

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 157 OF 2018

The State of Maharashtra,
Through Police Station Officer,
Police Station, Sillod (Rural),
Tq. Sillod, Dist. Aurangabad.

... Applicant

Versus

1. Samadhan S/o. Damodhar Mirge,
Age: 21 years, Occu : Agri.,
R/o. Warud-Pimpri,
Tq. Sillod, Dist. Aurangabad.
2. Malanbai @ Walbhabai w/o. Damodhar Mirge
Age: 47 years, Occu: Household,
R/o. As above.

... Respondents
[Ori. Accused]

...
Mrs. V. S. Choudhari, APP for the Applicant-State
...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 14.06.2023

ORDER (PER ABHAY S. WAGHWASE, J.) :

1. Instant leave application is by State, thereby seeking leave to question the judgment and order passed by learned Additional Sessions Judge-2, Aurangabad dated 22.02.2018 by which respondents herein are acquitted from charge under Sections 498-A, 302, 323 r/w 34 of the Indian Penal Code [IPC].

FACTS BEFORE LEARNED TRIAL COURT IN BRIEF

2. Prosecution was launched against accused Samadhan and Malanbai on the premise that accused husband and mother-in-law were regularly picking up quarrel with deceased Varsha on petty counts. On 09.06.2010, deceased had visited her cousin sister Nandabai to see her ailing son. Accused no.1 got enraged on that count and abused her. In the night also both accused blamed her for visiting house of cousin and she was beaten. On 10.06.2010 when deceased was cleaning the house, at that time again both accused picked up quarrel on above count. When she insisted that she would go, accused husband poured kerosene and set her on fire in which she suffered around 70% burns. While taking treatment, statement of deceased Exhibit 67 was recorded and on the strength of the same, crime was registered bearing no. 77/2010 and it was further investigated and it culminated into chargesheet which was committed to the learned Sessions Court.

Learned Additional Sessions Judge tried the case, recorded the evidence, heard both sides and reached to a conclusion that prosecution failed to establish that accused persons subjected deceased to physical and mental cruelty and that prosecution also failed to prove that death was homicidal one and having held that prosecution failed to prove that accused persons, in furtherance of common intention and knowledge, set deceased on fire resulting into her death, passed order of acquittal.

3. The above order of acquittal dated 22.02.2018 is proposed to be challenged by filing appeal and hence the instant leave application.

4. Learned APP would strenuously submit that by taking aid of in all 8 witnesses, including statement of very deceased, prosecution had put up a very strong case in support of the accusations of cruelty and murder. That, unfortunately such evidence has not been considered and properly appreciated by the learned trial court. Our attention was invited to the testimony of all the witnesses and it was submitted that there is clear and clinching evidence regarding maltreatment to deceased regularly and on petty counts. Accused persons, who were husband and mother-in-law of deceased, had objected to the visit of deceased to her cousin even when the child of said cousin was ill. It is pointed out that only because victim informed them that she would go to see her cousin, accused husband, on the count of back answering, has poured kerosene and set her on fire resulting into 70% burns which was proved to be the sole cause of death. Therefore, according to learned APP, the only conclusion that could have been drawn by learned trial Judge is that charges were proved by prosecution. It is submitted that, however, learned trial judge has adopted erroneous approach in appreciating the above evidence. It is submitted that testimony of independent witnesses like paternal aunt and medical experts has also not been correctly appreciated and their such

testimony has been disbelieved. Our attention is also invited to the observations in the judgment and it is submitted that the observations and findings are contrary to the evidence on record and therefore, judgment being illegal and perverse, it is submitted that the same cannot be allowed to be sustained and hence the prayers.

5. In the light of above submissions, we have taken up the evidence for ascertaining whether there was substance in the above submissions of learned APP. It is seen that one dying declaration/statement of deceased was recorded by PW2-Dagadu Khadekar, the then Naib Tahsildar. In his substantive evidence this witness states that after examination by doctor about fitness, he recorded her statement wherein she informed that husband Samadhan and mother-in-law poured kerosene on her and set her ablaze telling her not to go to the house of her cousin and on such count she being set to fire. This witness identified dying declaration Exhibit 39 dated 10.06.2010.

6. There is another dying declaration at Exhibit 67 recorded by PSI Kanade and it seems that unfortunately PSI Kanade, who recorded this dying declaration and registered crime, was not alive at the time of trial and hence not available for evidence.

7. Apart from above dying declaration, it seems that cousin of deceased namely Nandabai is also examined as a court witness and her evidence is at Exhibit 83.

8. Other witnesses examined by prosecution are father, brother, panchas and doctors.

9. We have carefully gone through the judgment passed by learned trial Judge and we have come across that in para 37 of the judgment, learned trial Judge has held that homicidal death has not been proved and evidence in that regard on behalf of prosecution does not inspire confidence. Learned trial Judge has held that there is no direct evidence and there is only hearsay evidence. That, there is failure on the part of investigating machinery in seizing clothes of accused. Therefore, it is concluded that from the overall evidence, possibility of suicidal death cannot be ruled out and opining so, accused seem to have been acquitted.

10. On going through the evidence on record, *prima facie* we are convinced that in this case there is no dispute that when the alleged incident took place, at that time only deceased and accused were present in the house. Crucial evidence seems to be of PW2 Naib Tahsildar who had recorded dying declaration wherein deceased blamed husband and mother-in-law for setting

her on fire. However, it is also emerging that in the dying declaration Exhibit 67, on the strength of which crime was registered, deceased had named husband alone responsible for pouring kerosene and setting her on fire. No doubt there are two dying declarations and the variance is that, in one accused husband alone is blamed, whereas in other one both accused are blamed. However, there is evidence of court witness Nandabai i.e. cousin of deceased, to whose house deceased last went and the same was objected to by accused. This court witness has stated that one day prior to the incident, deceased had come to her house. Accused no.1 also came to look out for his wife and in her presence, accused no.1 questioned his wife for visiting house of this witness. She stated that she left Varsha at her house and at that time both accused persons were present. This witness claims that she asked Varsha about the incident during which it was allegedly told that she was beaten in the night by accused no.1 and that accused no.1 burnt her by pouring kerosene whereas mother-in-law locked the door from outside by putting latch. Therefore, in our considered opinion, evidence of above witness and evidence of other witnesses needs to be properly re-appreciated and re-examined during appeal. Resultantly, we are *prima facie* convinced that case has been made out for granting leave to hear a full fledged appeal. Hence the following order:

ORDER

- I. The application stands allowed.

- II. Leave is granted to the prosecution to file Appeal.
- III. Registry to register the Appeal.
- IV. Appeal stands **admitted**.
- V. Call record and proceedings.
- VI. Compliance under Section 390 of the Code of Criminal Procedure be made before learned Additional Sessions Judge, Aurangabad. Respondents be released on bail till the conclusion of present appeal upon such terms and conditions as be deemed fit by the concerned Trial Judge.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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