

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

CRIMINAL APPEAL NO.126 OF 2021

Chandrakant S/o Sanduji Hivrle,
Age-53 years, Occu:Business,
R/o-Gadenagar, Naregaon,
Aurangabad.

...APPELLANT

VERSUS

- 1) Dayaram P. Bhoite,
Age-50 years, Occu:Business,
Police Inspector, Near Police
Commissioner Office, Mill Corner,
Aurangabad,
- 2) Aminabee W/o Sk. Rahim,
Age-45 years, Occu:Business,
R/o-Gadenagar, Naregaon,
Aurangabad,
- 3) The State of Maharashtra,
Through Police Station MIDC,
CIDCO, Aurangabad.

...RESPONDENTS

...
Mr. S.K. Hingole Advocate for Appellant.
Mr. R.D. Sanap, A.P.P. for Respondent No.3.
...

**CORAM: SMT. VIBHA KANKANWADI AND
Y.G. KHOBRADE, JJ.**

DATE OF RESERVING ORDER : 12th APRIL 2023

DATE OF PRONOUNCING ORDER : 6th JUNE 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by the original informant under Section 372 of the Code of Criminal Procedure to challenge the acquittal of respondent Nos.1 and 2 (original accused Nos.1 and 2) by learned Sessions Judge, Aurangabad in Sessions Case No.32 of 2008 on 27th December 2019 thereby acquitting respondent Nos. 1 and 2 (hereinafter would be referred as 'accused Nos.1 and 2' as they stood before the trial Court) under Sections 302, 120-B of the Indian Penal Code.

2. Heard learned Advocate Mr. Hingole for the appellant and learned APP Mr. Sanap for respondent No.3. We have considered the case at the admission stage. We had called the record and proceedings and went through the same with the able assistance of learned Advocate for the appellant and learned APP for respondent No.3. It is not even necessary to issue notice to respondent Nos.1 and 2.

3. The facts leading to the Appeal are that the present appellant is the informant, who is the son of deceased Mandabai Hivrale. Accused No.2 was the neighbour of the informant. There were disputes between the family of accused No.2 and the informant. Many cases were filed against each other. It was alleged by the informant that the family of accused No.2 was involved in illegal acts. Sons of accused No.2 were local *Gundas* and habitual offenders. Accused No.1 was serving as Police Inspector with M.I.D.C. Cidco Police Station, Aurangabad on or around 23rd April 2004. Informant and his mother Mandabai had lodged several complaints against accused No.2 in the said Police Station. Accused No.2 and her family members had also lodged reports against the informant and his mother. However, the informant alleges that no action was taken against accused No.2 – Aminabee and her family members on the basis of report lodged by him and his mother but accused No.1 had taken action against Mandabai on the basis of report lodged by Aminabee. Even informant and his mother were arrested and kept in lock-up. Therefore, informant and his mother Mandabai had the feeling that accused No.1 was taking the side of accused No.2.

4. According to the informant, he and his mother had gone to the said Police Station around 6.30 to 7.00 p.m. on 23rd May 2004. They asked accused No.1 as to why they were arrested and why there was chapter case against them only. Informant says that accused No.1 was under the influence of liquor at that time. Accused No.1 pushed Mandabai almost from his cabin till the flag-post outside the Police Station (within compound) and all the while he was beating Mandabai mercilessly. Thereafter accused No.1 brought kerosene from the canteen of one Sakhubai Hivale from the compound of the Police Station, poured the same on the person of Mandabai. Though Mandabai was shouting and crying for help, accused No.1 took out match box from his pocket and set Mandabai to fire. Informant says that he could not get the courage to interfere as accused No.1 was not in his senses and also the other Police persons, who were present, prohibited him from saving the life of his mother. Accused No.1 then threatened the informant that if he discloses the said fact to anybody, he would also be set to fire. The Police persons stood up as spectators. Informant went to the house of his sister and narrated the incident. Then PSI S.R. Chavan with two lady police constables took Mandabai to Government Medical College and Hospital, Aurangabad. Casualty Medical Officer Dr. S.M. Jawale

was giving treatment to Mandabai and even to him Mandabai told that accused No.1 has set her to fire. Mandabai was then shifted to burn ward. A.C.P. Dr. Chavan recorded statement of Mandabai. Even at that time, Mandabai told the said fact that accused No.1 had set her to fire. Mandabai stated to have given statements to several press reporters also. Her statement was then recorded by Special Judicial Magistrate Shri Ghorpade on 24th May 2004. Mandabai had sustained 96% burn injuries and she died on 24th May 2004.

