

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

CRIMINAL APPEAL NO. 599 OF 2015

Ashok S/o Dashrath Matang
Aged 45 years, Occ: Rickshaw Driver,
R/o Tarwalanagar, Mery Area,
Panchawati, Nasik,
Tq. and District Nasik.

... Appellant
(Orig. Accused)

Versus

The State of Maharashtra,
Through the Police Station Officer,
Shevgaon Police Station,
District Ahmednagar

... Respondent

...
Mr. N. C. Garud, Advocate for the Appellant.
Mrs. P. V. Diggikar, APP for the Respondent-State.

...

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

RESERVED ON : 20.01.2023

PRONOUNCED ON : 03.02.2023

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

1. Having held guilty for commission of offence punishable under Sections 307, 302 of the Indian Penal Code (IPC), the appellant Ashok is challenging the judgment and order of learned Additional Sessions Judge-4, Ahmednagar dated 12.06.2013 passed in Sessions Case No. 324 of 2012.

BRIEF ACCOUNT OF THE PROSECUTION CASE

2. Deceased Rekha was married to Ashok seven to eight years prior to the incident. Accused Ashok was residing with his parents at Nashik, whereas deceased was residing at Shevgaon with her brothers and sister. Accused used to visit deceased Rekha fortnightly.

3. On 14.04.2012, accused had come to Shevgaon to meet Rekha. On 15.04.2012 accused consumed liquor and thereafter demanded Rs.5,000/- from Rekha for drinking. She refused, as a result of which there was quarrel between them. Accused went out of the house and returned back at around 1.00 p.m. and he again put up demand of money. On its refusal, it is the case of prosecution that, Ashok sprinkled kerosene on her and set her ablaze. PW3 Anjana and PW5 Mahesh, i.e. siblings of deceased Rekha, and others shifted her to Nityaseva Hospital. There, her dying declaration was recorded. It was made the basis of registration of crime no. 84 of 2012. She had suffered over 94% burns. Finally on 20.04.2012, while undergoing treatment, deceased succumbed to the burns. Hence the charge.

4. PW12 P.S.I. Anand Bhande, Investigating Officer carried out investigation, gathered medical papers and dying declaration, drew spot panchanama etc. and took all necessary steps and after completion of investigation, accused came to be chargesheeted and was tried by learned

Additional Sessions Judge-4, Ahmednagar. After hearing prosecution as well as defence, learned trial court was pleased to record guilt of the accused for committing murder of his wife and sentenced him to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default to suffer rigorous imprisonment for two years.

5. Now exception is taken to the above judgment and order of conviction by preferring appeal under Section 374 of the Code of Criminal Procedure (Cr.P.C.) by raising various grounds.

6. This being the first appellate court, we are required to re-evaluate, re-examine and re-analyze the evidence to ascertain whether guilt recorded is legally tenable and sustainable.

7. It seems from the record that prosecution has rested its case on oral evidence of in all 12 witness and has taken recourse to the documentary evidence. For the sake of clarity and better appreciation, we propose to define the status and role of each of the prosecution witnesses.

EVIDENCE ON BEHALF OF PROSECUTION

8. **PW1 Babasaheb** and **PW2 Bharat** are panchas to seizure of clothes of deceased Exhibit 15 and spot panchanama and seizure of articles like kerosene

Can, match box from the scene of occurrence vide Exhibit 17.

9. **PW3 Anjana** is the sister of deceased Rekha and in her evidence at Exhibit 18, she spoke about marriage of accused and deceased, about deceased staying with them and accused visited her by coming from Nashik on 14.04.2012 and on the next day putting up a demand of Rs.5,000/- for drinking. On refusal, he quarreled and set her on fire. She stated that her brothers Ganesh and Mahesh and her mother Sulochana rushed to the rescue of Rekha and thereafter shifted her to the hospital.

10. She is subjected to extensive cross-examination. In para 3 of her cross-examination, following omissions are brought :

- i. That, accused woke up at 7.00 a.m. in the next morning and went to drink liquor.
- ii. At 11.00 a.m. when accused came back, both brothers, sister and mother were present in the house.
- iii. Rekha refused to pay him and he again went for drinking and came back at 1.00 p.m.
- iv. Brother Ganesh extinguished the fire on Rekha.

