

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.489 OF 2018

Iqbal Mahiboob Momin

Age : 34 years, Occ.: Labour

Residing at Beghar Wasti, Kumatha,

Taluka Akkalkot, District Solapur

(At present in Solapur District Prison,
Solapur)

.... Appellant
(Orig. Accused)

versus

The State of Maharashtra

... Respondent

.....

- Mr.Ritesh Thobde a/w Mr.Sagar Tambe, Advocate for Appellant.
- Mr.Amit A. Palkar, APP for State/Respondent.

**CORAM : SMT. SADHANA S. JADHAV &
SARANG V. KOTWAL, JJ.**

RESERVED ON : 07th MARCH, 2022

PRONOUNCED ON : 11th MARCH, 2022

JUDGMENT (PER : SARANG V. KOTWAL, J.)

1. The Appellant has challenged the Judgment and Order dated 29/03/2018 passed by the Additional Sessions Judge, Solapur in Sessions Case No.196 of 2015. The Appellant was the sole accused in the trial. By the impugned judgment and order

the Appellant was convicted for an offence punishable under section 302 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- and in default of payment to suffer rigorous imprisonment for six months. Though he was also charged under section 323 of the IPC, no separate sentence was awarded under that section. He was given set off as per section 428 of Cr.P.C. for the period already undergone in prison.

2. The prosecution story in brief is as follows:

The Appellant was married to one Shahida. Fatima was his second wife. Fatima is the deceased in this case. On 12/05/2015, in the evening the Appellant came home. At that time, Fatima was in the house. He picked up quarrel with Fatima. The Appellant had consumed liquor. He was suspecting Fatima's character. He banged her against the wall. He told Fatima that they should go to her parental house. When Fatima refused, he poured kerosene from a small lamp on Fatima and set her on fire. After that a neighbour Lalbi and the Appellant

himself poured water on her. She was taken to hospital. In the meantime, Fatima's mother also reached the hospital. She was admitted to hospital. She had suffered 41% burns and ultimately died on 23/05/2015 at about 10.15 p.m. It is the prosecution case that her Dying Declarations were recorded by Special Executive Magistrate and also by a police officer, wherein she had implicated the Appellant. The Appellant's defence was of total denial.

3. In support of its case, the prosecution has examined Lalbi Kasim Momin. She is a neighbour. She had seen the deceased when she was engulfed by fire. She is an important witness. P.W.2 Rajiya Khwajabhai Momin is the mother of the deceased. She had admitted the deceased to the hospital. According to her the deceased had narrated about the incident to her. This narration amounts to oral Dying Declaration. P.W.3 Rajendra Thanu Rathod was Police Head Constable attached to Akkalkot South Police Station. He had recorded the statement of the deceased and it was treated as the FIR. P.W.4 Shivanand

Nagappa Patil was a Pancha for spot panchanama from where various articles viz. small kerosene lamp, match box and clothes of the deceased were seized. The offence was registered vide C.R.No.65/2015 at Akkalkot South Police Station. PW.5 Kiran Digambar Jamdade was Naib Tahasildar and he had recorded the Dying Declaration of the deceased on receiving the requisition letter of the police. PW.6 Dr.Anant Vijay Chopade was the Medical Officer, who had given endorsement about the fitness of the deceased on both the Dying Declaration. PW.7 Chandrakant Raghunath Shirke was the Investigating Officer. He had recorded statement of witnesses, carried out Panchanamas, collected post-mortem report, C.A. report etc. and then had handed over the investigation to PI. Shelake, who had filed the charge-sheet.

4. Heard Mr.Ritesh Thobde, learned counsel for the Appellant and Mr.Amit A. Palkar, learned APP for the State.
5. Learned counsel for the Appellant submitted that the written Dying Declarations are not free from doubt. The

evidence of the police officers and the Naib Tahasildar, who have recorded those Dying Declarations, suffer from infirmities. The thumb impression on these Dying Declarations are not endorsed by these two witnesses. Both these Dying Declarations are manipulated and are prepared to suit the prosecution case. The requisition letter to S.E.M. itself mentions the entire story, which is taken down in the Dying Declaration. The Dying Declaration, which is treated as FIR clearly shows that it cannot be in the words of the deceased, as there are many details which an injured person could not tell the police. He submitted that even if it is assumed that the Dying Declarations were recorded as per the say of the deceased, she has stated so only after she was pressurized by her relatives. The presence of her relatives in the hospital before recording of the Dying Declarations is an admitted fact. In fact, the Dying Declaration which was treated as the FIR, does mention that it was recorded in the presence of the maternal uncle of the deceased. He further submitted that in any case, the evidence of P.W.1 is the most important piece of evidence, which exonerates the Appellant.

