

(2021) 11 BOM CK 0077
In the Bombay High Court
Case No : Criminal Appeal No.658 Of 2017

Allabaksh Gafur Shaikh

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 16-11-2021

Acts Referred:

Indian Penal Code, 1860 — Section 300, 302, 304I, 304II, 307, 323, 504
Evidence Act, 1872 — Section 106
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2021) 11 BOM CK 0077

Hon'ble Judges : S.S. Shinde, J; Abhay Ahuja, J

Bench : Division Bench

Advocate : Aniket Vagal, S.S. Hulke

Final Decision : Allowed

Judgement

Abhay Ahuja, J

1. This is an Appeal preferred by the Appellant (Original Accused) against the judgment and order dated 28th June, 2017, passed by the learned Additional Sessions Judge, Thane, in Sessions Case No.586 of 2014, thereby convicting the Appellant for offence punishable under Section 302 read with Section 504 of the Indian Penal Code, 1860 ("IPC") and sentencing the Appellant to suffer imprisonment for life and fine of R.5,000/-, in default to suffer further rigorous imprisonment for three months.

2. The case of the prosecution is briefly stated as under :-

(a) The deceased Shama Allabaksh Shaikh was wife of the Appellant. On 6th August, 2014, at around 4.00 p.m. the Appellant came home and asked the deceased to serve food. It is stated that the deceased had not prepared any food as she was expecting him for food in the evening and was yet to prepare the food. The Appellant started quarreling with the deceased and started abusing her, with filthy language and gave provocation to her to breach public peace.

Thereafter, the Appellant started assaulting the deceased and then picked up the plastic can containing kerosene and poured kerosene on the person of the deceased and after lighting a match stick threw the same on her, setting her on fire, knowing that the said act would cause the death of the deceased/complainant.

(b) Shama was first taken to Indira Gandhi Memorial Hospital, Bhiwandi and thereafter as per the recommendation of the doctor there, was brought to Thane Civil Hospital by her mother, the Appellant and a neighbour for further treatment with 85% to 90% burns in the burns ward.

(c) On 6th August, 2014 PI Deepak Dinkar Barge, attached to Nijampura Police Station (PW-4) went to Indira Gandhi Memorial Hospital and after obtaining doctor's endorsement about Shama's condition to make statement, recorded her complaint (Exhibit-26) where she has categorically stated that at around 4.00 p.m. on 6th August, 2014 her husband came back to the house in a drunken state and after abusing her and assaulting her on her failure to prepare meals, poured kerosene from a plastic can in the house and set her on fire and, therefore, she was making the complaint against her husband.

(d) On 7th August, 2014 Dhondiba Gopinath Khansole (PW-3), working as a Talathi with delegated powers as Special Executive Magistrate, was directed to record statement of Shama Shaikh who was admitted to Thane Civil Hospital as a burn case. After obtaining endorsement from the doctor on the patient's condition to make a statement, recorded statement/dying declaration (Exhibit-22) of the complainant/deceased by following due procedure in the required format after Shama Shaikh stated that as she did not prepare meals, her husband got annoyed and set her on fire.

(e) Based on the above, offence under Section 307 read with Section 504 of the IPC was registered on 6th August, 2014 which, as it transpired, later on due to death of the complainant, was converted into Section 302 read with Section 504 of the IPC.

(f) On 12th August, 2014 at 8.10 a.m., Shama succumbed to her injuries at Thane Civil Hospital.

(g) On 12th August, 2014 itself Dr. Pradnya Ganesh Band (PW-2) conducted postmortem of the complainant/deceased. The Postmortem Report (Exhibit-15) shows the probable cause of death was septicemic shock due to 85% burn injuries.

3. The investigation was carried out and after completion of investigation, the Charge (Exhibit-4) came to be framed on 1st April, 2017 against the Appellant (Original Accused) under Sections 302, 307, 323 and 504 of the IPC and the Appellant was charge sheeted.

4. According to the prosecution, while committing the said act of pouring kerosene on the complainant and setting her on fire, the Appellant (Original

Accused) also abused the complainant/ deceased in filthy language and provoked her to commit the breach of public peace. Therefore, on the complaint lodged by the complainant/deceased herself, an offence initially punishable under Section 307 read with Section 504 of the IPC was registered and later on due to the death of the complainant, it was converted into Section 302 of the IPC read with Section 504 of the IPC.

