IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.481 OF 2016

Santosh s/o Lalsing Rathod,
Age-34 years, Occu:Agriculture,
R/o-Warzadi Tanda, Taluka
and District-Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr. Nilesh S. Ghanekar Advocate for Appellant.
Mrs. V.S. Choudhari, A.P.P. for Respondent – State.

...

CORAM: SMT. VIBHA KANKANWADI AND S.G. CHAPALGAONKAR, JJ.

DATE : 4th JULY, 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by original accused No.1 challenging his conviction by the learned Additional Sessions Judge, Aurangabad in Sessions Case No.265 of 2012 on 10th August 2016, thereby convicting him for the offence punishable under Section 302, 498-A of the Indian Penal Code.

2. The prosecution story, in short, is that deceased Nitabai got married to appellant – original accused No.1 about four years prior to 25th March 2012. They had son, Vijay aged three years and daughter Payal, aged two years, on the day of incident. Accused - appellant was addicted to liquor. Nitabai was admitted to Ghati Hospital, Aurangabad on 25th March 2012 and her statement was recorded by police head constable Rajput of Karmad Police Station around 12.00 midnight. She disclosed that the accused used to raise suspicion over her character and used to assault on that count. Around 4.00 p.m. on that day when Nitabai was in the house with her children, accused came and started abusing her in filthy language by raising suspicion that she has relations with others. Accused told that he would teach a lesson to her. He took kerosene can, poured it on her person and by igniting the match stick, set her to fire. Nitabai started raising cry and then accused No.1 fled away. When her saree caught fire, the mother-in-law, accused No.3 came and tried to extinguish the fire. At that time, accused No.3 as well as son Vijay sustained burn injuries. Thereafter, accused No.2 – father-in-law admitted Nitabai, her mother-in-law and son to hospital.

3. On the basis of said statement recorded, offence under Section 307, 504 of the Indian Penal Code came to be

registered. It appears that Nitabai succumbed to the injuries on the next day i.e. 26th March 2012. Thereupon the inquest panchnama was prepared between 1.45 p.m. to 2.30 p.m. and the dead body was sent for postmortem. Statements of the witnesses were recorded. Panchnama of the spot was carried out. Accused came to be arrested and after completion of the investigation, charge-sheet was filed.

4. After committal of the case, charge was framed and trial was conducted. The prosecution has examined in all ten witnesses to bring home the guilt of the accused. After hearing both sides and perusing evidence on record, the learned trial Judge has acquitted the father-in-law and mother-in-law from all the charges. However, the appellant i.e. accused No.1 was held guilty, as aforesaid and he was sentenced to suffer imprisonment for life and to pay fine of Rs.1000/-, in default to suffer simple imprisonment for one month, for the offence under Section 302 of the Indian Penal Code. Further the appellant was sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1000/-, in default to suffer simple imprisonment for one month, for the offence punishable under Section 498-A of the Indian Penal Code. Both the sentences were directed to run concurrently. This conviction is under challenge in this Appeal.

5. Heard learned Advocate Mr. Ghanekar, appearing for the appellant and learned APP Mrs. Choudhari appearing for the State. Perused the Record and Proceedings.

6. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. Trial Court failed to consider that when there was absolutely no evidence, the investigating agency has made the parents of accused no.1 – appellant as accused and they were required to face the trial. The First Information Report, which is the first dying declaration Exhibit-63 would also make it clear that accused Nos.2 and 3 had not taken active participation in the alleged incident. If the falsity has gone to the extent that even innocent persons have been roped, it creates every doubt in respect of the story in Exhibit-63. Another fact that is required to be considered is that second dying declaration has been recorded between 1.05 a.m. to 1.25 a.m. by the Special Judicial Magistrate, Aurangabad on the same day and it involves only accused No.1. There is absolutely no explanation as to how accused No.3 and son Vijay had sustained burn injuries. If we consider the alleged oral dying declaration to PW-1 Rohidas, father of the deceased, then it can be seen that he is giving

