

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

CRIMINAL APPEAL NO. 826 OF 2015

Haridas s/o Kundlik Pokale,
Age 27 years, Occu. Agril.,
R/o Muggaon, Tq. Patoda,
Dist. Beed.

... Appellant
(Ori. Accused No.1)

Versus

The State of Maharashtra
Through Police Station Officer,
Police Station, Amalner,
Tq. Ashti, Dist. Beed.

... Respondent

...
Mr. Ravindra S. Shinde, Advocate for Appellant.
Mrs. P. V. Diggikar, APP for Respondent-State.

...

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

DATE : 17.01.2023

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

1. Appellant original accused no.1 is questioning the judgment and order of conviction passed by the learned Sessions Judge, Beed dated 06.10.2015 holding accused guilty for offence punishable under Sections 498-A and 302 of the Indian Penal Code and sentencing him as stated in operative of the order of the learned trial Judge.

PROSECUTION CASE IN TRIAL COURT IS AS UNDER

2. Accused appellant was married to deceased Sunita on 28.06.2022. Out of their wedlock they had a nine months baby girl. According to prosecution, for initial period of six months, deceased was treated well, but subsequently, on account of demand of money for purchasing motorcycle, husband as well as in-laws started ill-treating her, beat her and thereby subjected her to both, physical and mental cruelty. Such deeds at the hands of husband and co-accused were reported by deceased to her parents whenever she went to her parental house. On 20.04.2014, husband returned home in drunken state. In the backdrop of her failure to bring money for purchasing motorcycle, he beat her and incinerated her as a result of which, she suffered burns and she succumbed to the same.

3. While undergoing treatment, dying declaration of deceased came to be recorded and on the strength of the same, crime bearing no. 17/2014 was registered initially for the offence punishable under Section 307, 498-A r/w 34 of IPC against husband and in-laws, but after demise, crime came to be converted to Section 498-A and 302 of IPC.

4. Investigation was carried out by PW11 A.PI. Ashok Jadhav and after completion of the same, charge-sheet came to be filed and case came to be committed to the court of sessions which was duly tried and decided vide above judgment and order.

5. Being first appellate court, we proceed to re-evaluate, re-examine and re-appreciate the entire oral and documentary evidence i.e. brought on record.

6. Before touching to the evidence adduced by prosecution, it would be proper to first define the roles and status of witnesses examined by prosecution and also to reproduce the sum and substance of their substantive evidence before the court.

7. **PW1 Shivaji**, whose services were procured to act as pancha to spot panchanama, has not supported the prosecution as he denied visiting any spot where any incident of burn had taken place. In examination-in-chief itself he stated that his signature was obtained on a panchanama and he merely identified his signature over it but not the contents.

8. **PW2 Ramdas**, second pancha to the spot panchanama, also turned his back to the prosecution and consequently he was also cross-examined. But he refused and denied about acting as pancha to spot panchanama and about any panchanama being drawn in his presence.

9. **PW3 Siddhartha**, Pancha to seizure panchanama dated 27.04.2014 i.e. pancha to seizure of apparels of accused, did not co-operate and denied any seizure in his presence and was therefore cross-examined by prosecution itself.

10. **PW4 Bhagubai**, mother of deceased, spoke about marriage of her daughter Sunita with accused Haridas. She stated that Sunita resided with her mother-in-law, father-in-law, elder brother-in-law and his wife. She stated that her daughter was ill-treated on account of demand of Rs.3,00,000/- and her daughter used to narrate about it whenever she visited parental house. She added that her daughter was continuously ill-treated by accused persons. This witness stated that ten to twelve days after she went back from her parental house to matrimonial house, her husband received call from brother of accused informing burns suffered by Sunita and so they all went there. She stated that she saw burns on the person of her daughter and it had turned black and she was not talking. Surprisingly, at such point she denied about recording of her statement by police. She also denied having made a statement before police that while in the hospital, her daughter narrated that her

husband, due to non-fulfillment of demand of Rs.1,00,000/-, poured kerosene on her and set her ablaze. Finding mother of deceased not supporting, learned APP chose to cross-examine their own witness. But all suggestions about her daughter to be regaining consciousness on the morning of 22.04.2014 and narrating her about being beaten by hands, kicks, about kerosene being poured and she being set ablaze on account of demand of Rs.1,00,000/- are denied by this witness by answering it to be incorrect.

11. Rather, while facing **cross-examination** at the hands of defence, **PW4 Bhagubai** answered that no dowry was demanded nor paid in the marriage. She admitted that neither prior to marriage nor thereafter there was motorcycle in the family of Haridas. She was unable to tell as to when for the first time her daughter narrated about ill-treatment and about demand of money by husband. She answered that she does not know how many times money was demanded and as to who all ill-treated deceased Sunita. She answered that she is unable to state about the last incident of demand of money and ill-treatment meted out to her daughter. She further admitted that her daughter was hot tempered and she used to take up quarrels with her husband, who used to request them to give understanding to their daughter. She admitted that hospital expenses were borne by accused and even funeral was performed at her matrimonial place.

