

(2016) 10 BOM CK 0068

BOMBAY HIGH COURT

Case No: Criminal Appeal No. 216 of 2013.

Ashok s/o Dadarao
Sable, Age-26 years,
Occu:Agri., R/o-Hivra
(Khurd), Tq-Majalgaon,
Dist-Beed (At present
Appellant is in jail) (Ori.
Accused No. 1) -
Appellant @HASH The
State of Maharashtra
(Prosecution)

APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 14, 2016

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, Section 498A

Citation: (2016) 3 AIRBomRCri 746 : (2017) ALLMRCri 282 : (2016) 4 BomCR(Cri) 314 :
(2016) 4 Crimes 553 : (2016) 3 DMC 835 : (2016) 6 MhLJCrI 618

Hon'ble Judges: S.S. Shinde and Sangitrao S. Patil, JJ.

Bench: Division Bench

Advocate: Mr. R.N. Dhorde, Senior Counsel i/b. Mr. V.R. Dhorde, Advocates, for the Appellant;
Mr. S.W. Munde, A.P.P, for the Respondent

Final Decision: Allowed

Judgement

S.S. Shinde, J.(Oral) - This Appeal has been filed by the original accused No. 1 who has been convicted by the Additional Sessions Judge, Majalgaon in Sessions Case No. 32 of 2012 on 1st April 2013 under Section 302 of the Indian Penal Code, 1860 ("I.P.C." in short) and has been sentenced to suffer life imprisonment with fine of Rs. 5,000/- and in default of payment of fine to suffer rigorous imprisonment for three months. The Appellant has also been convicted under Section 498-A of the I.P.C. and sentenced to suffer

rigorous imprisonment for three years with fine of Rs. 5000/- and in default of payment of fine to suffer rigorous imprisonment for three months. Both the sentences were directed to run concurrently.

2. The prosecution case, in a nut-shell, is as under:-

(A). Accused No. 1 Ashok is the husband, accused No. 2 Dadarao is the father-in-law and accused No. 3 Sau. Shahubai is the mother-in-law of the deceased Anita. The accused are residents of village Hivra, Tq-Majalgaon, Dist-Beed. Accused No. 1 married to the deceased Anita ten years ago. She begot three sons viz. Akash, Avinash and Akshay, out of the said wed-lock. After the birth of the youngest child viz. Akshay, accused No. 1 started doubting the character of the deceased. This culminated into ill-treatment, such as abusing, beating and harassment by all the accused. The deceased Anita left the house of the accused in November 2010 and started residing with her parents. Accused No. 1 after sending legal notices, filed a petition bearing H.M.P. No. 34 of 2011 for restitution of conjugal rights under Section 9 of the Hindu Marriage Act in the Court of Civil Judge (S.D.), Majalgaon on 29th July 2011. The deceased Anita filed her written statement in the said Hindu Marriage Petition. It appears that since 17th December 2011 the deceased started residing with the accused. On 3rd March 2012 in view of the compromise-deed (Exh. 38) between the deceased Anita and accused No. 1, the said Hindu Marriage Petition was disposed of.

(B). It is the case of the prosecution that on 18th March 2012 at about 7.30 to 8.00 a.m. Anita sustained burn injuries while she was residing at the house of the accused. Accused Nos. 2 and 3 along with the neighbours, extinguished the fire. Accused Nos. 2 and 3 shifted her to Rural Hospital, Majalgaon. Anita was referred to Civil Hospital, Beed on the same day. She died on 19th March 2012 at about 4.00 p.m. at Civil Hospital, Beed. This was followed by drawing inquest panchnama (Exh.17) and postmortem by Dr. Tak (PW-2). Anita died on account of sustaining superficial to deep injuries as a consequence of septicemia. The dying declaration of Anita recorded by A.S.I. Shingare (PW-3) on 18th March 2012 (Exh. 28) came to be treated as the F.I.R. and Crime No. 34 of 2002 was registered for the offences under Sections 307, 498-A read with Section 34 of the I.P.C. against all the three accused. The accused were arrested on the same day. After the death of Anita, the offence under Section 302 came to be substituted for the offence under Section 307 of the I.P.C.

(C). As per the prosecution case, accused No. 1 committed murder of his wife by pouring kerosene on her person on 18th March 2012 pursuant to subjecting her to cruelty by doubting her chastity. As against accused Nos. 2 and 3, it is alleged that they also resorted to ill-treat the deceased.

