



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

CRIMINAL APPEAL NO. 537 OF 2003

1. Nana S/o. Uttam Shelke
Age: 40 years, Occu.: Labour,
R/o. Kanademala Behind Market Yard,
Ahmednagar, Dist.Ahmednagar.
 2. Laxmibai w/o Dhasharat Kalbhor
Age: 40 years, Occu.: Labour,
R/o. Bhosale Akhada, Bhavani Nagar,
Ahmednagar, Dist.Ahmednagar.
-Appellants
(Ori. Accused)

Versus

- . The State of MaharashtraRespondent

.....
Advocate for Appellants : Mr.Z.H.Farooqui h/f. Mr. Niteen V. Gaware
APP for Respondent : Mrs.Chaitali Choudhari – Kutti
.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 02 JULY, 2024

PRONOUNCED ON : 09 JULY, 2024

JUDGMENT :-

1. Judgment and order dated 24-07-2003 passed by learned 4th
Ad-hoc Additional Sessions Judge, Ahmednagar in Sessions Case
No.5 of 2003 thereby convicting present appellant no.1 for offence
under Sections 498-A, 306, 323, 504, 506 of the Indian Penal Code

(IPC) and appellant no.2 for offence under Sections 306 and 504 of the IPC, is taken exception to by the appellants by filing instant appeal.

PROSECUTION STORY IN NUTSHELL

2. Convict appellant no.1 - Nana Uttam Shelke was married to deceased Sharada and they have two sons. Appellant no.1 Nana was a Coolie, but he was addicted to liquor and he had kept a mistress i.e. accused no.2. Deceased Sharada objected for said relations and repeatedly requested her husband to sever ties, but appellant no.1 instead regularly beat her and brought accused no.2 home. On instigation of appellant no.2 also, it is the case of prosecution that appellant no.1 beat her. Finally on 17-10-2002, while Sharada was in house, appellant no.1 accompanied by accused no.2 came home and abused Sharada. Getting fed up of the routine ill-treatment, she incinerated herself and suffered 96% burns and succumbed to the same. On report of Sharada's brother PW2 Ankush, Camp Police Station, Bhingar, Dist. Ahmednagar registered crime.

Investigation was carried out by PW7 Chavan and on gathering sufficient evidence, both accused were chargesheeted. Accused were tried by 4th Ad-hoc Additional Sessions Judge, who on appreciating

the evidence, held charges proved and convicted both accused by its judgment and order dated 24-07-2003, which is now questioned by filing instant appeal.

SUBMISSIONS

On behalf of appellants :

3. Apprising this Court about the nature of charges, learned Counsel for the appellants would submit that prosecution has failed to establish the charges beyond reasonable doubt and by adducing convincing, cogent and reliable evidence. He took this Court through the testimonies of PW1 Balu and PW2 Ankush i.e. son of deceased and brother of deceased respectively and would point out that PW2 Ankush lodged report on receipt of information from PW1 Balu, who was a minor. That, it has come in prosecution evidence itself that at the time of evidence, child PW1 Balu was put up and in custody of PW2 Ankush, maternal uncle. That he was thus tutored to depose and accordingly, he has testified. According to learned Counsel, for said reasons, child's testimony cannot be accepted. He further pointed out that marriage is of almost more than a decade old. That accused and deceased has two children. That there is no convincing evidence that accused husband is maintaining a mistress and that charges to that extent are baseless. That there was no previous

complaint. He submitted that the occurrence is of 17-10-2002 but false and afterthought complaint was lodged on 18-10-2002 by PW2 Ankush. That his testimony is also shattered while in cross-examination.

Learned Counsel took this Court through the statement of deceased Sharadabai and submitted that accused no.2 had already left home of accused no.1 at the time of Sharadabai pouring kerosene and set herself on FIR, therefore, accused no.2 ought not to have been held guilty.

4. Criticizing the prosecution evidence, more particularly dying declaration, he submitted that the same ought not to have been accepted by the learned trial Court as according to him, it was firstly not in question-answer form. That there was no attestation of the thumb impression. According to him, it is also doubtful whether deceased was in capacity of giving dying declaration, she having suffered 96% burns. That she had suffered 18% burns to her limbs and therefore, it was not possible to obtain her thumb impression, but here in this case there is thumb impression and therefore, he raises doubt about dying declaration. According to learned Counsel, even there is no remark in the dying declaration that it was read over

and explained to the deceased. Learned Counsel submitted that it is unsafe to place reliance on said dying declaration and that learned trial Court erred in accepting said dying declaration.

