



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 63 OF 2019

Babasaheb Pandhari Chole
Age: 65 years, Occu.: Agri.,
R/o Aasola, Tq. Dharur, Dist. Beed

..APPELLANT

VERSUS

State of Maharashtra

..RESPONDENT

....
Mr. S.J. Salunke, Advocate for appellant
Ms. V.S. Chaudhari, A.P.P. for respondent - State
....

CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ
RESERVED ON : 29th JANUARY, 2024
PRONOUNCED ON : 05th FEBRUARY, 2024

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

1. The appellant has been convicted for murder of his wife vide order dated 29th December, 2018 passed by Additional Sessions Judge, Majalgaon in Sessions Case No. 23 of 2017, and therefore, sentenced to suffer life imprisonment and fine with default stipulation. He is, therefore, before us in this appeal.

2. Facts giving rise to the present appeal are as follows :-

The appellant is the resident of village Aasola, Tq. Dharur, Dist. Beed. He would reside alongwith his wife, Kamalbai (deceased), son, Tukaram (P.W.3), two daughters-in-law, Alka (P.W.5) and Nirguna (P.W.6)

and their children. The appellant was addicted to alcohol. He was sixty-five years of age at the relevant time. Kamalbai (deceased) was sixty years of age. The appellant would desire his wife to share bed with him every night. She would, however refuse to join him. She used to say that there were daughters-in-law and grand children in the house and same did not look good. Still she would occasionally sleep in the appellant's room.

3. The appellant came home drunken late in the evening on 19th March, 2017. A quarrel ensued between him and the deceased. He poured kerosene on the person of the deceased and set her ablaze. She raised cries in the name of her son and both the daughters-in-law loudly telling them to have been set on fire by the appellant. P.W.3 - Tukaram broke open the door of the room of the appellant. He and daughters-in-law of the appellant covered the deceased with a blanket and thus extinguished fire. Kamalbai was rushed to the hospital. She unfortunately succumbed to the burns on 22nd March, 2017.

4. Based on the statement (Exh.24) given by deceased Kamalbai, crime vide C.R. No.66 of 2017 was registered for the offence punishable under Section 307 of the I.P.C. On demise of Kamalbai, Section 302 of the I.P.C. came to be invoked. The crime was investigated. Upon completion of investigation, the appellant was proceeded against by filing the charge-sheet.

5. The Court of Judicial Magistrate First Class, Ambajogai committed the case to the Court of Additional Sessions Judge, Majalgaon ('trial Court'). Trial Court framed the charge (Exh.6). The appellant pleaded not guilty. His case is that the deceased committed suicide.

6. The prosecution examined eleven witnesses and produced in evidence various documents to bring home the charge. The trial Court, on appreciation of evidence, convicted the appellant and consequently sentenced as stated above.

7. The Executive Magistrate had recorded dying declaration ('D.D.') of the deceased. The same was, however not produced before the trial Court. He was summoned many a time for production of the D.D. and recording evidence in proof thereof. Learned counsel for the appellant had relied on an Apex Court judgment in case of *Samadhan Dhudaka Koli Vs. State of Maharashtra, (2008) 16 SCC 705* to submit that if the D.D. recorded by an Executive Magistrate was suppressed from the Court, the convict may be entitled for benefit of doubt.

8. We had, therefore, requested learned A.P.P. to communicate with the office of the Executive Magistrate as to whether D.D. is available with him. The concerned office took time, but ultimately produced the D.D.

recorded by the Executive Magistrate. Learned counsel for the appellant gave no objection to admit the said document in evidence.

9. Learned counsel for the appellant would submit that it would at the most be an offence punishable under Section 304 Part 2 of the I.P.C. The appellant was heavily drunk. Nobody witnessed the incident. A quarrel ensued between the appellant and the deceased. The appellant poured kerosene on the person of the deceased out of an anger. The appellant appears to have attempted to douse the fire, since he too suffered 15% of burns. He was an indoor patient for three days. Learned counsel, therefore, urged for converting the conviction from offence punishable under Section 302 to Section 304 of the I.P.C.

10. Learned A.P.P. would, on the other hand, submit that the case is based on two written D.Ds. and three oral. The deceased had suffered 97% of burns. The D.Ds. were recorded within hours of the incident. The fact that the appellant poured kerosene and set her wife ablaze suggests he had intended to kill his wife. According to the A.P.P., it's an offence of murder. The trial Court has rightly convicted the appellant therefor. She, therefore, urged for dismissal of the appeal.

11. Considered the submissions advanced. Perused the evidence on record. The appellant had two sons. Both were married. They were blessed

with children. One of the sons, Dnyandeo passed away. All of them would reside with the appellant and his wife Kamalbai (deceased). Admittedly, the appellant was addicted to alcohol. It is, however in the evidence of P.W.5 - Alka that the appellant had given up drinking. Same, however appears to be incorrect since D.D. (Exh.X-1) recorded by the Executive Magistrate suggests the appellant came home drunk.