5. The Appellant (Original Accused) pleaded not guilty to the said charge and claimed to be tried.

6. Prosecution has adduced evidence of Ms. Sharifa Lal Vajir Shiakh, mother of the deceased (PW-1), Dr. Pradnya Ganesh Band (PW-2), Mr. Dhondiba Gopinath Khansole, Talathi-cum-Special Executive Magistrate (PW-3), PI Mr. Deepak Dinkar Barge, Investigating Officer (PW-4) and Dr. Vidya Pramod Chapalgaonkar, Medical Officer, who had admitted complainant at Civil Hospital, Thane (PW-5), as witnesses No.1 to 5 respectively. On completion of evidence, statement of accused was recorded as per his say. His defence was that of total denial and that a false case had been made out against him.

7. After the trial of the Appellant (Original Accused) under Section 302 read with Section 504 of the IPC, the learned Additional Sessions Judge, Thane convicted the Appellant (Original Accused) for the aforesaid offences and sentenced him to suffer imprisonment for life and fine of Rs.5,000/-, in default to suffer further rigorous imprisonment for three months.

8. Aggrieved by the aforesaid, the Appellant is in Appeal.

9. We have heard Mr. Aniket Vagal, learned counsel for the Appellant and Mr.S.S. Hulke, the learned APP for Respondent-State.

10. Learned APP points out that the complaint was recorded at the instance of victim herself and not only during recording her statement in the complaint as well as in her dying declaration she has categorically stated the incident of quarrel between herself and the accused and that the accused himself has poured kerosene on her person and set her on fire. According to him, the said statement is itself sufficient to convict the accused as at the time of committing the said act he has set her on fire, not only by intentionally pouring kerosene on the person of the deceased, but also with knowledge that such act may cause serious injuries, bodily pain to complainant or may cause her death. Therefore the act of the accused is certainly within the four corners of Section 302 and deserves to be punished according to said Section.

11. On the other hand, Mr. Vagal submits that except the dying declaration there is absolutely no evidence on record which connects the Appellant/accused person with the alleged crime. According to him, though two statements of the victim were recorded; one by the investigating officer and other by so-called Special Executive Magistrate, their admissions in the cross-examination are itself sufficient to discard both those statements as the complainant expired and the

contents of the complaint cannot be proved through the investigating officer. He submits that the officer who had recorded the dying declaration has neither obtained opinion of the doctor that the complainant/victim was in fit state of mind to make the statement nor had he ever issued any such request letter to the medical officer to give such opinion. Therefore, in the absence of any such document on record it is difficult to accept that proper procedure was followed while recording the dying declaration. Learned counsel also submits that the officer had no authority to record dying declaration. Learned counsel further submits that the concerned medical officer's opinion is insufficient to consider the dying declaration and that the said document be discarded. It was further argued by the learned counsel that there is absolutely no corroborative evidence to the said dying declaration and as such in absence of any such evidence, case of the prosecution cannot be said to be proved. Hence, he has requested that the Appellant/accused be acquitted.

12. While making submissions in reply, the learned APP has placed reliance on *Laxman Vs. State of Maharashtra*; (2002) 6 SCC 710 in order to substantiate his arguments that it is not necessary for the person recording a dying declaration to obtain an endorsement from doctor that declarant was in a fit state of mind to make statement as long as there is material on record that indicates that deceased was fully conscious and was capable of making the statement, which statement he submits is corroborated by the complaint at Exhibit-26. Hence, he has requested to reject the said defence and to sustain the conviction of the accused as above.

13. We have given our anxious consideration to the facts and circumstances of the case, the arguments advanced by the learned counsel, the evidence on record and considered the judgment delivered by the learned Additional Sessions Judge, Thane.

