



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

CRIMINAL APPEAL NO.32 OF 2019

Suresh s/o Jaidrath Maske
Age 35 years, Occu. Nil,
R/o Sonwale, Tq. Ambajogai,
District Beed (At present in Jail)

... APPELLANT

VERSUS

The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court of
Judicature of Bombay,
Bench at Aurangabad

... RESPONDENT

.....
Mr. V.R. Dhorde, Advocate with
Shri S.P. Nimbalkar and S.S.Dudhane, Advocates for appellant
Mr. S.D. Ghayal, Addl. P.P. for respondent
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 3rd January, 2024

Date of pronouncing judgment : 24th January, 2024

JUDGMENT (PER R.G. AVACHAT, J.)

The challenge in this appeal is to a judgment and order of conviction and consequential sentence, dated 28/11/2018, passed by the Court of learned Additional Sessions Judge, Majalgaon, District Beed in Sessions Case No.40/2016. Vide impugned judgment and order, the appellant has been convicted for offences punishable under Sections 302, 307 and 498-A of the

Indian Penal Code and, therefore, sentenced to suffer life imprisonment for offence punishable under Section 302 and rigorous imprisonment for 2 years on each count for offence punishable under Sections 307 and 498-A with further direction to pay fine in different amount for the respective offences with default stipulations. All the substantive sentences have been directed to run concurrently.

FACTS :-

2. The appellant married Vidya (P.W.3), informant on 30/4/2006. The couple was blessed with two sons, Yash and Ansh. Both the appellant and P.W.3 Vidya were staying at Shikrapur, District Pune along with their elder son Yash. Ansh was residing with his maternal grandparents at Majalgaon, District Beed. The appellant was a Painter by profession. P.W.3 Vidya would also work with a factory. The appellant was not keeping well. Vidya, therefore, informed the same to her father-in-law. Deepak, appellant's brother, therefore, went to Shikrapur and brought the appellant, Vidya and their son Ansh to village Sonawala on 23/5/2016. Both the appellant and his brother went to a hospital at Ambajogai on 25/5/2016. They returned by 2.00 p.m. Vidya asked the appellant that they would first go to her parent's house at Majalgaon and then to Shikrapur. It was about 10.30 p.m. He refused. There was, therefore, quarrel between the couple.

3. Both the appellant and Vidya, along with their son Yash went to sleep in a two-room premises. It was about 11.00 p.m. on 25/5/2016, the parents and brother of the appellant went to sleep in the front yard of the house. Vidya sensed something to have been sprinkled on her person. It smelled like kerosene. It was about 1.00 a.m. of 26/5/2016. She realised the appellant to have poured kerosene on her person. She, therefore, came crying. She immediately removed Saree from her person. In a while she noticed smoke and flame emanating from the house. She heard shouts of her son Yash. Deepak, therefore, entered the house and brought Yash out. Yash had suffered extensive burns. He was rushed to hospital at Ambajogai. His statement-cum-dying declaration (Exh.57) was recorded. Vidya too gave her statement to a police official. The same was treated as F.I.R. (Exh.52). Initially, the crime for offence punishable under Section 307 of the Indian penal Code was registered. Yash died of burn injuries. Section 302, therefore, came to be additionally invoked. Vidya gave supplementary statement, alleging her parents and brother-in-law to have harassed and ill-treated her and even committed murder of Yash.

4. The appellant was arrested on the following day. He had suffered some burns. Upon completing the investigation, a charge sheet was filed against the appellant, his parents and

brother as well.

5. The case was committed to the Court of Additional Sessions Judge, Majalgaon (Trial Court). Charge (Exh.28) was framed against all of them. They pleaded not guilty. The prosecution examined 9 witnesses and produced documentary evidence. The appellant examined two witnesses in his defence. It is his case that, there was a quarrel between him and Vidya over going back to Shikrapur. He refused. Vidya, therefore, tried to commit suicide by pouring kerosene. Burnt match stick fell down. Vidya rushed out of the house. Yash suffered burns by accident and Vidya falsely implicated the appellant in the crime.

6. On appreciation of the evidence in the case, the Trial Court acquitted the parents and brother of the appellant. State has not preferred appeal against acquittal. The appellant was found guilty of the offence/s and, therefore, sentenced to various terms of imprisonment as stated above. The Trial Court relied on the dying declaration of Yash and the oral evidence of Vidya.