As regards to offence under Section 498-A of the IPC is concerned, learned Counsel pointed out that cruelty as contemplated under law, has not been proved by prosecution beyond reasonable doubt.

Lastly, he submitted that there is inordinate delay in recording statements of witnesses i.e. more particularly of PW1 Balu and therefore, by relying on Judgment of Hon'ble Apex Court in the case of *Ganesh Bhavan Patel and Another v. State of Maharashtra, (1978) 4 SCC 371*, he would submit that it amounts to serious infirmity in the prosecution case and it is sufficient to render prosecution version doubtful.

For all above reasons, he prays to allow the appeal by setting aside the impugned judgment.

In support of its case, he relied on the following decisions :

- i) *Sampat Babso Kale and Another v. State of Maharashtra, (2019) 4 SCC 739*
- ii) *State of Punjab v. Gian Kaur and Another, 1998 SCC (Cri) 942.*
- iii) *Shaikh Bakshu and Others v. State of Maharashtra, (2007) 11 SCC 269.*

- iv) *State of Andhra Pradesh v. M.Madhusudhan Rao, (2008) 15 SCC 582.*
- v) *Gurcharan Singh v. State of Punjab, (2017) 1 SCC 433.*
- vi) Judgment of this Court in Criminal Appeal No.112 of 2002 passed in *Ijaj Ahmad Riyaz Ahmed Qureshi and Others v. The State of Maharashtra*, dated 19-06-2024.

On behalf of State :

5. Refuting the submissions and supporting the impugned judgment, learned APP would strenuously submit that deceased incinerated herself only and only because of ill-treatment at the hands of accused no.1 husband and accused no.2, who was his mistress. According to learned APP, inspite of deceased repeatedly objecting appellant no.1 husband to sever ties with appellant no.2, he deliberately brought her home and getting drunk, he used to beat deceased. That such story is coming from none other than son of accused and deceased. That child has deposed in the witness box. That he has denied that he was tutored. That child has deposed that only because of repeated beating by his father, his mother poured kerosene and set herself on fire. That there is trustworthy child witness account. That he reported the occurrence immediately to his maternal uncle PW2 Ankush and he also duly filed the complaint. That dying declaration is recorded wherein accused no.1 husband as

well as accused no.2 are named. That learned trial Court has rightly held both of them guilty and has rightly convicted and sentenced them. For all above reasons, learned APP prays to dismiss the appeal for want of merits.

BRIEF ACCOUNT OF EVIDENCE ON RECORD

6. In support of its case, prosecution has examined as many as seven witnesses. Sum and substance of their evidence is as under :

PW1 Balu Nana Shelke, son of appellant no.1 and deceased, in his evidence at exh.20 stated that accused no.1 is his father and deceased Sharda was his mother. That his father was a Coolie. He testified that he knew accused no.2, who used to come to their house and she to be concubine of his father. That his father used to consume liquor and asked his mother to bring Rs.10,000/- resulting into quarrel. That due to accused no.2, his father beat his mother. That on the date of incident, his mother returned from work. That his father came consuming liquor accompanied by accused no.2. That his father put up a demand of Rs.10,000/- and when his mother refused, his father abused her. Saying that it has become a daily affair, she incinerated herself. So he rushed and informed his maternal uncle PW2 and his mother was taken to hospital.

PW2 Ankush Dattatraya Shinde, brother of deceased and maternal uncle of PW1 Balu, deposed that he knew accused no.2, who was concubine of accused no.1. That accused nos.1 and 2 used to beat his sister. That they continuously harass his sister. That his sister objected to said relation. That on the date of incident, PW1 Balu came and informed about the incident that his mother setting herself on fire and thereafter, she being shifted to the hospital and his sister died due to burns. Therefore, on the next day of the incident, he lodged report.

PW3 Macchindra Hiraji Thorat, is Pancha to spot panchanama exh.26.

PW4 Seema Bhaskarrao Deshmukh is Medical Officer, who gave endorsement on being approached by Special Judicial Magistrate for recording dying declaration. This witness identified certification exh.29 on the statement recorded by Special Judicial Magistrate exh.34.