3. The prosecution claims homicidal death of Anita, whereas as per the case of the accused, it was accidental. The case of the prosecution rests upon two dying declarations, one recorded by A.S.I. Shingare (PW-3) on 18th March 2012 (Exhibit 28)

and another dying declaration (Exhibit 23) recorded by Naib- Tahsildar Gore (PW-1). As per the prosecution case, there was oral dying declaration by the deceased to her father Machhindra (PW-5). In support of its case, the prosecution also examined Medical Officers Dr. Tak (PW-2) and Dr. Dhoot (PW-7). The prosecution also examined Police Head Constable Bombale (PW-4), Police Inspector Kurumkar (PW-6). In their defence, the accused examined Dr.Wagh (DW-1).

4. The defence taken by the accused is that due to sudden flaring of the local earthen oven while pouring kerosene in it, the deceased sustained burn injuries accidentally.

5. The learned trial Judge, after scrutinising the evidence and hearing the parties, convicted accused No. 1 only for offences punishable under Sections 302 and Section 498-A of IP.C. and passed sentence, as stated above. However, he acquitted accused Nos. 2 and 3 of these offences.

6. The learned senior counsel appearing for the Appellant submits that there are no specific averments regarding ill-treatment on the part of the Appellant and evidence also is lacking on that point. There are material variance in the dying declarations recorded by Investigating Officer and Naib-Tahsildar. The Medical Officers Dr. Dhoot (PW-7) and Dr. Wagh (DW-1) have deposed that Anita herself had given history of accidental burns when she was admitted in the hospital. The spot panchnama shows that the room, where the incident is alleged to have been taken place, was having no door and therefore statement of Anita that after the incident her husband went out of the room and closed the door from out-side, cannot be believed. The learned senior counsel further submits that the benefit of doubt ought to have been given to the Appellant. In support of his submissions, regarding accidental death, he placed reliance on the following reported cases:

(i) Paneerselvam v. State of Tamil Nadu, (2008) 17 S.C.C. 190, (ii) Vilas Vikramsingh Deshmukh and others v. The State of Maharashtra, 2013 ALL M.R. (Cri) 3145.

7. In support of his submissions that when there is variance in dying declarations, there should be corroborative evidence to the dying declarations, the learned senior counsel for Appellant placed reliance on the following reported cases:

(i) State of Rajasthan v. Shravan Ram and another, 2013 ALL M.R. (Cri)2254 (S.C.), (ii) Surinder Kumar v. State of Haryana, 2012 ALL M.R. (Cri) 696(S.C.), (iii) Girdhar Shankar Tawade v. State of Maharashtra, A.I.R. 2002 S.C. 2078, (iv) Samadhan Dhudaka Koli v. State of Maharashtra, A.I.R. 2009 S.C. 1059.

8. In support of his submission that the benefit of doubt ought to be given to the Appellant, he placed reliance on the Judgment in the case of **Sanjay v. State of Maharashtra, (2007) 9 S.C.C. 148**. In support of his submissions regarding tutoring to victim and suppression of documents, the counsel for Appellant placed reliance on the following reported cases:

(i) **Banarasi Dass and others v. State of Haryana, (2014) 15 S.C.C. 485**, (ii) **Samadhan Dhudaka Koli v. State of Maharashtra, 2009 ALL M.R. (Cri) 229(S.C.)**.

9. On the other hand, the learned A.P.P. appearing for the prosecution submits that there are two dying declarations, one recorded by the Investigating Officer and the other by the Naib Tahsildar. Moreover, the deceased Anita had given oral dying declaration before her father Machhindra. In all the three dying declarations, she has stated in specific words that Appellant poured kerosene on her person and set her on fire. All the dying declarations are consistent, reliable and there is no variance at all as regards the role attributed to the Appellant. The learned A.P.P. supports the reasonings recorded by the trial Court. He submits that the trial Court has discussed in detail the entire evidence and thereafter recorded the cogent findings which need no interference. In support of his submissions, the learned A.P.P. placed reliance on the judgment in the case of **Shaikh Juned Shaikh Moti Mansuri and another v. State of Maharashtra and another, 2014(2) Mh.L.J. (Cri.) 131**.

