imposed against the appellant.
- (IV) Rest of the terms of the impugned order to stand unaltered.
- (V) Criminal suo-moto revision application is dismissed.
- (VI) Fees of the learned counsel, appointed through Legal Aid for the appellant, is quantified to Rs.10,000/- (Rupees Ten Thousand).

(R.M. JOSHI, J.)

(R.G. AVACHAT, J.)

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