6. Learned APP on the other hand submitted that both the written Dying Declarations are consistent on material points and there is no reason to discard them. The Naib Tahasildar is an independent person. There is no reason why he should lie to support the prosecution. The evidence of the mother clearly brings out the strained relationship between the deceased and the Appellant, which afforded motive to the Appellant to commit offence. He submitted that besides the written Dying Declaration, the oral Dying Declaration made by the deceased to her mother, is also an incriminating piece of evidence.
7. To appreciate these submissions, it is now necessary to refer to the evidence produced by the prosecution in this case.
8. P.W.1 Lalbi Kasim Momin was the neighbour of the Appellant and the deceased. She has stated that she heard commotion outside the house of the Appellant. She went there. She saw that Fatima had caught fire. She poured water on her. Fatima came out of the house. The Appellant also doused the

fire by pouring water. At that time Fatima was saying that the Appellant had set her on fire. This witness then removed her burnt clothes and gave her other clothes. In the meantime, the Ambulance reached there. Fatima was taken to hospital. Fatima's clothes were given by this witness to police. Her statement was recorded. After Fatima's death after a few days, again police recorded her statement. She identified the clothes of the deceased.

9. The cross-examination of this witness is very important. She has stated that the Appellant was married to Shahida before marrying Fatima. About one month prior to the incident, Shahida had returned to the Appellant's house and then there were quarrels in the Appellant's house. Because of that Fatima had left the house. But her maternal cousin Haider brought her back. Importantly, she has admitted that when Fatima had caught fire, the Appellant was not in the house. She herself, the Appellant and Haider went to Civil Hospital with Fatima. She was sitting beside Fatima. PW.1 has categorically admitted that Fatima told her that she attempted to commit

suicide as she wanted to threaten the Appellant. P.W.1 has further admitted that when they reached the Civil Hospital, Fatima's 10 to 12 relatives had reached there. The parents and relatives of Fatima were talking with her. At that time, P.W.1 and others were sitting outside the room. After that, Fatima started saying that her husband had set her on fire. This cross-examination was quite damaging to the prosecution case and therefore some questions were put in re-examination by the learned APP. However, the re-examination was not clear enough. But this witness was confronted with her two different statements about the Fatima's statement as to whether her husband had set her on fire. This witness has admitted that Fatima had earlier stated that her husband had set her on fire. But again in cross-examination this particular statement was brought out in the form of omission from Fatima's police statement meaning thereby this witness had not told the police that Fatima was saying that her husband had set her on fire.

The important aspects of this witness's deposition are as follows:

- (i) The Appellant was not in the house when Fatima had caught fire.
- (ii) The Appellant himself poured water to douse the fire.
- (iii) Fatima was saying that her husband had set her on fire at the first instance. This was an omission from this witness's police statement.
- (iv) In the hospital Fatima admitted to this witness that she tried to commit suicide to threaten the Appellant as his first wife Shahida had returned home.
- (v) The relatives and parents talked with the deceased and then Fatima started saying that Appellant had set her on fire.
- (vi) On that particular evening, at least Fatima's statement was not reduced into writing and hence there was no written Dying Declaration at least on that day.

10. PW.2 Rajiya Khwajabhai Momin, is the mother of the deceased. She has deposed that Fatima had married with the Appellant two years before the incident. Because of differences with the Appellant's family members, the Appellant and Fatima

came to reside at Kumtha. It is her case that Fatima used to tell her that the Appellant used to beat her after consuming liquor. On 05/05/2015 P.W.2 and others met the Applicant and requested him to treat Fatima properly. The Appellant had given assurance to do so. On 12/05/2015 she received a phone call from one Haider about the incident. They immediately went to Kumtha from village Mandrup. The Ambulance reached at the same time. All of them went to Civil Hospital, Solapur. It is her case that the police recorded Fatima's statement and at that time she was sitting outside. Then she met Fatima and Fatima informed her that the Appellant poured kerosene on her and set her on fire. After that, this witness's statement was recorded by police. Fatima succumbed to injuries after a few days. In the cross-examination, she has admitted that Fatima was Appellant's second wife. She has admitted that when she went to Civil Hospital, the Appellant, P.W.1 Lalbi, Haider and a neighbour were present at the hospital. She went inside after one hour, after the admission of Fatima. The police came 1 and ½ hours thereafter.

P.W.2 has admitted that P.W.1 and the Appellant were in the hospital. She has stated that the police had recorded Fatima's statement and then she met Fatima. However, this version is not supported by the prosecution case because there is no statement on record showing that any Dying Declaration was recorded on 12/05/2015.

11. P.W.3 Rajendra Thanu Rathod is an important witness, who had recorded her Dying Declaration which was treated as the FIR. He has stated that on 13/05/2015, P.I. of his police station had directed him to record Fatima's statement at Civil Hospital, Solapur. He went there in the Burns' ward. He sought opinion of the Medical Officer about her condition. The Medical Officer gave a written endorsement. He himself put some questions to Fatima ascertaining that she was in a condition to give her statement. Then he recorded her statement. He has further stated that Fatima told him that on 12/05/2015 the Appellant returned home at about 05.00 p.m. under influence of

liquor. He expressed suspicion about her character. He beat her, banged her head on the wall. He tried to take her to her parent's house. She refused. He again beat her. He poured kerosene on her person from a small lamp and set her on fire. After that the Appellant and P.W.1 tried to douse the fire. They called Ambulance calling number 108 and she was taken to civil hospital.