5. Informant further contends that after completion of funeral, he had gone to the Police Station to lodge the report but no action was taken. Even there was discussion in the Assembly and the then Hon'ble Home Minister had informed to the House that necessary orders would be issued to lodge the FIR under Section 302 of the Indian Penal Code against accused No.1 and he would be suspended. In spite of that no crime was registered. Informant had approached the police authorities several times. The investigation was also given to C.I.D. but nothing happened. Informant had then wrote complaint to various authorities including the Home Minister of State, Director General of Police, the Chief Minister, I.G.P. (Crime), the President of India etc.

Ultimately informant lodged private complaint before the Chief Judicial Magistrate, Aurangabad.

6. After completing the procedure under Section 202 of the Code of Criminal Procedure i.e. recording of evidence of the witnesses in view of the fact that the case involves an offence under Section 302 of the Indian Penal Code; the learned Chief Judicial Magistrate had issued process against the accused by order dated 20th December 2006. After issuance of process, it appears that the case was transferred to the Court of learned Judicial Magistrate First Class, Court No.6, Aurangabad, who had then committed the case for trial by order dated 16th January 2008. After the case was committed to the Court of Sessions, charge was framed for the offence punishable under Sections 120-B and 302 of the Indian Penal Code against both the accused. Both of them pleaded not guilty and raised the defence that they have been falsely implicated. Accused No.1 has put specific defence that Mandabai has immolated herself and she had reason to implicate him and therefore it has been stated that she has given such statements. In fact accused No.1 was busy in his cabin discussing certain matters with social worker and his team in respect of illicit liquor business in the area.

7. The prosecution has examined in all 11 witnesses to bring home the guilt of accused and accused No.1 has examined one witness in defence. It will not be out of place to mention here that offence under Section 309 of the Indian Penal Code came to be registered against Mandabai on behalf of the State by Police Head Constable Udaik of M.I.D.C. Cidco Police Station, Aurangabad. The documents from the said case were produced in this case also. After considering the evidence on record and hearing both sides, the learned Sessions Judge has acquitted both the accused persons. Hence the informant has filed present Appeal under Section 372 of the Code of Criminal Procedure.

8. Relevant prayers to the present Appeal are thus:-

"C) The impugned Judgment and order of acquittal passed by the Sessions Judge at Aurangabad in Sessions Case No.32/2008 may kindly be quashed and set aside,

D) The respondent No.1 &2 may kindly be punished U/s.302, 120-B, of I.P.C.

E) The record and proceedings of Sessions Case No.32/2008, District & Sessions Judge, Aurangabad

decided on 27.12.2019 and record and proceedings of Criminal M.A. No.1341/2004 may kindly be called.”

9. Before we proceed further, it appears that initially the procedure that was undertaken by the learned Additional Sessions Judge was incorrect. He had considered the evidence that was before the Committal Court and then tried to record only the cross-examination, but then he has corrected himself by passing separate order and thereafter the evidence has been recorded in the matter. Further it appears that though the case was a private case till its committal, in view of Section 225 of the Code of Criminal Procedure, which prescribes that in every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor, the learned APP has conducted the case before the learned Sessions Judge.

10. Learned Advocate for the appellant has now raised orally that the prosecution has not conducted the matter properly. Ground has been raised that the trial Court has not examined two witnesses, namely, Shantilal Gaikwad of Sakal Newspaper and Pravin Hatkar of Samna Newspaper and then it is said that the case is therefore, liable to be sent for retrial. It is then also orally stated that the other witnesses have not been examined

whose names have been stated in the entire charge-sheet, mainly those two persons who had recorded the dying declaration. The oral dying declaration given to PW-10 Dr. Sunil Jawale has also not been considered by the trial Court. Exhibit-32 was the dying declaration taken by A.C.P. Dr. D.S. Chavan wherein it was specifically stated that Mandabai had told that accused No.1 Bhoite has set her to fire. The evidence of two eye witnesses i.e. PW-1 Chandrakant – present appellant – informant and PW-2 Premsagar Dandge has not been considered properly. The learned trial Court has relied on the evidence of police persons but failed to consider that they being the police persons and also accused No.1 is police officer, they were bound to support the accused rather than to support the prosecution. The postmortem report clearly shows that death was due to burn injuries and Mandabai had sustained 95% superficial to deep burn injuries. A brutal murder has been committed. The reason was demonstrated that accused No.1 was taking the side of accused No.2 only. Accused No.1 was taking action against the informant and his mother only whereas he was not taking any action against accused No.2 and her family members when informant and his mother were constantly lodging the FIR whenever the incidents used to take place. There was no

