

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO. 48 OF 1993

The State of Maharashtra.

....Appellant.

Vs.

Ashok Kerba Shendkar,
R/o. Survey No.130,
Dandekar Pool,
Pune- 411 030.

....Respondent.

.....

Mr. B.H. Mehta, A.P.P. for the Appellant-State.

Mr. Suresh Bhosale, Advocate for the
Respondent-appointed.

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CORAM: R.M.S.KHANDEPARKAR &
R.S.MOHITE, JJ.

DATED: 30TH JULY, 2004

ORAL JUDGMENT : (Per R.S. MOHITE, J.)

1. This is an appeal filed by the State for setting aside the Judgment and order passed by the Additional Sessions Judge, Pune on 2.12.1992 in Sessions Case No.73 of 1992, by which the Trial Court has acquitted the respondent (hereinafter referred as "accused") from the charge punishable under

Section-302 of the Indian Penal Code.

2. The brief prosecution case is as under :

a) Deceased Shalan was married with the accused. They were staying together in one room at Dandekar Pool area in Pune city.

b) On 2.10.1991, Shalan was cleaning the blue plastic cover glass on the television in their residence. The said T.V. glass accidentally fell on the ground and was broken in one corner. Shalan however, did not report the said fact to her husband. On the next day i.e. 3.10.1991 at about 10 a.m., the accused noticed that the glass covering the television was broken and he asked his wife as to why she broken the said glass. Shalan told him that while she was cleaning the T.V. glass, the same had accidentally fallen down from her hands and had broken. Being upset about the breaking of the glass, the accused then slapped Shalan twice.

c) It is further prosecution case that immediately after slapping his wife accused poured kerosene on her body and set her on fire with the aid of a match stick and thereafter he went away.

d) That, after being set on fire as aforesaid, Shalan ran out of the house and in a burning condition. She ran on the road in front of the house of P.W.No.1 Moharbai Merwade whose house was situated at a distance of 100ft. from the house of the accused. A mobile hospital van was standing in front of the house of P.W.No.1 Moharbai Merwade. Shalan entered into the said van and the doctor who was present in the van advised her to approach the police. Shalan then sat under the water tap to douse her flames and to obtain relief from the burns.

e) P.W.No.1 Smt. Moharbai Merwade then carried Shalan to the Dattawadi Police Chowki in an auto rickshaw. While she was taking Shalan in auto rickshaw she interrogated Shalan but she did not say anything to her. In Dattawadi Police Chowki a police officer gave

a letter addressed to Sasoon Hospital and advised P.W.No.1 Smt. Moharbai to shift Shalan to Sasoon Hospital. Smt. Moharbai then carried Shalan in an auto rickshaw to Sasoon hospital. On the way from Dattawadi Police Chowki to Sasoon Hospital she once again interrogated Shalan and Shalan gave her an oral dying declaration to the effect that when she informed her husband that the T.V. glass had broken from her hands, her husband got annoyed and poured kerosene on her person and set her on fire. On reaching Sasoon hospital, P.W.No.1 Smt. Moharbai got Shalan admitted into hospital.

f) P.W.No.5 P.S.I. Yashwant Shirke was then attached to Dattawadi Police Chowki. He was the officer who had advised Head constable Sonawane to give a letter in the name of Medical Officer, Sasoon Hospital. After Shalan and P.W.No.1 Moharbai had gone to Sasoon Hospital, this witness took a mobile van and went to fetch P.W.No.2-Rajaram Retawade who was Special Judicial Magistrate, with the intention of recording the dying declaration of Shalan. He collected Mr. Rajaram Retawade and took him to Sasoon Hospital. In

this dying declaration (Exh.12) Shalan stated that on that day her husband had asked her as to why she had broken the T.V. glass. She told him that while cleaning the glass it had fallen down from her hands and had broken. He slapped her twice and poured kerosene on her person and set her on fire by lighting a match stick. Mr. Retawade asked the P.S.I. to wait on the ground floor and he went to the ward in order to record the dying declaration. After obtaining the doctor's endorsement regarding her fitness to give a dying declaration, P.W.No.2 Rajaram Retawade then recorded the first written dying declaration at 11.00a.m. on 3.10.1991 in the ward. In this dying declaration (Exh.12) Shalan stated that at 9.00a.m. on that day her husband had asked her as to why she had broken the glass. He poured kerosene on her person and set her on fire by lighting with a burning match stick.

g) At about 1.45 p.m. the Investigation Officer P.W.No.5 P.S.I. Yeshwant Shirke had again went to the ward at Sasoon Hospital to record the statement of Shalan. He recorded that statement (Exh.19) which has also been produced and proved as the second written

dying declaration, made to this witness.

h) It appears that on the next day i.e. 4.10.1991 P.S.I. Shirke in the course of investigation felt the need for recording a second dying declaration by the Special Judicial Magistrate. He accordingly, addressed a letter (Exh.13) to the Special Judicial Magistrate P.W.No.2 Rajaram Retawade stating therein that Shalan who had earlier given a dying declaration was now giving a different version and therefore, it was necessary to record her dying declaration again. The Special Judicial Magistrate Mr. Retawade received this letter at his residence at 11.15 p.m. on 4.10.1991. He immediately proceeded to Sasoon Hospital and questioned Shalan but she refused to give any statement. He recorded all the questions put to her and answers given to him in the document and the said document is proved through the evidence of this witness.

i) The Investigation Officer visited the scene of the crime and prepared a spot panchanama. He seized

certain articles on the spot under panchanama Exh.7. He obtained the post mortem report and on completion of the investigation, he filed chargesheet.