14. Prosecution's case in a nutshell is that on the eventful day, time and place within the jurisdiction of Nijampura Police Station, Bhiwandi, accused has intentionally poured kerosene on the person of deceased and knowingly that his act of setting fire is likely to cause her death, has intentionally and knowingly set her on fire. At the same time on aforesaid date, time and place, he has intentionally insulted complainant Shama Shaikh by abusing her in filthy language and thereby gave provocation to her to break public peace. As per the prosecution, after the complainant was set on fire and started shouting for help accused had frightened and then made an attempt to extinguish the fire by pouring water on her person. She was then admitted to the hospital, wherein investigating officer has recorded her statement cum complaint and on that basis has registered offence. Prosecution has, therefore, requested that on the basis of evidence brought before the court the conviction of the accused be sustained. Prosecution, in order to substantiate the allegations, has accordingly examined aforesaid five witnesses. Out of the said five witnesses, Sharifa Shaikh (PW-1), mother of deceased, turned hostile and remaining witnesses have supported the

case of prosecution.

15. The entire case and the conviction of the Appellant is based on the dying declaration (Exhibit-22) of the victim and the complaint (Exhibit-26).

16. The main objection on behalf of the Appellant is that on the dying declaration (Exhibit-22) there is absolutely no endorsement of the concerned doctor and hence the dying declaration (Exhibit-22) cannot be treated as such and no reliance can be placed on it.

17. The complaint (Exhibit-26) has been recorded on 6th August, 2014 by PI Deepak Barge (PW-4), attached to Nijampura Police Station, after obtaining doctor's endorsement about the victim's condition, wherein victim Shama has stated that at around 4.00 p.m. on 6th August, 2014 her husband came back to the house in an inebriated state and after abusing and assaulting her on her failure to prepare the meals, poured kerosene from a plastic can in the house and set her on fire and, therefore, she was making the complaint against her husband. The dying declaration (Exhibit-22) was recorded on 7th August, 2014 by Talathi, viz., Dhondiba Khansole (PW-3) stating that after inquiring from the victim about the incident and after following due procedure, he recorded the dying declaration (Exhibit-22) in the required format. The dying declaration (Exhibit-22) recorded by the Talathi, viz., Dhondiba Khansole (PW-3), which was last statement recorded at her instance, is corroborated by the complaint (Exhibit-26).

18. PI Deepak Barge (PW-4) in his examination-in-chief stated that on 6th August, 2014 he was attached to Nijampura Police Station as Police Sub-Inspector and at 5.00 p.m. he received a phone call from an unidentified person that at Kranti Nagar one lady has sustained burn injuries and is admitted to Indira Gandhi Memorial Hospital, Bhiwandi. He therefore went there and found that initial treatment was provided to the victim and who was then shifted to Thane Civil Hospital. He then obtained endorsement of the doctor about patient's condition to make a statement and after the doctor's consent, the statement of the victim was recorded. He stated that the victim had made a statement that at about 4.00 p.m. her husband returned back to the house in a drunken condition and on the ground of her failure to prepare and serve meals, has abused and assaulted her and then has poured kerosene from the plastic can and set her on fire, that he had written the statement in Marathi and read it over to the victim in Hindi and, thereafter, obtained her thumb impression on the statement, which he has identified and signed on the statement. He has stated that he has registered the offence being C.R. No. I 155/2014 under Sections 307, 324, 504 of the IPC and personally investigated the matter, prepared the spot panchanama after taking over investigation on 6th August, 2014 and on 7th August, 2014 accused was arrested and his clothes were seized, that on 12th August, 2014 the victim succumbed to her injuries, after which he prepared the inquest panchanama and also recorded statement of Sharifa Shaikh (PW-1), who has been declared hostile. He also confirms that the then Talathi, Thane, viz., Dhondiba Khansole

(PW-3) has recorded the dying declaration and also obtained the postmortem note. He further states that on 24th August, 2014 he has recorded the statement of other witnesses as per their say and also forwarded the muddemal seized to the laboratory for analysis. After completion of investigation, he has forwarded the chargesheet against the accused. He further stated that after recording the statement of the victim, he had obtained an endorsement of the concerned doctor and that the complaint (Exhibit-26) is in the handwriting of Police Constable Kapase. He states that on 6th August, 2014 itself he had issued a letter that the Tahsildar, Thane should record a dying declaration.