Then she was questioned as to how old is her own marriage and

whether she is leading married life. She was questioned about mental condition of her brother Ganesh and about antecedents of her brother Mahesh. She admitted that she was not knowing about personal relations between Rekha and accused prior to the incident. She was questioned about number of rooms to the house. In para 4 of her cross-examination, she admitted that she is unable to explain how Rekha caught fire. She was again questioned about Ganesh and the role played by him. She admitted that accused also suffered injuries in the incident. She further admitted that accused Ashok also helped in extinguishing the fire. Rest is all denial.

11. **PW4 Shirish Chilwar** was the circle officer who claims that police called upon him to record dying declaration and he accordingly approached doctor and after obtaining fitness certification, he recorded dying declaration in question answer format. He identified the communication made to him as well as the dying declaration **Exhibit 23**.

12. This witness is also subjected to cross-examination wherein he answered that he is not a Special Judicial Magistrate and is not appointed by office of Collector. He answered that he has been delegated powers of Special Executive Magistrate and not Special Judicial Magistrate. He admitted that copy of appointment Exhibit 21 was provided to Special Executive Magistrate Pawar as his name was enlisted. He admitted that there was no document about his

appointment as Executive Magistrate and that vide Exhibit 21, seven persons were delegated the power to record dying declaration. He was asked about the time of receipt of communication to him, distance between hospital and his office. He was questioned about location of cabin of RMO, its distance from the casualty. Rest is all denial.

13. **PW5 Mahesh** is the brother of deceased Rekha. Regarding occurrence he also stated that on 14.04.2012, accused came and halted in their house. In the morning, accused consumed liquor and returned home and demanded Rs.5,000/- to Rekha for drinking, to which she refused resulting in quarrel. According to him, it being the quarrel between husband and wife, nobody intervened. He stated that there was marriage in the neighbourhood. At around 1.00 p.m. the neighbouring persons started running to the backside of the house of this witness. Therefore he and his mother also rushed there and they saw sister Anjana shouting about burns suffered by Rekha. They saw brother Ganesh and accused Ashok present there. Rekha told them that accused Ashok was asking to pay him for addiction and when she refused, he poured kerosene and set her on fire.

14. In cross-examination he admitted that he and his mother had been to attend marriage. He answered that said marriage place was 300 feet away from the house. He was asked about cases pending against him and whether

police recorded his statement. He was asked whether Ganesh participated in dousing the fire and at which all places Rekha had suffered burns. Rest is all denial.

15. **PW6 Dr. Jain** stated that on 15.04.2012, while he was on duty at Nityaseva Hospital, Rekha was admitted there due to burns. Dr. Madhuri Shirsath was also present as co-medical officer. Police came to the hospital. On call of Dr. Madhuri, he also came to the ICU. Dr. Madhuri told him that there was another emergency case in another ward and that she had to attend it. Dr. Madhuri went to see another patient. This witness claims that he examined Rekha and ensured that she was conscious and well oriented to be able to give statement and on the request of police, he examined Rekha and police recorded her statement. He endorsed to that extent at Exhibit 29 vide Exhibit 49 after completing the statement of patient.

16. This witness is extensively crossed on the physical condition post burns. He admitted that deceased Rekha sustained 94% burns i.e. on face, neck, chest, abdomen, legs and hands.

17. **PW7 Dr. Amit Sardesai** is the Medical Officer at Civil Hospital, Ahmednagar, who conducted postmortem and issued PM report which he identified as Exhibit 32.

18. **PW8 Dr. Madhuri Shirsath** is the doctor who had issued endorsement on Exhibit 36. This witness was also put to cross-examination, more particularly on the notice of admission Exhibit 34 and timing over it. She was asked whether she checked the case papers. She was also asked at which all places Rekha had suffered burns. She admitted that she does not know health condition of Rekha after she left the patient on arrival of Dr. Jain and as to what all happened thereafter.

19. **PW9 Dr. Sucheta Rathod** in her evidence at Exhibit 44 stated that on 16.04.2012 while she had been on casualty duty, Special Executive Magistrate approached the hospital and requested her to examine Rekha. According to her, thereafter she examined the patient and gave endorsement that patient was conscious, cooperative and in condition to give statement. She stated that Special Executive Magistrate recorded statement in question answer format and after completing it, she again gave endorsement that patient was conscious till the end. She also identified the said endorsements Exhibit 45 vide Exhibit 23.

20. In cross-examination, she admitted that overleaf page no.2 shows date 17.04.2012. She admitted that at the time of admission, condition of Rekha was serious and relatives were accordingly informed about it. She admitted

that the surgeon who visited the hospital also made an entry that patient was semi-conscious and therefore pain-killers and antibiotics were administered. She further admitted that the surgeon also noted the entry as poor progress in the patient and that services of gynecologist were also requisitioned due to abdominal problem. She admitted that on 18.04.2012, condition of patient became complicated.