10. The dying declaration recorded by A.S.I. Shingare (PW-3) is treated as the F.I.R. (Exh.28). In the said dying declaration, Anita stated that her marriage with accused No. 1 Ashok was solemnized in the year 2007. She started residing with her husband since then. Initially, she was treated well for one year, however, thereafter her husband started suspecting her chastity. He used to abuse and assault her. She used to inform her parents on phone about ill-treatment given to her by the appellant, however the parents used to advise her to ignore such incidents. She further stated that the accused as a part of ill-treatment, on some occasions, did not give her food. Therefore, she left the matrimonial house and went to the house of her parents and started residing there. She received three notices through Majalgaon Court and as a response of third notice sent by her husband, the amicable settlement was brought about and she went to the matrimonial home just eight days prior to the date of incident. However, the appellant continued the ill-treatment. The appellant used to abuse and beat her.

11. On 18th March 2012, at about 7.30 to 8.00 a.m. when the appellant and his parents were in the house, the appellant started quarrelling with her by suspecting her chastity. At that time her father-in-law and mother-in-law were sitting in Varandha (courtyard). The appellant started beating her. She started shouting. The appellant took kerosene can from the house and poured kerosene on her person, ignited match-stick and set her ablaze. The appellant closed the door from outside and went away. Thereafter the father-in-law and mother-in-law, who were sitting in Varandha, opened the door and came inside. Even Yashodabai, who was the neighbour also came with them. They tried to extinguish the fire by pouring water and also putting clothes on person of the deceased. Thereafter, appellant arrived at home. The appellant and his parents took her to Civil Hospital, Majalgaon where she was treated and thereafter as per the advice of the doctor, she was taken by a private vehicle to Civil Hospital, Beed where she was taking treatment. She stated that she was conscious. Once again she stated that the appellant suspected her chastity, abused her and beat her and thereafter poured kerosene on her

person and set her ablaze. In the said incident both the hands, breast, stomach, face and both legs of the deceased Anita were burnt. Therefore, she complained against all the accused persons.

12. To prove the said dying declaration, the prosecution examined A.S.I. Shingare (PW-3) at Exh.27. He states that on 18th March 2012 he was in-charge of Police Out-Post, Civil Hospital, Beed. He came to know that a patient namely Anita Ashok Sable was admitted in Civil Hospital, Beed and the M.L.C. thereof was sent to the out-post. He, therefore, informed Dr. Dhoot, Medical Officer that he wanted to record the statement of the patient Anita. A.S.I. Shingare (PW-3) along with Dr. Dhoot (PW-7) went to the Burns Ward. According to him, Dr. Dhoot (PW-7) examined Anita and then put endorsement that she was conscious and in a condition to give oral statement. Thereafter A.S.I. Shingare (PW-3) recorded the statement of Anita as per version as incorporated in the dying declaration (Exh.28). The deceased Anita stated that on 18th March 2012 at about 7.00 to 7.30 a.m. the appellant Ashok picked up a quarrel with her by doubting her chastity and assaulted her. She, therefore, raised hue and cry. Thereafter the appellant poured kerosene on her person and set her on fire. She further stated that thereafter appellant went outside the house and shut the door from outside. Upon hearing her hue and cry, accused Nos. 2 and 3 opened the door. Along with the neighbours, they extinguished the fire. Then they took her to Rural Hospital, Majalgaon where she received first aid and thereafter, as per the advice of the doctor, she was taken to the Civil Hospital, Beed for further treatment. After recording the dying declaration, Dr. Dhoot (PW-7) endorsed that the patient was conscious and fit to give oral statement. A.S.I. Shingare (PW-3) made entry in the inward register about recording of the dying declaration of Anita. Copy of the same was forwarded to the Police Station, Beed (City) along with report dated 19th March 2012. The same was then registered as F.I.R. (Exh.28).

13. In his cross-examination, A.S.I. Shingare (PW-3) denied the suggestion that Dr. Dhoot (PW-7) told him to record the dying declaration. He denied the suggestion that the parents and aunt of the deceased Anita were known to him prior to the incident. He further stated that the police constable Potdar was accompanying him while recording the dying declaration. It appears that while replying the question, whether he handed over the copy of the dying declaration to Mr. Gore, Naib-Tahsildar, in one breath he stated that he did hand over copy of the dying declaration to Naib Tahsildar Gore (PW-1). However, he again stated that he did not handover the copy of dying declaration to Naib Tahsildar Gore (PW-1). He denied the suggestion that he supplied the form for recording dying declaration to Naib Tahsildar Gore (PW-1).