PW5 Shaikh Manhur Ahmed Shermohamad is Special Judicial

Magistrate, who recorded dying declaration exh.34.

PW6 Rafale Martin Thorat (ASI) is Police Officer and he noted report received from PW2 Ankush and registered crime bearing no.108 of 2002 and handed over investigation to Investigating Officer.

PW7 Onkar Daga Chavan (PSI), is the Investigating Officer, who conducted investigation and chargesheeted accused.

ANALYSIS

7. After taking into consideration the arguments advanced by the learned Counsel for the appellants, he seems to be criticizing the prosecution version and judgment the trial Court on the ground that firstly, there to be no convincing, cogent, reliable evidence on the point of offence under Section 498-A of the IPC; secondly, child witness testimony is the sole evidence and there being possibility of he being tutored, same is not worthy of credence; thirdly, that prosecution failed to make out a case against accused appellant no.2; fourthly delayed FIR and delayed recording of statements of witnesses and lastly, dying declaration not inspiring confidence to be

voluntary or truthful version of deceased Sharada.

8. Here PW2 Ankush, brother of deceased Sharada, has set law into motion. Admittedly, occurrence of burns had taken place on 17-10-2002 and FIR is of next day. Entire case of prosecution hinges on testimony of child PW1 Balu and that of his maternal uncle PW2 Ankush. Rest of the witnesses are Doctor, Special Judicial Magistrate, investigating machinery. Second piece of evidence is dying declaration exh.34. Therefore, the same needs to be put to minute scrutiny.

9. **PW1** Balu, at the time of testimony in the Court on 27-06-2003 gave his age as 16 years. At the time of incident, according to him, he was in 7th Standard. Incident has taken place on 17-10-2002. Therefore, on the date of occurrence, he was around 14-15 years of age and hence, a child witness.

Before adverting to his testimony, it would be profitable to give a brief account of settled position as regards to evidentiary value of child witness and manner of its appreciation.

“In the case of *Dattu Ramrao Sakhare v. State of Maharashtra*; 1997 (5) SCC 341, the Hon’ble Apex Court held that;

“A child witness if found competent to depose to the facts and reliable on such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

In ***Ratansinh Dalsukhabhai Nayak v. State of Gujarat***; (2004) 1

SCC 64, the Hon’ble Apex Court held that;

“Child witness – evidence of – conviction on the basis of – held, permissible if such witness is found to be competent to testify and the court after careful scrutiny of its evidence is convinced about the quality and reliability of the same.”

In ***Nivrutti Pandurang Kokate and ors. v. State of Maharashtra***;

AIR 2008 SC 1460, the Hon’ble Court dealing with the child witness has observed as under;

“The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

In a celebrated case of ***Hari Om v. State of U.P.***; (2021) 4 SCC 345, very recently the Hon’ble Apex Court, in paragraph 22 of this judgment, has spelt out legal principles, summarized the evidentiary value of child witness, effects of its discrepancies, and duty of court and corroboration when to be insisted upon.

10. Before the Court, **PW1** Balu, a child witness deposed at exh.20 that his father was a Coolie and his mother was a labour. He claims that he knew accused no.2, who used to come to their house once or twice in a month. He deposed that she was concubine of his father and his father used to consume liquor. That his mother used to requests his father to sever ties with accused no.2 and not to bring her to their house, but his father used to tell his mother that she should bring Rs.10,000/- from her parents and on that count, there used to be quarrels. He further clarified that his father was demanding Rs.10,000/- to break relations with accused no.2. Due to accused no.2, his father as well as accused no.2 beat his mother.

Regarding the incident, child deposed that it took place a year back at around 07:30 to 08:00 p.m., when his mother had returned from work, his father had also returned home and accused no.2 also come to their house. That his father was consuming liquor. That at that time, his mother told him to break relations with accused no.2, but again his father told her to bring Rs.10,000/- from her parents and thereafter, he will break relations with accused no.2. That his mother refused and thereafter, both accused started abusing his mother. That his mother said that it is a daily habit to trouble her and getting annoyed, she poured kerosene on her person and set

herself ablaze. So he immediately rushed to house of his maternal uncle, who was residing at 100-150 feet away from their house. That his maternal uncle PW2 Ankush came and shifted his mother to the hospital. That his mother died. Child identified both the accused.