21. **PW10 Sudhakar** is the pancha to inquest panchanama.

22. **PW11** is the **Police Naik Pramod Pawar** who had also recorded statement of Rekha on 15.04.2012 i.e. after issuing communication Exhibit 36. He stated that Dr. Jain examined the patient and after giving endorsement, he recorded her statement wherein she stated that her husband came in the evening of 14.04.2012, halted for the night and on 15.04.2012 at around 10.30 to 11.00 a.m. her husband returned home after consuming liquor and asked her to pay Rs.5,000/- to which she refused. Again at about 1.00 p.m. he asked her to pay money and when she refused, he started abusing her and threw kerosene on her person from a Can and set her on fire, resulting burns all over her body i.e. face, neck, chest, abdomen, both legs and both hands. She stated that her husband tried to extinguish fire. Thereafter, her mother, sister and uncle brought her to the hospital. This witness identified the statement at Exhibit 49 and stated that on the strength of the same, he

recorded FIR Exhibit 51.

23. The above witness in cross-examination has answered and admitted that **notice of the hospital about admission of the patient bears date 16.04.2012.** He stated that he took entry of the same in the station diary. He stated about preparing Exhibit 36 before visiting the hospital. He stated that within four minutes they reached the hospital. He admitted that he did not take written endorsement of Dr.Jain that patient is conscious and fit to give statement. He also admitted that he did not note the time when recording of the statement commenced and when it was over. He admitted that there was score on the endorsement of timing. He admitted that he knew husband of Rekha was also in the same hospital on account of burns but further candidly admitted that he did not record his statement. Rest is all denial.

24. **PW12** P.S.I. Anand Bhande is the Investigating Officer who narrated about all the steps taken by him during investigation till filing of charge-sheet.

ANALYSIS OF THE EVIDENCE

25. Therefore, here prosecution opened the trial on the basis of oral evidence of sister and brother of deceased Sangita i.e. PW3 Anjana and PW5 Mahesh. Apart from these two witnesses, whom prosecution claims to be present at the scene of occurrence, prosecution is also heavily relying on 2

dying declarations Exhibit 23 and Exhibit 49. First, we propose to deal with the credibility and trustworthiness of testimonies of PW3 Anjana and PW5 Mahesh.

26. We have already dealt with the substantive evidence of PW3 Anjana. She had narrated about arrival of accused to Shevgaon to meet Rekha on 14.04.2012, about events of 15.04.2012 regarding accused going for consumption of liquor, returning back, putting up demand of Rs.5000/- to Rekha, quarreling with her when she refused, again going out on 11.00 a.m. and returning by 01.00 p.m. and again demanding money followed by episode of burns. She speaks of taking Rekha to Nityaseva Hospital. However, in cross-examination, improvements are brought about accused waking up at 7.00 a.m., going for drinking, returning back at 11.00 a.m. and putting up demand of Rs.5000/-, again going for drinks and returning back at 1.00 p.m. She has admitted that such statements made by her in witness box are not finding place in the statement to police. While answering cross-examination in para 3 on the point of location and family members, **she has admitted that she is unable to explain how Rekha caught fire.** Therefore, this witness has admitted that she does not know how actual episode of fire took place. In the same para in cross-examination she has admitted that accused had also suffered burns.

27. On examining evidence of brother PW5 Mahesh, he seems to have

deposed in examination-in-chief about visit of accused on 14.04.2012, next day morning accused consuming liquor and demanding Rs.5,000/- followed by quarrel. However, this witness has stated that at that time there was marriage in the neighbourhood at about 12.30 p.m. and at 01.00 p.m. he saw neighbours running to the back side of his house and therefore he too rushed there and he claims to have seen his sister PW3 Anjana shouting and his brother Ganesh and accused Ashok to be present there. He speaks about Rekha informing that accused asked her to pay for addition and on refusal, he set her on fire. In cross-examination he has admitted that he was at marriage which was 300 feet away from the spot. He admitted that his sister had suffered burns all over her body and he narrated the sites of burns.

28. Therefore, brother and sister of deceased seem to have reached after the episode of fire took place. As stated above PW3 Anjana has fairly admitted in cross that she does not know as to how Rekha took fire whereas PW5 Mahesh was not present in house but was 300 feet away for attending a marriage. Therefore there evidence is only corroborating each other to the extent of visit of accused on 14.04.2012, while under influence of liquor on the next day, putting up demand of Rs.5,000/- and on refusal quarrel taking place. As stated above, PW3 Anjana has admitted that accused had also suffered burns. Therefore, how Rekha actually suffered burns has not cogently come from very siblings of deceased who were present in the house or around the house.

