

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

CRIMINAL APPEAL NO.1295 OF 2012

Mahendra Kumar @ Lala Duvari
Kewat

... Appellant

Versus

The State of Maharashtra

... Respondent

....

Mr. Yogesh Rawool, Advocate a/w. Himalaya Chaudhari, Pravada Raut,
i/b. Shailesh Redekar, for the Appellant.

Mr. A.A. Palkar, APP, for the Respondent-State.

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**CORAM : S. S. SHINDE AND
SARANG V. KOTWAL, JJ.**

RESERVED ON : 16th MARCH, 2022

PRONOUNCED ON : 22nd MARCH, 2022

JUDGMENT : [*PER SARANG V. KOTWAL, J.*]

1 The Appellant has challenged the judgment and order dated 30.10.2012 passed by the Additional Sessions Judge, Vasai in Sessions Case No.13/2011. The learned trial Judge has convicted the Appellant for commission of offence punishable under Section 302 of the Indian Penal Code and he was sentenced to suffer life imprisonment and to pay a fine of Rs.2,000/-; and in default to suffer R.I. for one year. The Appellant was also convicted for commission of offence punishable under Section 333 of IPC and

was sentenced to suffer R.I. for seven years and to pay a fine of Rs.2,000/-; and in default to suffer R.I. for three months. The Appellant was further convicted for commission of offence punishable under Section 353 of IPC and was sentenced to suffer RI for two years and to pay a fine of Rs.1,000/-; and in default to suffer RI for three months. The substantive sentences were directed to run concurrently.

2 The prosecution case is that the Appellant was a rickshaw driver. The deceased Police Hawaldar Anil Aitewadekar was on traffic duty. On 27.10.2020 at about 7.00 p.m., he had given challan to the Appellant for traffic violation and for not having requisite documents. The Appellant got enraged. He came back to the spot in front of Hotel Rishikesh at Vasai. The deceased was on duty. The Appellant poured petrol from a plastic bucket on the person of the deceased. He also threw a shirt soaked with petrol on the deceased and set him on fire by lighting a matchstick. The deceased was taken to a hospital. He had suffered 39% burn injuries. He survived for a few days and then died on 3.11.2010. The cause of death was mentioned as “shock due to burns”. The

deceased had suffered burns on head, neck, face, chest, back and upper-limbs. After registration of the FIR, the investigation was carried out. The Appellant was arrested. On 18.11.2010, the test identification parade was held to enable the witnesses to identify the Appellant. After conclusion of the investigation, charge-sheet was filed and the case was committed to the Court of Sessions. During the trial, the prosecution examined fourteen witnesses, including the eye witnesses and PW-8 Uttam Jagdale who had recorded the dying declaration of the deceased.

3 The defence of the Appellant was that of total denial. He examined Dr. Vispi Driver, as a defence witness, to show that the deceased was suffering from other ailments and he had less chances of survival because of his health condition in case of lesser burn injuries.

4 Heard Shri Yogesh Rawool, learned counsel for the Appellant and Shri A.A. Palkar, learned APP for the Respondent-State.

5 Learned counsel for the Appellant submitted that there is discrepancy between the statements of the eye witnesses. The test

identification parade was not held in accordance with the rules framed in that behalf. There was no sufficient light on the road when the incident took place. Therefore, the eye witnesses could not have seen the incident properly.

6 Learned counsel submitted that though it was a crowded locality, only a few eye witnesses whose evidence is doubtful, are examined by the prosecution. The deceased could not be in a position to give his dying declaration considering that he was taking treatment including sedatives.

7 Learned counsel also made an attempt to argue that the case may not fall within the meaning of 'murder' as the deceased was suffering from serious health issues which could be the cause of his death. According to learned counsel, the offence could be of a much lesser degree.

8 Learned APP, on the other hand, relied on the deposition of the eye witnesses and submitted that the prosecution has proved its case beyond reasonable doubt.

9 Learned trial Judge had accepted the prosecution evidence in totality and had convicted and sentenced the Appellant, as mentioned

earlier.

10 We have considered these submissions and we have perused the prosecution evidence carefully. Broadly speaking, the prosecution has brought on record evidence of eye witnesses, dying declaration, medical evidence and other investigation papers, viz., panchnamas and C.A. reports.