11. The child is subjected to **cross-examination** wherein he has given name of his school. He answered that he is residing with his maternal uncle since admission of his mother in the hospital. He is questioned about surroundings, nature and measurement of the house, place of cooking in the house. He has admitted that accused no.2 has a son and that he had attended marriage of son of accused no.2. He admitted that accused no.2 lodged case against his mother and maternal uncle.

Omissions are brought in paragraph no.8 on the point that father demanding money from mother to break relations between himself and accused no.2; that on the date of incident, his father had consumed liquor. In paragraph no.9, he flatly denied a suggestion that his maternal uncle tutored him and told him how to depose in the Court and that he is deposing falsely in the Court at the behest of PW2. Rest all cross-examination is not on relevant points and is almost denial of suggestions.

12. Taking the above testimony of child into consideration, it is emerging that incident had taken place in the evening. Child has categorically stated that his mother returned from work, thereafter his father also arrived and even accused no.2 came to their house. Child further stated about his father consuming liquor and his mother asking him to break relations with accused no.2, but his father demanded Rs.10,000/- for severing relations. He deposed that getting fed up of daily abuses, his mother poured kerosene on herself and set her ablaze.

As stated above, in cross-examination, child has categorically denied that, he was tutored by his maternal uncle. No doubt there is omission regarding his father demanding money from his mother for breaking relations, but the aspects of father coming to the house, consuming liquor, arrival of accused no.2 to their house and his mother saying that she is fed up of daily habit to trouble her, she poured kerosene on her person and set herself on fire, have remained undisturbed and unshaken. The child's presence at the spot is not rendered doubtful. Child has rushed to PW2 his maternal uncle, who came and shifted his sister to hospital. Therefore, mere stay of PW1 child with PW2 itself is not sufficient to draw an inference that the child has been tutored or that he was deposing at the behest of PW2.

The child, at the time of incident, was in 7th Standard and at such age, he has witnessed above occurrence and has narrated it while in witness box barely after a year of occurrence. There is no reason to doubt his testimony as regards to incident. There is no reason for the child to falsely implicate his own father.

13. As regards to testimony of **PW2** Ankush is concerned, as stated above, he has also stated about conduct of father of PW1 Balu of consuming liquor. He resides 100-150 feet away from the house of accused. He also stated that accused no.2 was concubine of accused no.1 and that accused no.1 used to beat his sister on account of demand of Rs.10,000/- to sever ties with accused no.2. He also deposed that he used to hear about it from his sister and understanding was given to accused no.1 husband. That after receiving information from PW1 Balu, he rushed to the house of his sister and shifted her to hospital.

Though **cross-examined** and though it is brought on record that he was not in talking terms with accused no.1 and accused no.2 as they had lodged report against him at Kotwali Police Station, occurrence of burns suffered by his sister on 17-10-2002 is not rendered doubtful.

14. Therefore, taking testimonies of PW1 Balu and PW2 Ankush into account, there is reliable material to suggest that deceased Sharada poured kerosene on herself when accused no.1 husband had returned home and started consuming liquor. Child's testimony, as stated above, is already found to be credible. Therefore, it is clear that getting fed up of daily trouble at the hands of accused no.1 husband, Sharada incinerated herself.

15. Another piece of evidence is dying declaration exh.34 and the same is recorded by PW5 Shaikh, Special Judicial Magistrate. Said dying declaration exh.34 in translated form is as under :

"Exhibit : 34

Dying Declaration

*Civil Hospital
Ahmednagar
Date : 17.10.2002
Time : 10.30 pm*

Firstly, I introduced myself as Judicial Magistrate to the patient and started recording the statement as follows.

Myself Sau.Sharadabai Nana Shelke, Age 32 yrs, occupation: labourer, r/at Kanade Mala, Saras Nagar.

I am giving statement as asking upon personally that, I am residing at the above mentioned place with my two sons namely Balu and Amol, and with my husband Nana. My husband is doing labour work. My husband is of bad character. He has kept a woman namely, Laxmibai Kalbhor. He is always beating me.