different version than told in Exhibit-54 and 63. The prosecution has also examined PW-3 Govind who is brother of PW-1 and he has specifically admitted that he was present along with other relatives before the dying declaration came to be recorded and therefore, possibility of tutoring the dying declaration has not been ruled out. PW-4 Hiraman, is the uncle of PW-1 Rohidas. Initially after saying that Nitabai was harassed and there was meeting held for compromise, he turned hostile, but when questions in the nature of cross-examination were put, he has admitted that oral dying declaration was given to him by Nitabai. The story put to him was explaining the circumstance in which mother-in-law and son of the deceased got burn injuries. In the cross-examination, he has admitted that house of the accused is surrounded by other houses. Even PW-2 Ambadas is the neighbouring person who was taken as panch to the spot panchnama but in the cross-examination he has admitted that he was the person who has seen deceased coming out of the house in burning condition. He had taken part in extinguishing the fire on her person and in the cross-examination he admitted that when other people gathered and asked deceased as to how the things happened, she told that she set herself to fire. In categorical terms PW-2 Ambadas says that he did not find

accused in the house or present there at the relevant time. The oral dying declarations are not in conformity with the written dying declarations. PW-2 Ambadas clearly says that he had witnessed the incident, but for the reasons known the prosecution has examined him only to the extent of proving spot panchnama. Therefore, the learned trial Judge ought to have come to the conclusion that offence was not proved against accused No.1 – appellant also.

7. It has been further submitted on behalf of the appellant that the learned trial Judge has not appreciated the testimony of the witnesses in defence. DW-1 Santosh is the appellant and he has explained that he was not present when the alleged incident took place. He admits that he was addicted to liquor and there used to be quarrels between him and wife. He says that those quarrels were in respect that deceased was behaving arrogantly with his parents and also with him due to his addiction to liquor. On the day of incident when accused had come to the house and noticed that parents had gone to the field, he asked wife as to why she had not gone to the field. He received reply that his parents are not going to die if they do work in the field. It triggered the quarrel and he tried to pacify her stating that his parents are old and they can only take care of children. In the

meantime his parents came home and asked him not to quarrel with the deceased and therefore he left the place and went to the village. One Gokul Fattu Rathod and his son Rameshwar came on motorcycle to inform that his wife, son and mother have caught fire. Therefore, he went to the house and asked mother as to what has happened. Mother told that when she was sitting on platform outside the house along with grandson, deceased came running in burning condition from inside. It was disclosed that the deceased set herself to fire in a heat of anger. Testimony of the appellant stood supported by DW-2 Gokul Rathod and DW-3 Govind Rathod. There was no reason for the learned trial Judge to discard the testimony of the witnesses in defence. The conviction is therefore, perverse and deserves to be set aside.

8. Per contra, the learned APP supported the reasons given by the learned trial Judge. It is submitted that there are two dying declarations. As regards role attributed to the appellant is concerned, it is consistent and therefore, relying upon the Constitution Bench decision in ***Laxman vs. State of Maharashtra, 2002, Cri.L.J. 4095***, it is stated that importance has to be given to the dying declaration. A person on the death bed will not lie and it has come on record that there were

disputes between the deceased and the appellant even in the past also. Accused himself on oath accepts that he was addicted to liquor and it was one of the reason for the quarrel. When well reasoned Judgment is delivered, it need not be disturbed on some grounds raised by the defence. Upon scrutiny of the evidence when it was found that there is no evidence against accused Nos.2 and 3, they have been acquitted. However, there was ample evidence against accused No.1, which has been considered to be beyond reasonable doubt; the conviction of the appellant is perfectly correct and legal.