29. Therefore, now let us shift to the dying declarations, which the prosecution is banking on to prove guilt of the accused. Record before trial court shows that alleged episode had taken place on 15.04.2012 in the early afternoon hours i.e. 12.00 p.m. or so. Exhibit 34 issued by Nityaseva Hospital, Shevgaon goes to show that Rekha was taken to the said hospital at around 2.45 p.m. on 15.04.2012. Exhibit 36 shows that police of Shevgaon Police Station issued communication to Nityaseva Hospital to certify regarding fitness of Rekha to give statement. Exhibit 36 goes to show that PW8 Dr. Madhuri Shirsath, who was in service of Nityaseva Hospital as Medical Officer, certified about fitness. However, the said certification of fitness by PW8 Dr. Madhuri Shirsath is not on the dying declaration, rather it is on Exhibit 36 i.e. the communication by police of Shevgaon Police Station. Timing at which said communication was issued and timing of examination and endorsement is also unfortunately not appearing on Exhibit 36. However, PW8 Dr. Madhuri Shirsath speaks of examining Rekha around 3.30 p.m.

30. It is appearing that PW6 Dr. Jain is also examined by prosecution. He is also a doctor and posted at Nityaseva Hospital, Shevgaon. He corroborates PW8 Dr. Madhuri Shirsath about admission of Rekha on account of burns. PW6 Dr. Jain in his substantive evidence stated that he examined Rekha

Matang on request of police and on getting ensured that she was conscious, well oriented and able to give statement, he gave endorsement which he identified to be at Exhibit 29. But it is at the foot of the dying declaration which is got marked at Exhibit 49. This shows that at Nityaseva Hospital Shevgaon, though Doctor permitted police to record dying declaration, certificate of fitness is apparently not on Exhibit 49 but on Exhibit 36 which is mere request communication by police to ascertain as to whether deceased was in a position to give statement. The date and time of issuing communications are not noted on Exhibit 49 and Exhibit 36.

31. Record shows that from Nityaseva Hospital, Shevgaon, vide Exhibit 35, Rekha was referred to Civil Hospital, Nagar at 6.00 p.m. on 15.04.2012 itself. After being admitted at Civil Hospital Nagar, PW4 Chilwar, Circle Officer in the office of Tahsildar, Nagar, was directed to go and record dying declaration in the capacity of Special Executive Magistrate. This witness PW4 Chilwar in his evidence at Exhibit 20 deposed about receiving communication from police at 11.30 a.m. on 16.04.2012. Therefore, it is apparent from such record that since 6.00 p.m. of 15.04.2012 till noon time of next day i.e. 16.04.2012, dying declaration or statement of deceased was not recorded at Civil Hospital, Nagar. Be it so. At Civil Hospital, Nagar, relatives of deceased had already arrived and this is apparent from the deposition of PW4 Circle Officer, Chilwar. His evidence shows that he approached PW9 Dr. Sucheta Rathod for certification

of fitness to give statement. On going through her evidence, it seems that PW4 Circle Officer Chilwar posed himself as Special Executive Magistrate and sought certification. PW9 Dr. Sucheta Rathod states that she examined Rekha, interrogated her and thereafter made endorsement that patient was conscious and cooperative. She identified her endorsements Exhibits 45(1) and 45(2) over dying declaration Exhibit 23 which is in question answer form. She asserts that she was present throughout the recording of dying declaration. She also acknowledges the noting on medical paper confronted to her by learned APP.

32. But while answering cross, PW9 Dr. Sucheta Rathod has admitted that there is no entry in the medical paper referring her name for visiting and endorsing fitness. She has admitted that condition of Rekha was serious and relatives were also duly informed about it. She admitted that on 16.04.2012 surgeon had visited hospital and had made an entry that patient is semi conscious. We have verified medical case papers collectively marked at Exhibit 39. There is noting at 10.00 p.m. of 16.04.12 that patient was semi conscious. Therefore, from such record it is clear that few hours prior to recording of dying declaration Exhibit 49, deceased was serious and semi conscious. Resultantly, it is difficult to accept the case of prosecution that exhibit 49 - statement of deceased was noted while she was in a fit physical and mental condition to give statement. PW9 Dr. Sucheta Rathod has also admitted that

during visit of surgeon, pain killers and antibiotics were administered and that even surgeon had noted an entry of poor progress in the patient. Taking such admission into consideration, reasonable doubt creeps in about condition of deceased Rekha to give two dying declarations i.e Exhibit 23 and Exhibit 49.