19. Dhondiba Khansole (PW-3), the Talathi has in his examination-in-chief stated that he also has powers as Special Executive Magistrate and on 7th August, 2014 he was requested to record the statement of Shama Shaikh admitted as a burn case at Thane Civil Hospital where he reached at about 7.00 p.m. to 7.15 p.m. and after meeting Dr. Dipti Rokade who was on duty, went to the patient. He inquired from the patient whether she could understand Marathi language, her name, age, address and family background, which he noted in the format. He also inquired from the victim as to how the incident had occurred and received her reply that as she had not prepared meals, her husband got annoyed, poured kerosene and set her on fire. He has stated that he had made entries in the format and also obtained right hand thumb impression of the patient. From the examination-in-chief and cross-examination of Dhondiba Khansole (PW-3) it is clear that he was authorised to record the dying declaration being Talathi and that he met the medical officer and then recorded the dying declaration of Shama Shaikh on 7th August, 2014 being Exhibit-22.

20. We have also reviewed the examination-in-chief as well as the cross-examination of Dr. Vidya Chapalgaonkar (PW-5), medical officer attached to Thane Civil Hospital, who was present on duty on 6th August, 2014 at Civil Hospital, Thane at about 6.30 p.m. and examined the injured by name Shama Allabaksh Shaikh, who was admitted in the hospital with burn injuries after being referred to the Civil Hospital, Thane by Indira Gandhi Memorial Hospital, Bhiwandi. It is stated that on clinical examination after she was admitted in burn ward, it was found that she was sustained 85% to 90% burn injuries, that after sometime, she has again examined the victim and opined that she was conscious and fit to make a statement as made in Exhibit-26 and the endorsement was in her handwriting and bears her signature and seal.

21. We have also taken a look at the examination-in-chief and cross-examination of Dr. Pradnya Band (PW-2). Dr. Band (PW-2) has stated that she was requested on 12th August, 2014 through Thane Nagar Police to conduct the postmortem of Shama Allabaksh Shaikh and after conducting the postmortem on the person of Shama, has noted surface wound injuries and other required details and stated that the probable cause of death was septicemic shock due to 85% burn injuries and she has accordingly issued the postmortem report dated 12th August, 2014.

22. We had the occasion to take a look at the postmortem report (Exhibit-15)

and observe that the surface wounds and injuries referred to at Sr. No.18 have the remarks "superficial to deep burns of a total of 85%". At the end of the report under the caption of 'opinion as to the cause/probable cause of death', it is remarked "death due to septicemic shock due to 85% burns superficial to deep".

23. We observe that while recording the complaint (Exhibit-26), the investigating officer has obtained opinion of the doctor that patient was able to make a statement. Accordingly, medical officer's endorsement is made on the complaint itself which is filed at Exhibit-26. The dying declaration (Exhibit-22) is corroborated by the complaint (Exhibit-26). He has then narrated the facts that initially he had asked the patient whether she understood Marathi language and then asked her name, age and other family members background and then recorded the actual incident in question answer form. As such it appears that dying declaration (Exhibit-22) was recorded while the patient was in a fit condition to make the statement. Our view draws strength from the decision of the larger bench of the Apex Court in the case of Laxman Vs. State of Maharashtra (supra), where it has been held that whenever there is material on record which indicates that deceased was fully conscious and was capable of making statement, dying declaration cannot be ignored only because doctor has not made any endorsement that deceased was in a fit state of mind to make the statement in question.

24. The Hon'ble Apex Court in the case of Sher Singh Vs. State of Punjab; AIR 2008 SC 1426 has endorsed this view that whenever it is proved by the testimony of the Magistrate that declarant was fit to make a statement, even without there being a doctor's opinion to that effect, the same can be acted upon.

25. We therefore agree with the view of the trial court that the argument of absence of endorsement of doctor on the dying declaration (Exhibit-22) has to be discarded in view of the Apex Court decision.

26. With respect to the arguments of the learned counsel for the Appellant that when sedative is administered to a patient, it is difficult to accept that such a patient was really in a fit condition to make the statement and even though the said medical officers have accepted that as it was the burn injuries case patient was administered some sedative and pain killers and have named those medicines during cross-examination, however, all such suggestions appear to be general in nature as observed by the learned trial judge and we agree that no specific suggestion was put to the said medical officers that due to the said sedatives or pain killers, patient was not really in a condition to make a statement. On the other hand, the dying declaration (Exhibit-22) and the complaint (Exhibit-26) is corroborative in nature and the facts stated in both the statements are identical. Therefore, it cannot be said that there was any sort of pressure on the person making the statement at the time of recording dying declaration (Exhibit-22) as well as complaint (Exhibit-26). Victim has narrated the incident which had really occurred can be presumed. In our view, therefore the patient was in a fit condition to make the dying declaration (Exhibit-22). On

the basis of said dying declaration (Exhibit-22) and complaint (Exhibit-

26) it can be presumed that whatever statement has been made is in accordance with the incident occurred. We therefore accept the dying declaration (Exhibit-22).