9. As aforesaid, the case of the prosecution is based on at least two dying declarations and two to three oral dying declarations. We will consider the oral dying declarations later on because as compared to written dying declarations the evidentiary value of the same is less. Exhibit-63 is the first dying declaration which is alleged to have been recorded around 12.00 midnight on 25th March 2012. If we consider Exhibit-62, which appears to be the request letter by head constable Rajput to the medical officer for granting him permission to record the statement of the patient, it appears that he had approached the hospital around 11.30 p.m. on 25th March 2012. In order to prove the said dying declaration Exhibit-63, prosecution has

examined PW-6 Rajendra Rajput, the head constable and PW-10 Dr. Pramod Hambarde. Apparent corroboration may be there in their testimony, however, it is to be noted that the dying declaration Exhibit-63 bears the right hand thumb impression stated to be of deceased Nita. Both of them have not explained as to why the right hand thumb impression was taken, when usually left hand thumb impression is taken. If there is deviation, it requires explanation. Further, if we consider the postmortem report Exhibit-70, which has been admitted by the accused, it would show that as regards the right upper limb and left upper limb is concerned, percentage of the burns was 9% and area spared was said to be nil. Under such circumstance also, how clear thumb marks can appear. The total percentage of the burns given in postmortem report Exhibit-70 is 96%. Even if for the sake of argument it is accepted that Nitabai was in a position to speak as per the testimony of PW-10 Dr. Pramod, yet there is no explanation for the right hand thumb impression and how it could have given clear thumb marks when there was no spare space of the burns available. Therefore, it creates doubt as regards the dying declaration Exhibit-63.

10. Further, it is to be noted that Exhibit-54, the second dying declaration, has been got proved through PW-5 Sakharam

Gokhale, the Special Judicial Magistrate. He has also taken right hand thumb impression but does not explain as to why. The said dying declaration Exhibit-54 is almost on a printed proforma, which cannot be approved. There are fill in the blanks in the same. In his cross-examination he has stated that police head constable Rajput from Police Station Karmad has come to his house situated in Cidco, N-2, Aurangabad around 12.00 midnight. If we consider the endorsement by PW-10 Dr. Pramod on Exhibit-63 at the end, which shows that dying declaration recorded by PW-6 Police Head Constable Rajput from Karmad Police Station ended around 12.00 p.m. at Ghati Hospital, Aurangabad. If we consider Exhibit-52, there is a specific endorsement by PW-5 Sakharam Gokhale that he received the said letter at his house at 12.00 midnight. Thus, PW-6 Rajput cannot be at two different places at the same time. If PW-6 Rajput had recorded the dying declaration Exhibit-63 prior in time, then why it was necessary for him to give letter Exhibit-52 to the Special Judicial Magistrate requesting him to record the dying declaration which alleged to have been got written within one hour thereafter. Further, PW-6 Rajput has not stated anything regarding Exhibit-52 in his examination-in-chief. In his cross-examination when asked about Exhibit-52, he says that he

had prepared the said letter before recording statement Exhibit-63 by him. Such kind of explanation is absolutely not believable. Both the writers of the dying declaration Exhibit-63 and Exhibit-54 have admitted that the relatives of the deceased Nitabai were present in the hospital prior to their arrival. Under such circumstance, the possibility of tutoring the dying declarations cannot be ruled out.

11. We agree to the submissions made on behalf of the appellant that dying declaration Exhibit-63 is rather in detail but Exhibit-54, which is recorded subsequently, does not contain those details, is also a suspicious fact. We are aware about the ratio laid down in ***Laxman*** (supra) and in case of multiple dying declarations it is required to be seen, as to what is the role attributed to the particular accused and whether there is consistency or not. But when it comes to a fact that the reason for the incident or the manner in which it alleged to have taken place if differs, then the alleged consistency only cannot be considered. Both the dying declarations being the result of tutoring by the relatives, ought not to have been relied upon by the learned trial Judge.