14. The dying declaration (Exh.23) has been recorded by Naib-Tahsildar Gore (PW-1). The said dying declaration is in question-answer form. So far as the main incident dated 18th March 2012 is concerned, Anita stated that on the said date in between 7.30 and 8.00 a.m. the appellant started quarrelling with her suspecting her chastity and assaulted her. Thereafter he poured kerosene from the kerosene can, ignited a match-stick and set her ablaze. Thereafter he closed the door from outside. Her father-in-law and

mother-in-law opened the door, came inside and tried to extinguish fire and thereafter they took her to Majalgaon Government Hospital. Thereafter she was referred to the Government Hospital, Beed. When she was asked as to who were responsible for the said incident, she stated that her husband, father-in-law and mother-in-law were responsible for the said incident and she had grievance against them.

15. To prove the dying declaration (Exh. 23), prosecution examined Naib Tahsildar Gore (PW-1) at Exh.20. He deposed that on 18th March 2012 he was working in the capacity of Naib-Tahsildar at Beed. As per the request of police officer, he went to the hospital and recorded the statement (Exh.23) of Anita as per her say as mentioned in the above paragraph.

16. Naib Tahsildar Gore (PW-1) stated that Dr. Tak examined Anita before recording the statement. In fact the said statement is incorrect. There are endorsements of Dr. Dhoot (PW-7) and not that of Dr. Tak (PW-2) as stated by him. It further appears from his evidence that the original dying declaration was maintained in sealed envelope which was kept in the record-room. However when he brought the said envelope, there was no receipt of handing over the said envelope containing statement (Exh.23) of Anita to show that the same was brought from the custody of the record-room keeper. He further admits in his cross-examination that he is not aware that original dying declaration needs to be deposited in the Court of J.M.F.C. He further admits that he did not go through the treatment papers of Anita before recording her statement. If his evidence is considered in its entirety, it appears that there is no proper recording of dying declaration and even he is not aware which Medical Officer was present during recording of dying declaration (Exh.23).

17. Apart from the two dying declarations referred to above, the prosecution examined Machhindra (PW-5), the father of the deceased Anita to prove oral dying declaration. He stated that the appellant sent two notices through his Advocate to Anita. Thereafter the third notice was sent and in response to the said notice, they attended the proceedings before the Court at Majalgaon. The appellant then promised to treat Anita properly, hence he sent Anita with the appellant on his giving undertaking to that effect before the Court. The incident occurred 2-3 months after the appellant had taken Anita with him from the Court to his house. He stated that on 18th March 2012 accused No. 2 phoned him and told that Anita sustained burn injuries and she was admitted in Rural Hospital, Majalgaon. On receiving that information, he himself, his wife, sister and brother-in-law went to the Rural Hospital, Majalgaon. They came to know that Anita was shifted to Civil Hospital, Beed and then they reached Civil Hospital, Beed at about 4.00 p.m. All the three accused were present there. They, however, fled away from the hospital after seeing them. They met Anita in the hospital. They saw that she had sustained burn injuries. Anita stated that the appellant poured kerosene on her person and set her ablaze by igniting a match-stick, then went outside the house and closed the door. After hearing her hue and cry, accused Nos. 2 and 3 entered the house and they extinguished the fire by pouring water on her person. Accused Nos. 2 and 3 then took her to Rural Hospital, Majalgaon and then to

Civil Hospital, Beed and admitted her there.

18. During his cross-examination, Machhindra (PW-5) stated that Anita married to appellant ten years prior to the incident. Three children have been born out of the said wed-lock. He denied the suggestion that he reached at Civil Hospital, Beed at about 9.00 a.m. on 18th March 2012. He reiterated that he reached the Civil Hospital, Beed at about 4.00 p.m. and the accused then fled away from there upon noticing him and others. He denied the suggestion that Anita told him that she caught fire while igniting the local oven accidentally. He specifically denied the suggestion that he himself and his wife tutored Anita to give such dying declaration.

19. Dr. Dhoot (PW-7) stated that he had examined the deceased Anita prior to and after recording of her statements by A.S.I. Shingare (PW-3) and Naib Tahsildar Gore (PW-1) and found her to be conscious and fit to give statements. Accordingly, he made endorsements under his signature. In his cross-examination Dr. Dhoot (PW-7) fairly stated that through-out recording of the dying declarations he was not present. He stated that the deceased Anita was administered injections Rantac, Dyclophin and Aciloc. He stated that the injection Fortwin is sedative. This fact shows the state of mind of the deceased Anita at the time of giving the statements (Exh.28 and 23).

20. Dr. Dhoot (PW-7) stated that the deceased Anita Ashok Sable was referred to Civil Hospital, Beed by Rural Hospital, Majalgaon. She had given history of accidental burns. There is specific mention on the first page of the case papers (Exh.45) of the deceased Anita about the history of accidental burns given by her at the time of her admission.