12. Another witness examined by prosecution is **PW5 Ashok**, father of deceased. In examination-in-chief itself, he is found to be stating that on 30.03.2014, his daughter along with her daughter had been to the parental house for participating in Jalindarnath fair. That, on 20.04.2014 in the evening he received call from accused Ramdas about burns sustained by Sunita and she being admitted in Nagar Hospital. This witness stated that thereafter he along with his wife and relatives went to the said hospital. He also stated that when they saw Sunita in the hospital, she was not talking. He further stated that on being asked, Sunita stated that she set herself on fire. There is a court question to this witness, "Whether you asked Sunita reason for setting herself on fire?", to which this witness answered that she did not assign any reason. He denied that Sunita disclosed to him in the evening that her husband poured kerosene and set her on fire. Finding father also not supporting, learned APP sought permission of the court to cross-examine this witness. But he too, like his wife, not supported prosecution, but has agreed to all suggestions put by the defence counsel.

13. **PW6 Gahininath**, pancha to seizure of cloths of accused, also, as was not supporting, was declared hostile and thereafter subjected to cross-examination, but nothing fruitful has come out from his cross-examination.

14. **PW7 Shivaji**, pancha to seizure of plastic Can of kerosene, denied that on 29.04.2019, accused Haridas took police and this pancha witness to his house after giving memorandum and then produced plastic Can. Therefore, as this witness was also not supporting, he was declared hostile.

15. Similar statement was given by **PW8 Ambadas**, second pancha, on the point of seizure panchanama of plastic Can of kerosene. He also did not support prosecution.

16. **PW9 Bhaskar Bhos**, Special Judicial Magistrate in his evidence at Exhibit 56, stated that on receiving information and communication from police station on 21.04.2014, he visited the hospital namely, City Care Hospital, Ahmednagar. He approached doctor for issuing fitness certification and permission to record dying declaration, but on that day doctor informed that patient is not in conscious state. Therefore, he again went to the said hospital on 22.04.2014 and at that time, after approaching doctor, when doctor issued certification of fitness to give statement, he claims that he initially put preliminary questions and thereafter asked her details of burns, wherein she allegedly told that after six months of marriage her husband and in-laws started giving her ill-treatment. Husband used to beat her after consuming liquor and he used to ask her to bring Rs.1,00,000/- from her parents for purchasing motorcycle and on this count, he beat her. She stated that her

brother-in-law Ramdas instigated mother-in-law and wife of Ramdas to beat her. In the evening at about 7.00 p.m., when nobody was in the house, her husband came in drunken state, assaulted her for not bringing money and thereafter he poured kerosene on her and set her on fire. This witness accordingly recorded the statement wherein husband and in-laws were held responsible.

17. In cross-examination, above witness is unable to state bed number of deceased Sunita in the City Care Hospital. He admitted that doctor Takte intimated him that Sunita was in serious condition. He admitted that dying declaration is in typed format. He is questioned about manner of dying declaration. He has admitted that doctor has passed endorsement before commencement of recording dying declaration that he was present at the time of starting the statement till the end. That, in the certification it is not noted that doctor examined the patient. He admitted that there were no detail questions about date of marriage, date on which she returned and during which period there was ill-treatment to her by husband and in-laws. He also admitted that in letter Exhibit 57, cause of burns is mentioned as accidental burns. Remaining cross-examination of this witness is not of much importance as it is pertaining to information of this witness.

18. **PW10 Dr. Yuvraj** is the doctor, who gave certification about fitness to give statement and he identified his endorsement. This witness in cross-examination admitted that in the MLC register, it is noted that husband admitted the deceased in the hospital and **history was given of accidental burns**. He admitted that face and fingers of patient were not burnt. Then there are questions about burn wounds but admittedly this witness has not treated her and merely issued certification of fitness.

19. **PW11 A.PI. Ashok Jadhav** is the Investigating Officer who narrated about steps taken by him during investigation. In cross-examination, he stated that when he visited the hospital, at that time, deceased was serious. He answered that when he seized the plastic Can, there was no kerosene in it and it was empty. That, on the plastic can before the court there was no paper label signed by panchas. He answered that he has not gathered evidence to show that accused nos. 1 and 2 and their father resided jointly. He admitted that last rituals of deceased took place at Muggaon on 27.04.2014. He admitted that he had not inquired whether accused no.1 was possessing driving licence or not. Rest is all denial.

ANALYSIS

20. Here, on taking overall survey of the entire oral evidence adduced before the trial court, it is conspicuously emerging that including parents, i.e. father and mother of deceased, all panchas and other witnesses have taken a

somersault and have not supported prosecution in any manner. In spite of being cross-examined by prosecution nothing fruitful could be elicited by prosecution.

