



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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.269 OF 2019

The State of Maharashtra
Through Asstt. Police Inspector,
Police Station, M.I.D.C., Latur,
Tq. & District Latur.

..Applicant

Versus

1. Balaji s/o. Vitthal Surwase
Age: 36 years, Occu.: Goat-keeping
2. Mandakini w/o Balaji Surwase
Age: 30 years, Occu.: Labour,
Both R/o. Takli (B),
Tq. & Dist.Latur.

..Respondents
(Ori. Accused)

...
APP for Applicant : Mr.A.M.Phule
...

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

DATE : 6 OCTOBER, 2023

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

1. Acquittal of respondents from charge under Sections 302, 504 and 506 read with 34 of the Indian Penal Code (IPC) by the learned Sessions Judge, Latur dated 24-09-2019 in Sessions Case No.2 of 2017 prompted applicant State to seek leave to file appeal against judgment and order of acquittal.

2. Learned APP apprised us about the case in the trial Court and about accused no.1 to be having evil eye on deceased. That respondent no.1 had called deceased in his house and when she did not yield to the demand of maintaining sexual relations with respondent no.1, both the respondents i.e. husband and wife initially beat deceased and thereafter, she was set on fire. According to learned APP, deceased had suffered more than 60% burns and she succumbed to the same. It is pointed out that while in hospital, her first dying declaration Exh.45 was recorded by **PW8** Shinde, Police Naik, who was on duty at Police Chowki in Civil Hospital, Latur, wherein deceased Sumitra had informed accused to be responsible for her burns and on the strength of the same, crime was registered. There is second dying declaration Exh.58 recorded by **PW11** Palepad (Special Executive Magistrate). That both dying declarations are consistent. Role of respondents are clearly spelt out. That husband of deceased, brother-in-law of deceased and neighbours have deposed about conduct and behaviour of respondent no.1 - accused no.1 towards deceased and his ill intention. Other neighbours, who had seen deceased coming running out of the house of accused persons in the burning condition, have categorically and consistently deposed to that extent and according to learned APP, there is full-proof evidence. Charges were cogently established by adducing evidence. Death is shown to be homicidal one. Case of prosecution ought to have been accepted and guilt of accused ought to have been recorded but that has not happened. He submits that State is intending

to prefer appeal and further as there is a need of re-appreciation and re-analysis of evidence in appeal, learned APP seeks leave to file appeal.

3. In the light of above submissions, we have visited prosecution evidence adduced in the trial Court. It is emerging that case of prosecution in the trial Court is rested on evidence of 13 witnesses and their status and role could be summarized as under:

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Ramesh Dasu Ghadge is brother-in-law of deceased. His evidence is at Exh.29.

PW2 Dnyanoba Pandharinath Ghadge is another brother-in-law of deceased. His evidence is at Exh.30.

PW3 Prakash Pandhari Ghadge is husband of deceased. His evidence is at Exh.32.

PW4 Kamlakar Narhari Dure is acquaintance of deceased and her husband. His evidence is at Exh.34.

PW5 Anant Baliram Uphade is neighbour. His evidence is at Exh.35.

PW6 Nandkishor Rangnathrao Mallurwar is Pancha to spot panchanama. His evidence is at Exh.37. Spot panchanama is at Exh.38.

PW7 Prakash Manikarao Uphade is Pancha to seizure of clothes of accused Balaji. His evidence is at Exh.40. Seizure panchanama is at Exh.41.

PW8 Shahaji Bapusaheb Shinde is Police Naik. He recorded dying declaration

Exh.45. His evidence is at Exh.43.

PW9 Dr.Sudhir Bisan Sasaparadhi is Doctor who examined deceased and made endorsement that deceased was in condition to give statement. His evidence is at Exh.47.

PW10 Dr.Nomani Mohammad Mufti Taher is Autopsy Doctor. His evidence is at Exh.51.

PW11 Shivaji Maruti Palepad is Naib Tahsildar. He has recorded dying declaration Exh.58. His evidence is at Exh.56.