12. The appellant was sixty-five years of age at the relevant time. The deceased was sixty years old. It is in the testimony of P.W.3 - Tukaram and both the daughters-in-law Alka (P.W.5) and Nirguna (P.W.6) that the appellant would desire his wife (deceased) to sleep with him every night. The deceased would not like the same, in view of there being daughters-in-law in the house. She still used to share bed with the appellant occasionally. It is in the oral evidence of these witnesses that on the fateful night the appellant took his wife (deceased) to his room. The appellant poured kerosene on her person and set her ablaze. It was 02:00 a.m. of 19th March, 2017. On hearing her cries, all of them woke up. P.W.3 - Tukaram broke open the door. According to them, the appellant went away. The deceased was covered with a blanket so as to extinguish fire and then was rushed to the hospital.

13. During cross-examination of these three witnesses, it was suggested that the deceased was annoyed with her son as he was addicted to

alcohol and gambling. He had lost a sum of Rs.10,000/- in gambling. She, therefore, committed suicide. All these suggestions have been denied. The appellant examined his mother in his defence to make out his such defence. There is, however nothing to infer the same.

14. The fact remains that the appellant at about 02:00 a.m. on 19th March, 2017 set ablaze his wife after pouring kerosene on her person. She suffered 97% of burns. A Police Head Constable on duty at the hospital recorded her statement (F.I.R.-cum-D.D.) (Exh.24). Before recording the same he verified from P.W.11 – Dr. Shinde, Medical Officer on duty that the patient was conscious oriented to make the statement. P.W.11 – Dr. Shinde, Medical Officer after examining her gave endorsement to that effect twice, first before recording and then after recording her statement. On demise of Kamalbai, the F.I.R. became D.D. It has been recorded therein that she was sleeping by the side of her daughter-in-law, P.W.6 - Nirguna. The appellant woke her up and took her to his room. He assaulted her and then set her ablaze. On hearing her cries, P.W.3 - Tukaram rushed to the room. She was covered with a blanket and then she rushed to the hospital. The D.D. (Exh.X-1) recorded by the Executive Magistrate bears endorsement of P.W.11 – Dr. Shinde, Medical Officer certifying the declarant (deceased) to be conscious oriented to give statement. The deceased stated in her D.D. that the appellant came home drunk. There was quarrel between her and him.

The appellant poured kerosene on her person and set her ablaze. Her son and daughters-in-law extinguished fire and rushed her to the hospital.

15. Both the D.Ds. are consistent with each other. The oral evidence of son and daughters-in-law of the appellant is also consistent in material particulars. The evidence on record indicate the appellant was heavily addicted to alcohol. He was even admitted to rehabilitation/de-addiction center. It, however appears that the same had no effect. On the fateful night, the appellant came home drunk. He had a quarrel with his wife (deceased). He then set her ablaze after pouring kerosene on her person. It was 02:00 a.m. The appellant was sixty-five years of age at the relevant time. The deceased was sixty.

16. The question is whether it is an offence of murder or culpable homicide not amounting to murder. Pouring kerosene and setting the deceased ablaze may prima facie indicate it to be a case of intention to kill. There is, however other aspect of the matter. The appellant was admittedly addicted to alcohol. At the relevant time, he was under influence of alcohol. He might not have been in his senses. He had a quarrel with the deceased. He then set her ablaze. There is on record one discharge card (Exh.62) that indicate the appellant was an indoor patient for three days. He suffered 15% of burns. Clothes on his person were burnt. His hand had suffered extensive burns. Same leads us to infer the appellant to have attempted to extinguish

fire with a view to save his wife. Same suggests the appellant had not intended to kill his wife. The incident took place was preceded by a quarrel. In our view, therefore, it is not a case of offence of murder. The appellant has, however to be attributed with knowledge that by such act, death would be a consequence. It is, therefore, an offence punishable under Section 304 Part II of the I.P.C. The appellant is behind the bars for about seven years.

17. For all the aforesaid reasons, we are inclined to partly allow the appeal. Hence, the following order :-

(I) Criminal appeal is partly allowed.

(II) The order dated 29th December, 2018 passed by Additional Sessions Judge, Majalgaon in Sessions Case No. 23 of 2017 and thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code is hereby set aside.

(III) He is convicted for offence punishable under Section 304 Part II of the Indian Penal Code, and therefore, sentenced to suffer rigorous imprisonment for nine years and to pay fine of Rs.5,000/- (Rupees Five Thousand).

(IV) The fine amount has already been paid by the appellant in trial Court.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

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