11 PW-12 Dr. Ashutosh Meshram had conducted the postmortem examination on 3.11.2010. He had found that the deceased had suffered 39% burns, as mentioned earlier. The cause of death was “shock due to burns”. The cause of death was not because of any other health issues of the deceased. Therefore it is beyond doubt that if the act is proved against the Appellant, the offence cannot be of any lesser degree. He has further deposed in the cross-examination that the burn injuries were sufficient to cause death. Thus, the prosecution has proved that the deceased had died a homicidal death.

12 PW-1 Manjunath Shetty had seen the incident when the deceased was already engulfed by the flames. He has deposed that he was working in the Hotel Rishikesh. It was situated opposite Vasai bus-stand. He knew the deceased who was a traffic police. On 27.10.2010, at about 8.00 p.m., he saw that one person wearing police uniform was engulfed with flames. The staff of his hotel extinguished

the fire with the help of water and then that person was taken to the hospital. He denied having seen the actual incident of pouring petrol and setting the deceased on fire.

13 PW-2 Sayyad Hussain Razak is an important witness, who was one of the eye witnesses. He knew the deceased. On 27.10.2010 at about 8.00 p.m. he had gone to Hotel Rishikesh with his friend to have tea. He saw the Appellant coming near the deceased with a bucket having petrol. He threw it on the deceased, who was sitting on his motorcycle. The Appellant also threw a shirt, which was soaked in petrol, on the deceased and then lit a matchstick and threw it on the deceased. The Appellant then ran away from the spot. PW-2 himself tried to catch him, but, the Appellant ran away. He came to know about name of the Appellant from his friend Vaibhav. The deceased was taken to a hospital. On 18.11.2010, PW-2 was called for test identification parade, where he identified the Appellant out of six persons who were standing in the parade.

In the cross-examination, he has stated that there were commercial establishments around the spot. In the evening, there used to be rush of people on that road. He did not know whether at the entrance of the S.T. bus-depot there was any street light or whether there were street lights from Rishikesh Hotel to Ambadi Naka. He was not

acquainted with the Appellant or with Vaibhav before the incident. He had seen the Appellant when the Appellant was two feet away from the deceased. According to him, he could not save the deceased because the incident took place within a short time.

14 PW-7 Nagendra Vishwakarma is another eye witness. He also had gone to the same hotel at about the same time. He has narrated the incident in the same manner as deposed by PW-2 Sayyad Razak. He had also chased the Appellant. He was also called for identification parade on 18.11.2010 and he had identified the Appellant in the parade.

In the cross-examination, he has deposed that he was knowing the deceased since prior to the incident. There was heavy traffic near that hotel. It was a crowded area in the evening. He denied the suggestion that at the time of incident there were no street-lights at the spot. He has stated that the dummy persons, who stood in the identification parade, were of the same age group of 25 to 27 years.

15 PW-9 Raghunath Vanmali was the Naib Tahsildar, who had conducted the identification parade. He has deposed about the procedure followed by him. He had selected six dummy persons, who were similar in the description to the Appellant. First PW-7 Nagendra identified the Appellant. Then PW-2 Sayyed Razak had also identified

him. Apart from them, three more witnesses i.e. Amrish Pal, Vinod Yadav and Divakar Tiwari identified the Appellant. Those three people were not examined as the prosecution witnesses.

In the cross-examination, nothing much is brought out in favour of the defence. The test identification parade panchnama is produced on record at Exhibit-33.

16 Thus, the evidence of PW-2 Sayyed Razak, PW-7 Nagendra Vishwakarma and PW-9 Raghunath Vanmali sufficiently establish that the Appellant has committed this offence. Apart from that, there is a strong evidence of written dying declaration. The prosecution has examined PW-8 PI. Uttam Jagdale in that behalf. He has stated that on receiving information about the incident he was asked to record statement of the injured. He went to Golden Park Hospital. At about 10.15 p.m., the doctor informed him that the injured was in a position to give his statement. PW-8 obtained his opinion in writing and after that the statement of the injured was recorded as per his say. His thumb impression was obtained on it. It was treated as FIR and the offence was registered. It is produced on record at Exhibit-29.