question of implicating accused persons. Otherwise, there was no reason for Mandabai to commit suicide. The defence that has been taken has been unnecessarily got considered and therefore, when a lady has been put to fire, for no fault, by the Police Officer who was in a drunken state; the learned trial Judge ought to have held that the offence has been proved beyond reasonable doubt. The matter deserves admission.

11. At the outset, we would like to say that the informant is now coming under Section 372 of the Code of Criminal Procedure, but he could have in fact assisted the APP in conducting the matter also, since the case was initiated by him by filing a private complaint. But as aforesaid in view of Section 225 of the Code of Criminal Procedure the case was conducted by the prosecutor, that does not mean that the informant had no right to assist the APP in prosecuting the case. Now the informant is saying that certain important witnesses have not been examined. He could have intervened and prayed for issuance of summons to those witnesses also. We can say that he allowed the evidence to be led as it is by the APP and now he is raising the dispute. Another fact to be noted is that in his private complaint, which was initially registered as M.A. No.1341

of 2004, informant had given the list of witnesses and that list was of 13 persons. If we consider that list, except he himself he had not named any other eye witness. There are certain police persons as well as medical officers and the two persons who had taken the dying declaration of Mandabai. Still, as aforesaid, the prosecution has examined in all 11 witnesses who were amongst those who were named by the informant himself in his private complaint. Now it is required to be seen, as to whether the available evidence on record was sufficient to hold the accused persons guilty and whether on the basis of the said evidence a case is made out by the appellant to admit the Appeal and re-appreciate the evidence. We would like to say that we would be considering the case at this stage with the said limited question and minute scrutiny is not contemplated.

12. Informant PW-1 Chandrakant has deposed about the enmity between his family and family of accused No.2 and all those details were given. He has also tried to give the details as to how accused No.1 was favouring accused No.2 and the fact that he as well as deceased Mandabai were arrested in connection with the report lodged by accused No.2. Though informant has stated that accused No.1 had given threat to kill

him and he had filed complaint with Collector, Aurangabad, it appears that he had not approached the Court of law by filing private complaint. He has then stated that he had gone along with his mother Mandabai around 6.30 to 7.00 p.m. on 23rd May 2004 to CIDCO MIDC Police Station, Aurangabad and they met accused No.1. It is to be noted that accused No.2 has not come directly in picture and even at this stage itself we would say that there is no evidence on record adduced by the prosecution to show that there was a conspiracy to kill Mandabai between accused Nos.1 and 2. The conspiracy requires prior meeting of minds though presence may not be there. But here even that evidence is also lacking. The present Appeal, therefore, deserves to be dismissed as against accused No.2 directly. At this stage itself we would also consider that in both the dying declarations which were allegedly recorded on the say of Mandabai (without going into technicalities), she has also not blamed accused No.2 in any manner.

13. The informant claims that accused No.1 was under the influence of liquor and he had man-handled Mandabai - mother, dragged / pushed her up to flag-post and then brought kerosene can from the canteen of Sakhubai Hivale situated near the police

station and poured kerosene on the person of Mandabai and set her to fire. In his examination-in-chief, informant has tried to give excuse that the other police persons stopped him from rescuing mother, but this appears to be a lame excuse as the fact has come on record regarding the situation in the police station. The distance between the cabin of accused No.1 till the flag-post is about 200 ft. There was no threat to kill or nobody could have imagined that accused No.1 would pour kerosene on the person of Mandabai when she was allegedly dragged for a distance of about 200 ft. It is a police station where the alleged incident is stated to have taken place and it being the public place there would have been general public also at the relevant time. How none of them would have intervened, is a question. No doubt when accused No.1 was in power i.e. he was the senior-most police officer there, the other police persons could not have immediately reacted. But we cannot generalize this, because every police person is duty bound to protect the person and property of the citizens. Another fact to be noted is that as per the testimony of informant, Mandabai was taken from cabin to flag-post and then only accused No.1 allegedly went to the cabin and brought the kerosene can. The canteen is stated to be run by one Sakhubai Hivale. Said Sakhubai or any other person