7. Heard. Learned counsel for the appellant would submit that, there was no independent witness. All was not well between the couple, appellant and the informant. There was history of disputes between the two and even report with police was lodged

earlier. The informant Vidya has even implicated her innocent parents and brother in the offence of murder in spite of there being no shred of material against them. The same suggests that, she could go to any extent to save herself. Her testimony is, therefore, unreliable. On the question of dying declaration of deceased Yash is concerned, the learned counsel would submit that, it was recorded by police official. While recording the same, Yash was on the laps of his mother, Vidya. He (Yash) was just 7 years of age. The doctor who claimed to have examined Yash to find him conscious oriented to make a statement, gave his endorsement on the first page itself. The police official who recorded the dying declaration has admitted that Yash did not answer his question No.5. Answer of question No.5 appearing in the dying declaration has been authored by the police official himself. Learned counsel would further submit that, Yash suffered extensive (85%) burns. The incident took place at the dead of night (1.00 a.m.). He being a child, must have been in slumber at the relevant time. He suffered burns accidentally. According to learned counsel, the prosecution evidence fell short to establish the guilt of the appellant beyond reasonable doubt. He, therefore, urged for allowing the appeal.

8. Learned A.P.P. would, on the other hand, submit that, the dying declaration has been recorded in question-answer form. The Medical Officer had examined Yash before and after recording

of the dying declaration. The doctor is an independent witness. An innocent child has no reason to speak against his own father. His evidence gets reinforced by the evidence of his mother Vidya. A quarrel between the two was cause of the incident. Dousing person with kerosene and setting ablaze goes a long way to infer the appellant to have intended to kill his wife (Vidya) and even intentionally killed his son Yash. According to learned A.P.P., the trial Court has not committed any error in appreciating the evidence. He, therefore, urged for dismissal of the appeal.

9. Considered the submissions advanced. Perused the evidence on record. The appellant had married Vidya way back in 2006. The couple was blessed with two children, Yash and Ansh. Father of the appellant was serving with BSNL at Majalgaon. He was residing in official quarters at Majalgaon itself. On marriage, both the appellant and Vidya had resided along with parents of the appellant in BSNL quarters. Vidya's parental house was at Majalgaon itself. It is in the evidence of Vidya that, after one year of her marriage, she started residing at Jalalpur area in Parali along with the appellant. They stayed there for about 4 years. Yash was born at Jalalpur. Then they shifted to Sonawala (village). Thereafter they shifted to Majalgaon and started residing in a room taken on rent. After 4 - 5 months of stay thereat, they joined the parents of the appellant and started residing in BSNL quarters.

After having stayed there for about 2 months, the couple shifted to Shikrapur in the District of Pune. The appellant started doing painting work to earn his living. Vidya joined a service with a Company located nearby Pune.

10. It is in the evidence of P.W.3 Vidya that, the appellant was not keeping well. She had, therefore, informed the same to her father-in-law on 21/6/2016. Deepak, her brother-in-law therefore came to Shikrapur. He brought all of them to village Sonawala on 23/5/2016. It has come during her cross-examination that she was reluctant to come to Sonawala. It is further in her evidence that, the appellant was addicted to liquor. He would suspect her fidelity. The appellant, therefore, used to beat her up. Deepak and parents went to hospital at Ambajogai on 25/5/2016. They came back to Sonawala by 2.00 p.m. There is further evidence to indicate that 31st May was birthday of Ansh. Vidya, therefore, wanted to visit her parent's house and thereafter go back to Shikrapur. She, therefore, asked the appellant that they would first go to her parental house and then to Shikrapur. The appellant was not inclined to go to any place. There was, therefore, a quarrel between the two. Parents and brother of the appellant tried to convince him. He, however, did not listen. It is further in her evidence that, by 11.00 p.m., the appellant, herself and Yash went to sleep in their tin shed house. Her in-laws went to sleep in the courtyard. It is further in her

evidence that, she sensed something like kerosene to have been thrown on her person. It was 1.00 a.m. She realised that it was the appellant who poured kerosene on her person. She immediately came out of the house crying. Her in-laws woke up. She removed Saree from her person. She immediately noticed smoke and flames emanating from the house. Yash was shouting. Deepak (appellant's brother) entered the house and brought Yash out. Yash had suffered extensive burns. The appellant too had suffered some burns to his leg. Deepak, herself and the appellant rushed Yash to a hospital at Ambajogai. A police official there recorded statement of Yash and her as well.

11. In response to the questions put to her in her cross-examination, it has come on record that the appellant did not want to go back to Shikrapur. She had, however, insisted him to go back. A quarrel therefore took place between the two. It has also come in her evidence that, while they were residing at Parali, there was a quarrel between them and therefore, she had left the company of the appellant and was residing with her parents. The appellant had issued her a notice through Advocate, asking her to resume cohabitation. She thereafter joined the appellant. She had, however, lodged a report with Women's Grievance Redressal Forum at Ambajogai. It is also in her evidence that, while staying at Shikrapur, she had lodged a report to the police against the

appellant. The same suggests all was not well between the couple. They had no happy married life. The appellant was alleged to have been suspecting her character.