21. The only witness whose testimony remains for consideration is PW9 Special Judicial Magistrate who has recorded dying declaration and it seems that prosecution also is heavily banking on the same. In the light of above discussion, it is emerging that PW9 visited hospital on 21.04.2014 but for want of fitness to give statement, he returned back and according to him, he again went on 22.04.2014 and on such date, dying declaration was recorded. In this dying declaration, witness claims that deceased informed about her marriage and about ill-treatment on account of non fulfillment of Rs.1,00,000/- for purchase of motorcycle. Dying declaration shows that allegations of ill treatment and demand are apparently attributed to husband alone and not other accused. Regarding the occurrence, she has informed that she had been to her parental house on account of Padwa festival and she returned back a day before yesterday and in the evening of Sunday her husband came home drunk. No body else was present in the house. For not bringing money he poured kerosene and set her on fire.

22. It is pertinent to note that on 21.04.2014 when she was brought to the hospital in the evening, doctor as well as Investigating Officer themselves

admit that patient was serious. Admittedly deceased had suffered 93% burns. Therefore the moot question arises is when since inception itself deceased was not in position to give statement, how in the very early hours of the morning of next day i.e. 22.04.2014, she was declared to be in position to give statement. How her condition improved overnight has not been explained. Treatment papers which carry notings about periodic monitoring are not before the court. Therefore there is reason to raise doubt as to how drastic improvement was brought in the physical and mental condition of deceased within 10 to 12 hours.

23. While sifting the record we have come across Exhibit 57 which is communication addressed by Topkhana Police Station, Ahmednagar addressed to Special Judicial Magistrate i.e. PW9 to go to record statement however, in said communication it is apparently informed that the lady has **suffered accidental burns**. PW9 also, while facing cross, in para 9 admitted that on **Exhibit 57** cause of burn was written as **accidental burns**. We have come across **Exhibit 73**, paper issued by City Care Hospital stating that burns are suffered due to **bursting of stove**. PW10 Dr. Yuvraj, Medical Officer who issued certification of fitness, while under cross has admitted that husband Haridas brought her and admitted her in the hospital and history was given as accidental burns and it was accordingly recorded in the MLC register.

24. On minute scrutiny of Exhibit 59, the fitness remark/certification given by doctor also creates doubt because in spite of deceased being a lady, remark noted by doctor is patient is conscious and well oriented to give “his” oral statement. Therefore, there is room to infer that certification of fitness was not obtained before recording dying declaration. Another doubtful aspect is that according to PW9 Special Judicial Magistrate, he obtained thumb impression of the deceased after recording her dying declaration. However, as pointed out by learned counsel for appellant in the PM report in column no. 17, autopsy doctor has given the percentage of burns by applying rule of 9. Therein both right and left hands are shown to be affected to 9% and therefore apparently, hands and fingers being burnt, it is doubtful whether deceased was able at all to affix her thumb impression. Above are the unexplained shortcomings in the sole dying declaration.

25. We were surprised to find that while under cross-examination, **PW11 A.PI. Ashok Jadhav**, Investigating Officer has admitted that the Can which was seized was empty and there was no kerosene in it. However, while it was dispatched to the analyzer for analysis, the muddemal Can is shown to be having kerosene. At the first count when the Can which was seized was empty at the time of seizure and there was no kerosene in it. However, on carefully going through the C.A. report, to our surprise, we have come across communication to analyzer wherein muddemal Can is shown to be filled with

kerosene. Consequently, in our opinion, evidence has been apparently tampered while the muddemal was in the custody of police as apparently, seizure was dispatched at a belated stage i.e. on 05.05.2014.

26. Learned trial court seems to have ignored the above quality of evidence. It seems that dying declaration and evidence of PW9 Special Judicial Magistrate has prevailed over the opinion and conclusion of learned trial Judge. The above doubtful material noted and discussed by us does not seem to have been taken into account while appreciating the evidence. It is trite law that when case is based on solitary dying declaration, the evidence should be voluntary, truthful and free from any doubt. Here it is not so. As discussed above, deceased was at the inception shown to be in serious condition but within 10 to 12 hours she is shown to be both mentally and physically fit to give statement. Therefore, doubt creeps in about dying declaration to be truthful version of deceased. Resultantly, the findings and reasoning assigned, in our opinion are on erroneous appreciation necessitating intervention at the hands of this appellate court. Resultantly, in the interest of justice, we are constrained to interfere for setting aside the impugned judgment and order of conviction by allowing the appeal. Hence, we proceed to pass the following order:

ORDER

1. The appeal stands allowed.
2. The Judgment by which the appellant has been convicted in Sessions Case No. 113/2014 by learned Sessions Judge, Beed on 06.10.2015 is hereby set aside.
3. The appellant stands acquitted of the offence punishable under Section 498-A, 302 of the Indian Penal Code.
4. The appellant be set at liberty, if not required in any other case.
5. The fine amount deposited on 06.10.2015 with the Sessions Court, Beed by the accused-appellant be returned/refunded after the statutory period.
6. It is clarified that there is no change in the order in respect of disposal of muddemal property.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)