working in the said canteen has not been examined. The said canteen is abutting to police station. When accused No.1 had left Mandabai near the flag-post and went to the canteen, Mandabai had every opportunity to flee away along with the informant. Mandabai as well as informant could have gathered that there is possibility that they would be assaulted by accused No.1. It is hard to believe that till accused No.1 brought the kerosene can, Mandabai was waiting near the flag-post for some or the other reason. Another fact which has come on record from the cross-examination of this witness that he himself escaped after the incident that happened with his mother. According to him, he had gone to the house of his sister at Labour colony. The distance between police station and Labour colony is about 4 to 5 Kms. He was there in the said colony for 15 minutes. He informed the fact to his sister, PW-3 Gautami Gaikwad and went home. He was at home entire night and then he says that he had come to know on the same day that police had hospitalized his mother at Ghati hospital. He does not say that though he had escaped from the police station when he came to know that the mother had hospitalized at Ghati Hospital he had gone there to meet the mother. His conduct after the incident is also questionable. He says that on the next day at about 8.00 to 8.30

a.m. he had gone to Ghati Hospital. He has denied the suggestion that the doctors had made him aware about the critical condition of his mother on 23rd May 2004 itself.

14. PW-3 Gautami is saying that at about 7.00 to 8.00 p.m. on 23rd May 2004, PW-1 Chandrakant had gave her information that accused No.1 has set to fire their mother but she does not say that immediately thereafter she herself and brother Chandrakant decided to go to hospital. There are many relatives of deceased and these two witnesses but they have not taken help of the relatives to go to hospital. But then she says that they have received the call from the Government Hospital and therefore, they went there at which time they found that Mandabai was admitted. Again at the cost of repetition we would say that even after the allegedly witnessing that the mother has been put to fire, instead of taking efforts to extinguish the fire and taking her to hospital, the son fled away from the spot and did not even go to hospital. At no point of time he says that due to the fear of the police he had not gone to the hospital. Therefore, it creates doubt as to whether he had really gone to the police station along with his mother. The oral dying declaration tried to be

stated by them is not believable for the simple reason that Mandabai appears to have had reason to implicate.

15. PW-2 Premasagar Dandge has been posed as eye witness, who says that he was passing in front of MIDC police station by bicycle. He was proceeding to buy fish from Mukundwadi. But in his cross-examination he has admitted that there is a fish market near his house. Therefore, obvious question would be as to why he would choose relatively distant fish market. He then says that he had seen four persons inside fencing of the police station and four persons were outside the police station. He heard shouts of a woman and therefore stopped there. He found that one police officer was pulling the woman outside the police station, brought her to flag-post and then police officer brought kerosene from the canteen, poured it on the person of woman and set her to fire. Again these facts give rise to the same question, as to why Mandabai though had the opportunity to run, would not have run away. In his cross-examination PW-2 has admitted that prior to the incident he was not knowing the said woman as well as informant Chandrakant. Chandrakant had met him in the trial Court i.e. Court of Judicial Magistrate First Class. Under such circumstance, the possibility of he being a planted

witness, cannot be ruled out. He had also not tried to rescue the lady, therefore, his presence appears to be doubtful.

16. The prosecution has more relied on the evidence of PW-8 Jaiprakash Ghorpade, the Special Judicial Magistrate, who recorded dying declaration Exhibit-41 and also PW-9 D.C.P. Mr. Dnyaneshwar Chavan, who had recorded dying declaration Exhibit-32. In the dying declaration Exhibit-32 it is stated that Mandabai told before him that Bhoite has set her to fire. However, Exhibit-32 itself is very clear in indicating as well as testimony of PW-9 Dnyaneshwar Chavan would show that Mandabai was disoriented though medical officer informed him that she was conscious. Mandabai was found by the scribe of the dying declaration Exhibit-32, as not in a fit condition to give valid statement. In his cross-examination PW-9 has stated that when he had gone to the hospital, the relatives of the deceased were there. He himself was not aware about the history stated by the deceased to the hospital authorities. She was unable to give answers to some questions those were put by him and the relatives of the deceased were making grievance against the police. Such dying declaration, even if taken as it is, cannot prove the guilt of the accused because in the said dying

declaration Exhibit-32 the purpose or motive is absent. Same is the case with dying declaration Exhibit-41 recorded by PW-8 Ghorpade. Though he has stated that the medical officer endorsed that Mandabai was in a position to give statement and then Mandabai told that accused Bhoite poured kerosene on her person and set her to fire, the motive is absent there also.