Today i.e on 17.10.2002 at around 8.00 p.m., I just came from work and was sitting at the door, my husband and Laxmibai came at home and my husband started abusing me like every day. She started a fight between us and left the house. As I could not bear the daily trouble/harassment, I myself poured a can of kerosene, which I had in the house, on my body and lit a stick and ablaze myself. I was wearing a nylon saree, it caught fire. As a result, I have bruises on my chest, back, thighs, and arms. My mother-in-law came immediately and put water on my body and extinguished fire. Later my brother-in-law and my brother admitted me to the government hospital. Currently I am undergoing treatment. The said incident was happened only because my husband kept that woman (Laxmibai Kalbhor) and was harassing me everyday and was beating me, So I have made a suicide attempt out of frustration. I have a complaint against my husband and that kept woman Laxmibai Kalbhor. I have given this statement. My statement has been read over to me and it is true to my knowledge.

*TI Left Hand
Sau. Sharada Nana Shelke*

11.00 pm

17/10/2002 Patient was conscious oriented thr'out the statement.

Sd/-

*Sessions Case No.5/03
Exhibit No. 30
Admitted in Evidence on 30.06.2003
Sd/-*

*Sessions Judge,
Ahmednagar. 30.06.2003*

*Seal
Special Judicial Magistrate
Ahmednagar District"*

(As translated by Sr. Translator, High Court, Aurangabad)

16. **PW5** Shaikh, Special Judicial Magistrate has testified about receiving letter from Police, visiting hospital, approaching Doctor, obtaining fitness certificate. Thereafter, Special Judicial Magistrate introduced himself, put questions to patient and on completion of statement, he claims that, it was read over to the patient and when she was asked, she admits to the correctness of the statement and after she affirmed, he obtained her left thumb impression and again obtained Doctor's endorsement and then himself cause signature. He narrated substance of the dying declaration i.e. deceased informing that accused no.2 is mistress of her husband and due to her, her husband used to raise quarrels with her and they both harassed her and she could not tolerate it and lastly, she poured kerosene and set herself on fire.

PW4 Dr.Seema, Medical Officer corroborates above testimony of Special Judicial Magistrate about he recording dying declaration. She has deposed that she herself got verified and satisfied that Sharada was conscious.

Nothing adverse is brought in the **cross-examination** of PW5 Shaikh, except that there is no attestation below the thumb impression and that there is no remark that on verification and satisfaction that patient to be conscious, statement is recorded. Such

infirmity itself will not be sufficient to discredit entire dying declaration.

CONCLUSION

17. It appears from above discussions that dying Declaration is promptly recorded on the same day on obtaining certification of fitness from Doctor and therefore, there is no reason to disbelieve the same to be not voluntary and untruthful.

18. I have gone through the citations relied upon by the learned Counsel for the appellants. The facts in those cases and case in hand are quite distinguishable and therefore, those decisions cannot be made applicable to the case in hand.

19. As discussed above, learned Counsel for appellants submitted that implication of accused no.2 and her further conviction by learned trial Court is unwarranted and misplaced.

There is force in the above submission. Though prosecution has shown that accused no.1 husband had kept accused no.2 as mistress, the child witness PW1 and brother of deceased PW2 are speaking about she visiting house occasionally i.e. once or twice in a month.

Even in the dying declaration, deceased had reported that on that day after accused no.2 left, thereafter incident took place. It seems that it was result of quarrel between husband and wife alone and at the time of pouring kerosene by deceased on herself and setting her on fire, accused no.2 was not present there. Therefore, it will be unjust to rope accused no.2 for alleged immolation by deceased.

20. I have gone through the impugned judgment. Learned trial Court has appreciated evidence on record in proper perspective and recorded guilt of appellant no.1. Therefore, the findings and conclusion reached at by the learned trial Court to the extent of conviction and sentence awarded to appellant no.1 need not be interfered. Accordingly, I proceed to pass following order :

ORDER

- I) Criminal Appeal No.537 of 2003 is partly allowed.
- II) The conviction awarded to appellant no.2 – Laxmibai w/o Dasharat Kalbhor in Sessions Case No.5 of 2003 by the learned 4th Ad-hoc Additional Sessions Judge, Ahmednagar on 24-07-2003 for the offence punishable under Sections 306 and 504 of the Indian Penal Code, stands quashed and set aside.

III) The appellant no.2 stands acquitted of the offence punishable under Sections 306 and 504 of the Indian Penal Code.

IV) **The bail bonds of appellant no.2 stand cancelled.**

V) The fine amount deposited, if any, be refunded to appellant no.2 after the statutory period.

VI) It is clarified that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE)
JUDGE