12. Now, turning towards the oral dying declarations, PW-1

Rohidas – father of the deceased, PW-3 Govind – brother of PW-1, PW-4 Hiraman (admitting oral dying declaration in the cross-examination conducted by learned APP after he was declared hostile) have stated that the accused abused Nitabai in filthy language. Accused used to suspect her character and by abusing he poured kerosene on her person, set her to fire and ran away. Nitabai came running outside. In his examination-in-chief, PW-1 Rohidas says that when Nitabai came outside in burning condition, her son aged three years came in her way and then caught fire. Father-in-law gave blow of stick to Nitabai and she fell down. As regards the oral dying declaration is concerned, we cannot stick to the role attributed to the appellant only. The entire oral dying declaration should be considered and needs to be supported by other cogent and conclusive evidence. As regards the role attributed in the oral dying declaration alleged to have been given by Nitabai to PW-1 Rohidas, her both dying declarations do not support the same. Further as regards the son also, as per the version in examination-in-chief the son only came in way of Nitabai, however Exhibit-63 says that son was on the lap of mother-in-law and Nitabai had actually fallen on them, resulting in burn injuries to mother-in-law as well as son. In the cross-examination, PW-1 Rohidas admits that Nitabai had told

that at the time of incident her mother-in-law was sitting on *Ota* along with her son Vijay on the lap, she came outside the house and fell on mother-in-law, as a result of which mother-in-law and son sustained burn injuries. They were also admitted in Ghati Hospital. Thus, it can be seen that in the examination-in-chief PW-1 Rohidas was interested in projecting those facts only which were favourable. There is also cross-examination to extract that when he had come much prior to written dying declaration and had talks with Nitabai, why he had not gone to the Police Chowki in the Civil Hospital, to lodge the report. We are unable to get any explanation for the same. Even if we gave concession that since Nitabai had sustained 96% burn injuries, he would not have gone to the Police Chowki, yet the fact remains is that Ghati Hospital and the Police Chowki therein comes within the jurisdiction of Begampura Police Station but the incident had taken place within the jurisdiction of Karmad Police Station.

13. Exhibit-61 appears to be the writing taken by the police official of Karmad Police Station who had received telephonic information about the MLC received by ASI Ghuge, attached to Medical Police Chowki, Ghati Hospital, Aurangabad and it was about admission of three persons, i.e. one - Nita, two - Jamunabai i.e. accused No.3 and third – Vijay. In Exhibit-61 it

was specifically stated that it was told by accused No.3, i.e. history that was given by accused No.3, was that Nita had set herself to fire in the heat of anger and when accused No.3 had gone to extinguish the fire, she as well as Vijay sustained burn injuries. Why no statement of accused No.3 was taken by PW-6 Rajput, is a question. Merely because accused No.3 had sustained less injuries that does not mean that her statement should not be recorded. ASI Ghuge has not been examined. As to why he had not tried to take statement of Nitabai when he came to know or had reason to know that Nitabai had sustained severe burn injuries. The basic purpose as to why the police authority or anyone who comes in contact with a patient of burn case to record his statement as early as possible is that the circumstances under which that person received burn injuries should be reduced into writing immediately. If such blame game or avoidance to record the statement is made by the police authorities, then the very purpose for which such statements are made admissible under Section 32(1) of the Indian Evidence Act would get frustrated. Further, as against the concerned police officer, it would amount to dereliction of duty or negligence in performance of the duty. The prosecution ought to have given explanation as to why in spite of receipt of MLC, the ASI Ghuge

had not recorded dying declaration. It would have avoided the tutoring by the relatives also. With this background, all the dying declarations will have to be discarded, for the aforesaid reasons.

14. PW-2 Ambadas is the panch to the spot panchnama and his examination-in-chief has been restricted to that role only. However, in the cross-examination it was brought on record that he is residing in front of the house of the accused and he was the first person to reach the spot. He had not found accused – appellant when he went to the spot. Then learned APP has taken re-examination in the nature of cross-examination, wherein it was admitted that accused was addicted to liquor. Accused is his cousin uncle. But that is not the criteria to discard what he has said in his cross-examination taken on behalf of the accused. Important point to be noted is that his statement under Section 161 of the Code of Criminal Procedure was recorded. Purpose of the said statement is not to corroborate but it has been put to such use in his re-examination by the prosecution, which is impermissible. Therefore, the admissions given in the cross-examination by PW-2 Ambadas ought to have been considered in favour of the accused.