17. It is not disputed that Mandabai died due to 95% burn injuries. However, the evidence of PW-5 the then PSI Shivdas Chavan would clearly show that Mandabai had self immolated and at that time accused No.1 was in his cabin. PW-5 Chavan has stated that he himself, PI Bhoite i.e. accused No.1 and PSI Sarode were in the cabin and they were with ward member Raju Ramrao Shinde and Madhukar Sonaji Salve. When they were discussing the issue of illicit liquor, they heard shouts of Sakhubai who used to run tea stall abutting the police station that a woman has burnt and then all of them went outside the cabin. One Ramaiyanath Jadhav had thrown water on the person of Mandabai to extinguish the fire, so also lady constable Smt. Wakode then covered Mandabai with a blanket and thereafter police persons as well as Sakhubai took a tempo in which Mandabai was shifted to Ghati hospital. All these details have

come in the cross-examination of PW-5 and therefore there is no reason to disbelieve the same as those have gone unchallenged.

18. Here itself we would like to take note of evidence in defence i.e. DW-1 Advocate Mr. Mohammad Numan Khan. He has stated that he had gone to the police station at the relevant time to bring AA form. He usually deals with the cases of motor accident claims. When he along with his brother-in-law went to the police station and parked the vehicle outside the police station, they noticed that a lady aged 62 to 64 years was leaving police station by murmuring. They ignored her. They had entered into the cabin of P.I. and then P.I. has put the signature on AA form. Thereafter they were coming out of the police station and when DW-1 Mr. Mohammad was taking out his vehicle, he noticed that the woman had ablaze herself. Thereafter someone extinguished the fire and arrangements were made to shift the lady to hospital. The defence witness has been cross-examined by the learned APP, however nothing contrary has been transpired. As aforesaid, the police station being public place, definitely there is no reason to disbelieve that the Advocate would have gone to collect AA form. Thus, it can be seen that there is sufficient evidence rather to prove that Mandabai had

committed suicide by pouring kerosene upon herself and then setting herself to fire, but due to the enmity and may be because of the angle that accused No.1 was not taking action on the complaints filed by her, she had taken that step. No doubt accused No.1 was in fact duty bound to take actions whenever relevant, against all the persons and he cannot favour one party. But still to say that accused No.1 has committed murder of Mandabai, that too, in conspiracy with accused No.2 on the basis of evidence that was adduced before the trial Court was not justified at all. The learned Sessions Judge, Aurangabad was justified in acquitting both the accused persons.

19. Now as regards the scope of Section 372 of the Code of Criminal Procedure is concerned, definitely that right has been given to the victim to challenge such acquittal but for that purpose the evidence should be strong and the informant should not have been a mute spectator during the entire trial. Again we are taking note of the fact that the initiation of the proceeding was a private complaint. No doubt it appears that the informant was going pillar to post so that his FIR could be lodged, but it appears that he had not followed the steps as laid down in ***Lalita Kumari vs. Government of Uttar Pradesh, (2014) 2***

SCC 1 in quick succession i.e. without wasting of time. If the evidence that was collected in the said FIR lodged under Section 309 of the Indian Penal Code against Mandabai was to the extent that she had committed suicide by setting herself to fire, then informant's act of allowing the time to run against him was not justified. Herein this case already the accused persons have faced the trial. The option of retrial can be sparingly used and for that purpose it will have to be shown that there is miscarriage of justice. Informant now cannot say that the APP had not properly represented him. Such point cannot be raised when entire trial is over. The said reality, if any, ought to have struck to the informant much earlier, then he had further options also at that time. By making a statement that even the matter was given to C.B.I. will not be sufficient. It ought to have been produced on record as to what action was taken by that authority. We would also like to say that giving the publicity in the form of news items will not take the place of evidence. No doubt the matter was sensitive but the fact remains is that even from the testimony of the informant, we could gather that there is concoction of story and therefore, we do not find that case is made out to admit the Appeal. In fact we have almost re-

appreciated every evidence even to see whether retrial can be ordered, but it would be injustice to pass such order.

20. For the aforesaid reasons, the Appeal stands dismissed at the threshold.

[Y.G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JUNE23