33. It is worth mentioning that scene of occurrence as per Exhibit 17 is an open space behind the east facing house of informant. In the panchanama itself it is noted that there are no signs of incident of burns. That apart, we are unable to comprehend that how, when accused allegedly poured kerosene and thereafter ignited Rekha, why at all she remained standstill at that spot itself. It is not the case of prosecution that deceased Rekha was incapacitated or made immobile by accused first, thereby restricting her movement, and then set her on fire. She also does not seem to have raised alarm after accused poured kerosene and she could have run away and not wait there till she was ignited. Therefore, for above reasons also, the episode comes under shadow of doubt.

34. Here, as discussed above, oral evidence of PW3 Anjana and PW5 Mahesh cannot be said to be direct eye witness account for the reasons stated by us while examining the creditworthiness of above discussed brother and sister of deceased. PW3 Anjana – sister of deceased has already admitted that accused had suffered burns. The Investigating Officer has also admitted to that

extent. Medical papers of accused Ashok are also finding place i.e. including Nityaseva Hospital at Shevgaon and his admission papers show that he too was admitted with history of superficial to deep burns at round 2.45 p.m. on 15.04.212. He has also sought discharge to go to Civil Hospital. At Nityaseva Hospital, he is shown to have suffered 18% burns to upper extremities and abdominal part 5% to 6% and in all he has also suffered 25% burns and was treated at very Civil Hospital, Nagar where deceased also was treated. With such degree of burns on the person of accused, prosecution was duty bound to explain the same but apparently prosecution has not done so. In the light of admission of PW3 Anjana and the above discussed medical record, it is clearly emerging that accused was also victim of burns. PW8 Dr. Shirsath, who had occasion to examine deceased, also seems to have occasion to examine accused Ashok and therefore she seems to have appeared as a witness on behalf of defence in the capacity of DW1. She seems to have admitted that while examining Ashok he was not found to be under influence of liquor. This further gives jolt to the accusation of prosecution that accused incinerated Rekha while he was in drunken state.

Therefore there is room to infer that he did not intend to commit murder of his wife Rekha but his conduct shows that he had been to her rescue and had attempted to extinguish the fire on Rekha.

SUMMATION

35. Close relatives PW3 Anjana and PW5 Mahesh, though present near or around the scene of occurrence, have not eye witnessed the episode of burning. PW3 Anjana was very much present in the house but in another room. There is no oral dying declaration to her as the one allegedly given to PW5 Mahesh. Further, PW5 Mahesh admitted that he was not present in the house and rather he was attending a marriage in the neighbourhood. Resultantly, evidence of PW3 Anjana and PW5 Mahesh cannot be said to be direct eye witness account. For the reasons discussed above, dying declarations are apparently given when relatives were around her and accompanying her to the hospital. It is admitted fact that accused had also suffered 24% burns. Deceased herself spoke of husband trying to extinguish fire by use of quilt. Therefore, with such material on record, taking into account the circumstances under which the incident had taken place, though there is history of quarrel preceding the episode of fire, however whether the same were accidental, suicidal or homicidal has not been successfully brought on record by the prosecution.

36. In the light of above discussion, we are of the considered opinion, that on taking into account totality of the circumstances which have surfaced on record, prosecution has not discharged their primary burden of proving case against accused beyond reasonable doubt. Dying declarations which were

taken support of are failing to inspire confidence for the reasons spelt out in the aforesaid paragraphs. Hence, appellant succeeds. We accordingly proceed to pass the following order:

ORDER

- (i) Criminal Appeal stands allowed.
- (ii) The conviction awarded to the appellant - Ashok s/o Dashrath Matang in Sessions Case No. 324 of 2012 on 12.06.2013 by the learned Additional Sessions Judge-4, Ahmednagar by holding him guilty of committing offence punishable under Sections 307 and 302 of Indian Penal Code, stands set aside.
- (iii) The appellant is acquitted of the offence punishable under Sections 307 and 302 of Indian Penal Code.
- (iv) The appellant be set at liberty, if not required in any other case.
- (v) The fine amount paid, if any, be refunded to the accused after the statutory period.
- (vi) It is clarified that there is no change in the order regarding disposal of Muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)