15. Accused admits that Nitabai had sustained burn injuries,

but the manner in which those injuries were caused, has been disputed. Therefore, the postmortem report is not the sole document which could give us a picture that it was homicidal death. Surprisingly, though the house of the accused is surrounded by other houses, none of the neighbour has been examined by the prosecution. PW-4 Hiraman is the person who had attended the meeting called for settling the dispute between Nitabai and accused. He supported the prosecution to that extent. Then he says that after it was heard that Nitabai has sustained burn injuries he went to Ghati Hospital along with PW-1 Rohidas. Only after the statement that his brother i.e. Rohidas was inside the ward and Rohidas had talks with Nitabi and witness PW-4 was outside the ward, permission was sought to put questions in the nature of cross-examination. This practice will have to be deprecated. Merely after asking, such permission should not be given. Unless it is shown that witness was resiling from his earlier statement, such permission should not have been granted. After the said permission, PW-4 Hiraman has admitted that oral dying declaration was given by Nitabai to him. However, at this stage we would like to take note of the statement of the accused under Section 313 of the Code of Criminal Procedure recorded by the learned Additional Sessions

Judge. In fact the said statement Exhibit-95 is as vague as it can be. In whose evidence what has come, cannot be gathered at all. When the said statement was taken after the evidence of the prosecution was over which was the mandatory stage, then it was expected that all those circumstances which were incriminating should have been put to the accused. Section 313 of the Code of Criminal Procedure is divided in two parts. The first part is, in a way, discretionary and it can be considered at any stage, but second part is mandatory and it should be after the evidence is led by the prosecution. If any circumstance, which is incriminatory, is not put to the accused in statement under Section 313 of the Code of Criminal Procedure, then it cannot be read in the evidence or cannot be put to use against the accused. Therefore, whatever was admitted by PW-4 Hiraman after he was declared hostile, cannot be considered at all.

16. Thus, the evidence led by the prosecution in this case by no stretch of imagination was sufficient to prove the guilt of the appellant beyond reasonable doubt.

17. The appellant has examined himself as DW-1 and explained the circumstance in which his wife had sustained the

burn injuries. It can be seen that the learned trial Judge has not considered the said evidence in proper perspective. Testimony of the appellant was supported by DW-2 Gokul and DW-3 Govind. They both are relatives of the accused and residing in the neighbourhood. Merely, because they are the relatives of the accused, their testimony cannot be discarded. They have taken active part in extinguishing the fire. The evidence led by the defence is consistent and therefore, ought to have been considered by the learned trial Judge.

18. Here, as regards Section 498-A of the Indian Penal Code is concerned; the learned trial Judge failed to consider that there was no illegal demand. It was then stated by the prosecution witnesses that the appellant was raising suspicion over the character of Nitabai. In order to bring offence under Section 498-A of the Indian Penal Code there has to be illegal demand or woman should be driven to commit suicide by acts of cruelty. In this case the prosecution had not come with the case that Nitabai has committed suicide. It was rather case of the accused that she has committed suicide. By no stretch of imagination the facts disclose and prove the ingredients of Section 498-A of the Indian Penal Code.

19. Taking into consideration the above discussion, it can be certainly said that the Judgment of the learned trial Judge is perverse. There is no proper appreciation of the evidence. As there is no proper appreciation of evidence as well as law, interference is required and the Appeal deserves to be allowed. Hence we pass following order:-

O R D E R

(I) Criminal Appeal stands allowed.

(II) Conviction awarded to the appellant – Santosh S/o Lalsing Rathod in Sessions Case No.265 of 2012 by holding him guilty of committing offence punishable under Sections 302, 498-A of the Indian Penal Code by the learned Additional Sessions Judge, Aurangabad on 10th August 2016, is hereby set aside.

(III) The appellant stands acquitted of the offence punishable under Sections 302, 498-A of the Indian Penal Code.

(IV) The appellant be set at liberty, if not required in any other case.

(V) Fine amount deposited, if any, be refunded to the appellant after the statutory period is over.

(VI) It is clarified that there is no change in the order passed by the learned Additional Sessions Judge, Aurangabad regarding disposal of Muddemal.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JUL23