In the cross-examination, he denied the suggestion that the doctor was not present when the statement was recorded.

17 The doctor who had given endorsement on this dying declaration was examined as PW-5. He was Dr. Malcum Pestanji. He has stated that prior to recording of that statement, the police officer enquired with him about the patient's condition. According to this witness, the injured was capable of giving his statement and in the presence of this witness, his statement was recorded. He has stated that the statement was given in full consciousness. He has identified his endorsement on the statement.

In the cross-examination, he stated that since he was busy giving treatment to the patients, he did not hear what the patient told the police. The patient was in a critical condition. The thumb impression was not affixed in presence of this witness.

18 In the dying declaration, which is treated as FIR, the deceased had described the incident. It is mentioned in the FIR that at about 7.00 p.m., the Appellant was asked for his license by the deceased. He did not have other documents and that he was taking the passengers from the area which was prohibited for taking passengers. Therefore, the deceased seized his license and gave him a challan. At about 8.00 p.m., he came there and poured petrol on the deceased and threw his shirt on the deceased and then set him on fire.

This version is consistent with the version of the eye witnesses and it is sufficiently proved. There is hardly any infirmity in this dying declaration or in the procedure in recording the dying declaration.

19 The other witnesses had taken part at different stages of the investigation. PW-3 Sanjay Sawant was a pancha for seizure of clothes of the Appellant and for spot-panchnama. During conducting that spot panchnama, the half burnt pouch of the deceased containing the Appellant's license, was seized.

20 PW-4 Mohd. Hanif Patel was the photographer, who had taken the photographs.

21 PW-6 Hareshwar Patil was a pancha and was present when the rickshaw was recovered at the instance of the Appellant.

22 PW-10 Sunil Shinde had taken the deceased to the hospital in a rickshaw. When the deceased was taken to the hospital, he was able to speak and in his presence he told Vaibhav Borker about the incident and had told them that the Appellant had committed this offence. Therefore, the statement of the deceased made in the presence of this witness amounts to oral dying declaration.

23 PW-11 Vaibhav Borkar was a friend of the deceased. He was a

witness to the incident when the deceased had seized driving license of the Appellant. This witness had extinguished the fire. However, he has not deposed about the oral dying declaration.

24 PW-13 Police Naik Rajesh Badekar had gone to the Golden Park Hospital. He has deposed that in his presence, the deceased had narrated the incident and had named the Appellant as an offender.

25 PW-14 PI Chandrakant Jadhav was the investigating officer. He arrested the Appellant on 28.10.2010. He had conducted the investigation into C.R. No.I-400/2010 of Manikpur police station concerning this offence. He had seized the shirt on the spot, the clothes of the deceased and other articles. He had sent them for C.A. examination.

26 Besides this oral evidence, C.A. reports were produced on record. The C.A. reports show that the articles at the spot, the clothes of the deceased as well as full-pant of the Appellant showed presence of petrol residues.

27 Thus, from the above discussion, we are satisfied that there is strong evidence against the Appellant. There are statements of eye witnesses who have identified the Appellant at the test identification

parade. There are other eye witnesses who were knowing the Appellant. They have also implicated the Appellant. There is a written dying declaration recorded with the endorsement of the medical officer. There is recovery of clothes of the Appellant showing presence of petrol. There was recovery of license from the half burnt pouch of the deceased. That license was that of the Appellant.

28 Based on this evidence, it can safely be concluded that the prosecution has proved its case beyond reasonable doubt against the present Appellant. There is no scope to hold that it can be a lesser offence. The offence punishable under Section 302 of IPC is duly proved by the prosecution against the present Appellant. The learned trial Judge has taken all these factors into consideration in convicting and sentencing the Appellant. Therefore, we do not find any reason to take a different view. With the result, the Appeal is dismissed. However, it is clarified that the Appellant shall be entitled for the set-off under Section 428 of Cr.PC., which is not mentioned in the operative part of the trial Court judgment. The Appeal is accordingly disposed of.

PRADIPKUMAR
PRAKASHRAO
DESHMANE

(SARANG V. KOTWAL, J.)

(S. S. SHINDE, J.)

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