PW12 Dr.Gajanan Umakant Motiphale is Medical Officer, who examined accused no.1 Balaji and issued injury certificate. His evidence is at Exh.63.

PW13 Pawan Bibhishan Yadav (PSI) is investigating Officer. His evidence is at Exh.70.

4. Admittedly here dying declaration Exh.45 is made the basis of registration of crime and entire case of prosecution is based on two dying declarations i.e. Exh.45 and Exh.58.

FIRST DYING DECLARATION

5. First dying declaration is recorded by **PW8** Shinde (Police Naik), who deposed that on 29-09-2016, on receipt of communication, he visited burns ward and recorded dying declaration in presence of Doctor, which he identified at Exh.45. On going through dying declaration Exh.45, deceased

allegedly given statement that since two years, her neighbour Balaji (accused no.1) was insisting her to maintain relations with him and subjected her to mental cruelty. On 29-09-2016 at around 10:00 a.m., accused no.1 allegedly called her in the house and again put up above demand and on refusal, she informed that accused no.1 and his wife both abused her. Accused no.1 brought kerosene can from house and poured it on her person, whereas accused no.2 wife ignited her. On the strength of such statement, Police seems to have registered crime No.340 of 2016 for offence under Sections 307, 504 read with 34 of the IPC.

SECOND DYING DECLARATION

6. Second dying declaration is at Exh.58 and the same seems to be recorded by **PW11** Palepad. This statement seems to be recorded at 10:00 p.m. on 29-09-2016. To a question as to how incident occurred, deceased seems to have answered that since last two years, Balaji (accused no.1) was insisting her to maintain physical relations with him and calling her at field and threatening her. On 29-09-2016, while she was filling water, accused no.1 called her and therefore, she went to his house. Here she stated that she slapped him for calling her. Then she stated that she was beaten by him and thereafter, kerosene was poured over her and he ignited her. His wife Mandakini was present there. Because of burning sensation, she ran out of the house.

ANALYSIS

7. If we juxtapose both dying declarations Exh.45 and Exh.58, in our opinion, the same are not consistent. In first dying declaration Exh.45, she has attributed role of pouring kerosene to accused no.1 Balaji and role of igniting to accused no.2 Mandakini. Whereas in second dying declaration Exh.58 recorded on the same day, she has attributed both roles of pouring kerosene and igniting to only accused no.1 Balaji. Consequently, dying declarations are inconsistent and therefore, the same come under shadow of doubt.

8. Though husband, brother-in-law and other neighbours are examined, they seem to have reached at the spot at a later point of time. Therefore, there is no cogent and reliable evidence or direct evidence about alleged pouring of kerosene on her person and igniting her. Therefore, except dying declarations, there is no other evidence. Though brother-in-law and husband speak of receiving dying declarations, no prompt complaint has been lodged by them inspite of Police Chowki available in the Civil Hospital premises.

9. Even when witness PW5 Anant speak about seeing deceased burning in the house of accused and running towards the water stream, clothes of deceased are not seized from the house of accused. Therefore, this aspect also cast doubt about the occurrence. It seems that accused no.1 has suffered burns but prosecution has not explained the same. There is no independent

witness. Evidence of PW5 Anant and more particularly, answers given by him in cross-examination, it is unsafe to consider and rely on the same. Statements of witnesses are apparently recorded at a belated stage.

CONCLUSION

10. Therefore, on taking survey of the entire evidence adduced on behalf of prosecution, there are material shortfalls in the evidence of prosecution. Dying declarations, which are made basis for registration of crime and implication of accused, are not inspiring confidence for the reasons stated above. Therefore, we are of the considered opinion that learned trial Court has not committed any error or perversity in appreciating such evidence on record. No case being made out on merit, we refuse leave to file appeal as sought. Therefore, we proceed to passed following order:

ORDER

Application for Leave to Appeal by State no.269 of 2019 is hereby rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)