12. There is evidence to indicate the clothes on the person of the appellant at the time of the incident reek kerosene. He too had suffered some burns. He took treatment at hospital in Ambajogai. He was, therefore, arrested on the following day. The question is, whose version is to be believed, the appellant or that of Vidya. Here is a lady (Vidya) who gave a supplementary statement to the police on fourth day of the incident, implicating her parents and brother-in-law to have also been involved in committed murder of her son Yash. Close reading of her case in the F.I.R. and the fact that the brother-in-law Deepak risking his life, entered the house to save Yash, goes long way to hold that Vidya had deliberately implicated them in a serious offence for which a sentence of life imprisonment or death has been prescribed. The Trial Court has rightly acquitted the parents and brother-in-law of Vidya. When a person can falsely implicate an innocent person, in an offence of murder, her evidence becomes doubtful. We are conscious of the principle that "*Falsus in Uno Falsus in Omnibus*" is not applicable in India. The Court has to sift grain from chaff. In case of evidence of a witness who is neither reliable or unreliable, there has to be some corroborative evidence.

13. The prosecution here is relying on dying declaration of Yash (Exh.57). At the relevant time, Yash was 7 years of age. A child prone to tutoring. Admittedly, he was sleeping along with his parents. It was the dead of night (1.00 a.m.). In all probability, he must have been in slumber. It is not the case of the prosecution that Yash was awake. He had also no reason to be awake since as per prosecution there was no quarrel between the appellant and his wife Vidya for being a reason for Yash to be awake.

14. The dying declaration of Yash has been recorded by a Police Head Constable, P.W.4 Rajebhau. It is in his evidence that, he rushed to the hospital on the direction of his official. He enquired with Yash to find to be able to speak and make a statement. It is further in his evidence that he requested the Medical Officer on duty to examine Yash and certify whether Yash was conscious oriented to make a statement. Dr. Laxman (P.W.6) examined Yash and gave his two endorsements on a paper containing dying declaration, first before recording of the statement and second one after recording of the statement was over. P.W.4 Rajebhau has categorically admitted that Yash did not reply to the question No.5 appearing in the dying declaration. The same suggests that the answer appearing to the said question in the dying declaration was authored by P.W.4. True, the dying

declaration has been recorded in question – answer form. Yash is said to have informed P.W.4 that when he woke up, he saw his father (appellant) set him ablaze. It was his uncle Deepak who poured water on his person and brought him out of the house.

15. P.W.7 Onkar had examined Yash. He was on duty at S.R.T.R. Medical College & Hospital at the relevant time. It is in his evidence that, on examining Yash, he found him conscious oriented to make a statement. According to him, statement of Yash was recorded in his presence. He gave two endorsements on the statement of Yash, recorded by P.W.4 A.S.I. Rajebhau. P.W.7 Onkar was, however, categorical to state that, children could not bear pain compared to adults. In case of severe pain child could be in alter consciousness. It is possible that, in such type of burns, the patient is not stable.

16. We have every reason to suspect either Yash might have been prompted by his mother Vidya to make such a statement or it was the statement given by Vidya to have been converted into dying declaration. It is reiterated that, Yash was just 7 years of age. By the time of incident he must have been in slumber. He must have woke up on having suffered heat or burns. P.W.3 Vidya had already come out of the house. Saree on her person had some kerosene on it. Clothes on the person of the appellant also reek

kerosene. He too suffered some burns. While the dying declaration of Yash was recorded, he was on the lap of Vidya. Yash had suffered 85% burns. It is not known as to why the police officer (P.W.4) preferred to first record statement of Yash and then of Vidya. The officer in charge of the Police Station, however, treated Vidya's statement as F.I.R. It has already been observed above that, Vidya had no happy married life. There was separation between the couple for some days. Cohabitation had again resumed. In spite of her brother-in-law Deepak to have risked his life to save Yash, it is Vidya who gave supplementary statement implicating Deepak and his parents in committing murder of Yash. We have, therefore, every reason to doubt genuineness of the dying declaration (Exh.57). In our view, the said dying declaration either must have been a result of prompting/ tutoring or entirely given by Vidya but shown to have been given by deceased Yash. For all these reasons, even though the post mortem report (Exh.65) indicate Yash to have died of shock due to 85% burns of total body surface area, we do not find the prosecution to have brought home the appellant to be the author of setting his son Yash ablaze and to be responsible to his consequential death. In our view, the appellant is entitled for benefit of doubt. The Trial Court ought not to have relied on the dying declaration of a 7 year old child who was in slumber at the relevant time, and his mother, who had every reason to implicate her husband and even who had falsely

implicated her parents and brother-in-law in a serious offence of murder in spite of their non-involvement in the alleged crime was writ large still they had to face the prosecution only at her instance.

17. In the result, the appeal succeeds. Hence the order :

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The order of conviction and sentence dated 28/11/2018, passed by the Court of learned Additional Sessions Judge, Majalgaon, District Beed in Sessions Case No.40/2016 is hereby set aside. The appellant is acquitted of the offences punishable under Sections 302, 307 and 498-A of the Indian Penal Code.
- (iii) The appellant be set at liberty forthwith if not required in any other case. Fine, if paid, be refunded to him.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-