27. It is observed from the examination-in-chief and cross-examination as well as from the dying declaration, the complaint, postmortem report that there is no dispute about the presence of the Appellant at the time of the incident. Except him and the deceased, there is no eyewitness to the incident. Besides the Appellant, there was nobody else in the house and whatever occurred between the complainant/deceased and the Appellant is something within the special knowledge of the victim and of the Appellant alone.

28. The victim is dead after giving her complaint (Exhibit-26) and statement (Exhibit-22), which is the dying declaration. It was therefore expected that the Appellant would submit an explanation on how the incident had occurred in the context of the complaint, the FIR, the dying declaration, but there has been no explanation on these special facts by the Appellant. The learned trial judge has found that the incident occurred around 4.00 p.m. and that the material used for committing the offence, viz., plastic can containing the remaining quantity of kerosene alongwith the piece of the clothes of the deceased, match box, etc., have been seized by the investigating officer, special facts that the Appellant had poured the kerosene on the person of the complainant/deceased and then set her on fire and in the face of the muddamal seized, it was only expected from the Appellant to put forth a proper explanation as to why those articles were seized from the spot in corroboration with the statement of the deceased. However, there has been no explanation on this special facts, which were within the knowledge of the Appellant. Therefore, in view of Section 106 of the Evidence Act, which is an exception to general rule that prosecution has to prove every fact alleged, except in the case of facts which are in the special knowledge of the accused. We agree with the learned trial judge that in the absence of any such plausible explanation, the presence of the accused at the relevant time definitely raises questions about the defence of the Appellant. In view of the dying declaration (Exhibit-22) and the complaint (Exhibit-26), there was absolutely no reason to involve the Appellant in the present matter, if the Appellant would not have committed the said act. We, therefore, see no reason to interfere with the aforesaid findings of the learned trial judge.

29. In this view of the matter we agree with the learned Additional Sessions Judge in coming to a conclusion that the Appellant has not put forward any plausible defence, either in the cross-examination or while recording statement under Section 313 of the Cr.P.C. raising any doubt about the case of the prosecution especially in the absence of any eyewitness other than the accused and in the face of the the dying declaration (Exhibit-22) and the complaint (Exhibit-26). We also agree that the mother of the victim, viz., Sharifa Shaikh (PW-1) having been declared hostile, would not make any difference in view of

the above findings. The learned trial court is correct in saying that once the defence has admitted the spot panchanama and articles referred to therein have been confirmed by the investigating officer upon the spot visit, the onus had really shifted on the Appellant after the deposition of the five witnesses to put forward an explanation as to what had actually happened, making the prosecution's case more probable in the absence of any such explanation. We therefore agree with the learned trial Judge that the circumstances complete the ring of events and the facts are sufficient to point out that crime has been committed by the accused alone.

30. After the appeal hearing was almost concluded, Mr. Vagal, learned counsel for the Appellant submitted upon instructions, that the incident is admitted and sentence is the only question. He therefore seeks to confine his arguments only to the sentence part. Learned counsel for the Appellant has submitted that while making an attempt to save the victim, accused has also sustained injuries and when the accused came to know that treatment is not possible at Indira Gandhi Memorial Hospital, he has made attempt to arrange for money to administer proper treatment to the victim and taken her to Thane Civil Hospital. He has also submitted that accused has got two tender aged children and there is nobody else to look after them. He therefore submits that this Court modify the conviction of the Appellant from Section 302 to Section 304 Part II and reduce the sentence. Learned counsel for the Appellant relies upon the decision of the Hon'ble Supreme Court in the case of Kalu Ram Vs. State of Rajasthan; (2000) 10 SCC 324 and on the decision of this Court in the case of Hanumant Bhiva Chavan Vs. State of Maharashtra in Criminal Appeal No.524 of 2011.