12. In the cross-examination he has stated that he had recorded statement between 01.00 to 01.15 p.m. and then he reached Akkalkot South Police Station at about 03.00 p.m. and then the FIR was registered. The Dying Declaration was treated as the FIR. It is produced on record at Ex.36.

13. P.W.5 Kiran Jamdade was the Naib Tahasildar. He is an important witness. He had recorded the Dying Declaration at about 11.40 a.m. on 13/05/2015. He had received a requisition letter on that very date at about 11.30 a.m. That requisition letter is produced on record at Ex.31. Significantly, the

requisition letter mentions exact prosecution story that, on 12/05/2015, the Appellant had poured kerosene on the deceased from a small lamp as he was suspecting her character and then had set her on fire. On receiving this requisition letter, P.W.5 went to the hospital. He met the doctor on duty. He took his endorsement about Fatima's consciousness. P.W.5 himself enquired with Fatima before recording her statement and then he recorded her statement.

14. There is a cryptic two line story given in that Dying Declaration by her that, in the previous evening her husband poured kerosene on her and set her on fire. Because of that she had suffered burn injuries. She had admitted that a neighbour and the Appellant himself had doused the fire.

15. Doctor's endorsements are at two places on this document at the beginning and the at the bottom. The first endorsement was at 11.40 a.m. and the next was at 12.10 p.m. about her fitness to give statement.

16. The post-mortem notes were admitted by the defence and they showed that she had suffered 41% injuries mostly on the head, neck, face, upper limbs and trunk. There was no burn injuries on the lower portion of the body. The cause of death was mentioned as 'Septicemia due to burn injury'. Viscera was preserved.
17. Undoubtedly, the prosecution case relies heavily on the two written Dying Declarations. At this stage, there is nothing much to doubt about the fitness of Fatima to give the statement because both P.W.3 and P.W.5 had satisfied themselves about her fitness. The Doctor had given endorsement on both these Dying Declarations about her fitness. The deceased had survived for few more days. Therefore at this stage, it can be accepted that Fatima was in a position to give her statement. However, the crucial question still remains as to whether these Dying Declarations are reliable regarding truthfulness about the incident. The FIR Ex.27 does mention that this statement was read over to Fatima in presence of Fatima's maternal uncle Mubarak.

18. The evidence of P.W.2 Rajiya shows that the police had approached Fatima on 12/05/2015 and had reduced something into writing. However, that writing is not produced on record. Till the FIR was registered, there was nothing to show that the police officers were aware of the facts of the case. Therefore it was quite surprising that the requisition letter received by P.W.5 at 11.30 a.m. on 13/05/2015 mentions the entire prosecution story. It is not the case of prosecution that any of the witnesses, including the P.W.2 or the deceased herself, had given this story to any of the police officers or to anybody else. Therefore it was quite surprising that the prosecution story was mentioned in the requisition letter. After that, immediately the same allegations were repeated in the Dying Declaration recorded by P.W.5. After that, the same story was repeated in the Dying Declaration recorded by the police officer. Therefore this entire sequence raises doubt about the truthfulness of the version given by the deceased.

19. In this context, evidence of P.W.1 is very important. She has clearly stated that when she reached the hospital, Fatima had told her that she tried to commit suicide to put pressure on the Appellant. P.W.1 has admitted that the Appellant was not in the house when the deceased had caught fire. The Appellant himself had poured water to douse the fire. The parents and other relatives of Fatima had reached the hospital about the same time and after having discussion with them, she started blaming the Appellant. Therefore the defence has probablised the theory that the version given by Fatima was a result of tutoring, by her relatives; particularly when P.W.1's deposition is completely against the theory of the Appellant pouring kerosene on the deceased and setting her on fire. P.W.1 was a natural witness. She was not declared hostile. From her evidence we are satisfied that she is a truthful witness. There is no reason to discard her evidence. In this view of the matter, it is difficult to observe that the prosecution has proved its case beyond reasonable doubt. The defence has been successful in creating reasonable doubt against the prosecution story. Therefore in this

situation and in the facts of this case, the benefit of doubt must go to the accused/Appellant and therefore he deserves to be acquitted.

20. Hence, the following order :

ORDER

- (i) The Appeal is allowed.
- (ii) The Appellant is acquitted of the charges framed against him.
- (iii) The Appellant shall be released forthwith, if not required in any other case.
- (iv) Fine, if paid by the Appellant, shall be refunded to him.
- (v) The Appeal is disposed of in the aforesaid terms.

(SARANG V. KOTWAL, J.)

(SMT. SADHANA S. JADHAV, J.)