3) After committal of the case, at the trial, the prosecution examined in all five witnesses. Though the area where the house of the accused was situated is a crowded area, the prosecution has examined only one neighbour i.e. P.W.No.1 Smt. Moharbai Merwade. Special Judicial Magistrate P.W.No.2 Rajaram Retawade was examined to prove the dying declarations dated 3.10,.1991 and 4.10.1991 (Exh.s 12 and 14 respectively). P.W.No.3 Dr. Laxman Pherwani was examined to prove the post mortem notes (Exh.16). P.W.No.4 Dr. Dattu Nikam who was the Medical Officer attached to Sasoon Hospital was examined in order to prove an oral dying declaration said to have been made by Shalan to him at the time of her admission in the hospital when he was taking down the history of the case. P.W.No.5 was examined as Investigation Officer and he proved the Dying Declaration (Exh.19) said to have been made by Shalan to him.

4) The defence of the accused was of total denial. He also came out with the positive case that at the time of incident he was not present at his house but had gone to have a cup of tea in the house of a neighbour i.e. defence witness No.1-Sangeeta Mahadu Belose. Said Sangeeta had been cited as prosecution witness. It appears that she was not examined by the prosecution and therefore, she was examined as defence witness No.1 by the defence.

5) After recording of the statement under Section-313 of Criminal Procedure Code and after conclusion of the trial, the trial court passed the impugned Judgment and order acquitting the accused.

6) With the assistance of both the counsel, we have perused the entire record. It was vehemently argued by the learned A.P.P. that the Trial Court ought to have accepted the dying declaration made by Shalan on 3.10.1991. He pointed out that the first dying declaration was made by Shalan to Moharbai

Merwade immediately after the incident. Second oral dying declaration was made by her to P.W.No.4 Dr. Dattu Nikam who was the Medical Officer at the time when she was admitted in Sasoon Hospital. The third dying declaration was made to Special Judicial Magistrate Rajaram Retawade at 11.a.m. on 3.10.1991 and the fourth dying declaration was made by her to P.S.I. Shirke at 1.45p.m. on 3.10.1991. He pointed out that there was no reason for Shalan to deliberately implicate her husband. There was also no occasion for her to be tutored or instigated because she had been taken to hospital by a neighbour who was an independent witness. He argued that so far as 5th dying declaration said to have been recorded by P.W.No.5 Rajaram Retawade on 4.10.1991 was concerned, that statement made by her on 4.10.1991 could not be said to be contrary to the earlier dying declarations because Shalan had chosen to keep silent. He argued that if a dying declaration was found reliable and acceptable it could form basis of the conviction and therefore, he contended that the impugned Judgment and order was not passed on sound reasons. The learned Advocate appearing for the accused however, argued that the reasons given by the Trial Court for acquittal were

plausible and cogent. According to him, in the course of investigation the Investigating Officer had himself found that Shalan was giving a different version on the next day and had found it necessary to request the Special Judicial Magistrate-P.W.No.2 Rajaram Retawade to again record a dying declaration. He pointed out that there was no evidence of the accused treating his wife with cruelty. Even the parents of the deceased had not come forward to make any allegations of cruel treatment to the deceased by the accused. Nobody had seen the accused coming out of his house alongwith Shalan at the time of the incident or immediately thereafter. That, in any case the defence version was proved through the evidence of D.W.No.1-Sangeeta Belose and that there was nothing in the cross examination of this witness to indicate that her version was contrary to her police statement.

7) On perusal of the record, we found that the view taken by the Trial Court cannot be said to be unreasonable. The Trial Court has disbelieved the dying declaration said to have been made by Shalan on 3.10.1991 mainly on the ground that the Investigating

Officer has found during the investigation that Shalan had changed her stand as taken in the dying declaration and was stating a different story. This can be gathered from the contents of Exh.13 which is a letter of request written by the Investigation Officer P.S.I. Shirke to the Special Judicial Magistrate-P.W.No.2 Rajaram Retawade on 4.10.1991. The background of the case also does not indicate that the accused had ever treated his wife cruelly any time after her marriage. The prosecution has not examined the parents and relatives of the deceased Shalan to indicate that any cruel treatment was meted out to her after her marriage with the accused. Though the locality is a crowded locality, there is no evidence forth coming to indicate that the accused was in his house or emerged from his house immediately after the incident. That the prosecution did not examine the doctor who was sitting in the mobile van and who was the first person to whom deceased Shalan approached in a burning condition. That, in so far as dying declaration to P.W.No.1 Smt. Moharbai Merwade is concerned, this witness admitted that she made specific enquiry with the Shalan but she did not disclose as to how she received the burn injuries till she reached the police chowki. Even

subsequent disclosure to this witness on the way from the police chowki to Sasoon hospital is a proved omission in the police statement of this witness. The Trial Court has rightly observed that it is within the realm of possibility that on Shalan being a sensitive individual, may have got annoyed due to her being slapped by her husband and may have set fire to herself. The Trial Court has accepted the evidence of the defence witness who supported the case of the accused that he had gone to her house for a cup of tea. The Trial Court has observed that the defence witness D.W.No.1 Smt. Sangeeta Belose was in fact cited as prosecution witness but was not examined by the prosecution. On perusal of the evidence of this witness, we find that there is no contradiction in the version given by this witness in her substantial evidence and the version recorded by the police.

8. Taking an over all view of the evidence on record and keeping in mind the fact that this is an appeal against an acquittal, we find that this was a fit case for acquittal. Appeal is therefore, dismissed.

9. C.C. expedited.

(R.M.S.KHANDEPARKAR, J.)

(R.S. MOHITE, J.)