21. The prosecution ought to have examined Dr. Wagh (DW-1) who was attached as Medical Officer to Rural Hospital, Majalgaon where the deceased Anita was admitted immediately after the incident. The appellant has examined him in his defence. He stated that on 18.03.2012, at about 8.45 a.m. Anita Ashok Sable was admitted in the hospital. She was brought in the hospital by the appellant. At the time of admission, she told the history of accidental burns due to flames of the local oven while pouring kerosene in it. She was conscious at the time of admission.

22. Under the above circumstances, it will have to be seen how far the dying declarations of the deceased Anita are consistent and whether they are believable. The comparative chart of her dying declarations is as under:-

**Dyling
Declaration
recorded by
Mr. Gore
(Exh. 23) at
2.00 p.m. on
18th March
2016**

**Dying
Declaration
recorded by
A.S.I. Shingare
(Exh. 28) at
12.10
p.m. on 18th
March 2016**

**Deposition
Pw-5
Machhindra
Dhumal**

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23. If the contents of dying declarations at Exh.23 and Exh.28 are compared, there is a variance. In dying declaration Exh.23, Anita has stated that she had grievance against her mother-in-law, father-in-law and husband and they all had burnt her. In dying declaration Exh.28 Anita had not stated specifically that mother-in-law and father-in-law also are responsible for her burn injuries. Because of the said statement, the father-in-law and mother-in-law of Anita had to face trial for her murder. The persons, who actually extinguished fire from her person, also were involved by her in the incident of setting her on fire. This shows that either she was tutored by somebody to involve them or had no regards for truth. In the circumstances, the dying declarations of the deceased Anita cannot be said to be made voluntarily or truthful.

24. We have carefully perused the original case papers (Exh.53) in respect of treatment of Anita at Rural Hospital, Majalgaon wherein the history of burns is mentioned as accidental burns while igniting Chulha by pouring kerosene in it. The case papers (Exh.45) of the deceased Anita prepared at District Hospital, Beed also contain history of accidental burns by her. Dr.Dhoot (PW-7) and Dr.Wagh (DW-1), who are the Medical Officers and independent witnesses, have stated in their statements before the Court that Anita had given the history of accidental burns and at the time of giving such statement, she was conscious and oriented. It is true that the accused persons had accompanied Anita, however the evidence of Medical Officers Dr. Dhoot (PW-7) and Dr. Wagh (DW-1) cannot be ignored. Considering the variance in the dying declarations referred to above and the history of burns given by the deceased Anita at the time of her admission in the hospitals, we are not inclined to believe the case of the prosecution that the appellant set her ablaze.

25. We have also carefully perused the Spot Panchnama. It appears that spot of the incident is shown inside small room without door. Upon reading the contents of the said Spot Panchnama, it is stated that inner room is having door. However, there is confusion about the spot of the incident. The contents of the Spot Panchnama show the spot of incident inside the inner room, however in the map the spot of the incident is shown in the outer room without door. Therefore, we find force in the arguments of the learned senior counsel that when the spot of incident is outer room without door, there was no question of closing the door from outside by the appellant as stated by Anita. There is no Varandha outside the said room where accused Nos. 2 and 3 were sitting as stated by Anita. Nothing incriminating has been found from the spot of the incident. It is true that Spot Panchnama is carried out on the next day of the incident i.e. on 19th March 2012. However except a Chulha in the outer room, the Investigating Officer and Panchas did not notice kerosene can, smell of kerosene from anything, blackening of articles, clothes, etc. which would lead one to the conclusion that such incident, either accidental or otherwise, had taken place at the spot subject matter of the Panchanama.

26. The evidence of the prosecution creates doubt about homicidal death of Anita. The benefit of doubt deserves to be extended to the appellant. In view of the appreciation of dying declarations of the deceased Anita and the inferences drawn therefrom, we are not

inclined to subscribe to the inferences drawn by the learned Trial Judge. The impugned judgment of conviction, in the above circumstances, cannot be upheld. It is liable to be quashed and set aside. Hence the following order:-

ORDER

(I) Criminal Appeal is allowed.

(II) The conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offences punishable under Sections 302 and 498-A of the Indian Penal Code.

(III) Fine, if any, deposited by the appellant be refunded to him.

(IV) Since the appellant is in jail, he be released forthwith, if not required in any other case.

(V) The appellant shall furnish personal bond in the sum of Rs. 10,000/- with a surety in the like amount before the trial Court vide Section 437-A of the Code of Criminal Procedure.