31. On the other hand, learned APP has submitted that the order of the learned trial judge be sustained and maximum punishment as prescribed under the IPC be imposed on the Appellant.

32. We, therefore, proceed to deal with the issue of sentencing. Section 302 of the IPC is quoted as under :-

"302. Punishment for murder.-Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine."

From a perusal of Section 302 of the IPC, we observe that it provides either with capital punishment of death or imprisonment for life and the accused is also be liable to pay fine.

33. The trial court has, after considering Section 302 of the IPC convicted the Appellant for offence punishable under Section

302 and sentenced the Appellant to life imprisonment and fine.

34. It would also be apposite here to set forth the provisions of Section 304 of the IPC, which read thus :-

"304. Punishment for culpable homicide not amounting to murder.-Whoever

commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

35. Section 304 does not define an offence but provides for punishment for culpable homicide not amounting to murder. It draws a distinction for punishment in cases covered by one of the five exceptions in Section 300 when there was intention to kill a person and there was only knowledge that death will likely be caused. When it is proved that accused had the intention to cause such bodily injury as is likely to cause death, the offence committed is punishable under Section 304 Part I of the IPC. Section 304 Part II is attracted when it is proved that even if the accused had no intention to cause such bodily injury as was likely to cause death but had the knowledge that injury was likely to cause death. However, in the decision of *Kalu Ram Vs. State of Rajasthan* (supra) cited by the learned counsel for the Appellant, the Hon'ble Supreme Court has, in almost similar circumstances as in the present case, held that the conduct of accused/convict cannot be seen divorced from the totality of the circumstances. The Hon'ble Supreme Court goes on to observe that very probably he would not have anticipated that the act done by him would have escalated to such a proportion that his wife/victim might die. If he had ever intended her to die he would not have alerted his senses to bring water in an effort to rescue her. All that the accused thought of was to inflict burns to her and to frighten her, but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. The Hon'ble Supreme Court therefore went on to hold that the offence has to be brought down from first degree murder to culpable homicide not amounting to murder and altered the conviction from Section 302 of the IPC to Section 304 Part II of the IPC.

36. In the case at hand we note from the complaint (Exhibit-26) lodged by the victim Shama Shaikh that she was married with the Appellant around six years before the said incident and had two daughters from him. She has also stated in her complaint that her husband was a rickshaw driver operating a rickshaw on rental basis from which income they would run their household. She has also stated that the Appellant was addicted to liquor and in an intoxicated state, he would abuse and subject her to violence on trivial issues. On the date of the incident, i.e., on 6th August, 2014 her husband, as usual went for his work, at around 10.00 a.m. and in the afternoon around 4.00 p.m. when their two daughters had gone to her mother's house for playing and when she was alone in

the house, her husband returned home in an inebriated state and asked her to serve meals, to which, when she replied that while going to work in the morning, he had said that he would come in the evening and, therefore, she had not prepared any lunch, there was a fight between the two of them and the Appellant abused her, threatened her and assaulted her with fists and blows, picked up the plastic can containing kerosene, poured the kerosene on her person and set her on fire. She has herself stated therein that after setting her on fire, when she started crying loudly/shouting, her husband got scared and he poured water on her person and after that covered her with a bedsheet; that he also accompanied her along with her mother and neighbour to Thane Civil Hospital for treatment. Also, we note from the Arrest/Court Surrender Form 3 in Column 14 as well as Certificate dated 8th August, 2014 by Medical Officer, Grade-2, Indira Gandhi Memorial Hospital, Bhiwandi that the fingers of both the hands of the Appellant have injuries due to burns indicating that he did try to save the victim. There is also a certificate by a Medical Officer, Class-2 of Indira Gandhi Memorial Hospital, Bhiwandi, where the deceased was taken for the first time, where after examination of the Appellant on 8th August, 2014, the said officer has certified that the injuries are noted on the left hand four fingers except thumb and right hand three fingers except thumb and index finger of the Appellant which are approximately 48 hours old.

37. The above suggests that there was no premeditation to commit the offence nor an intention to kill. The Appellant was upset that the victim did not serve him food and the fight began. It is not as if the Appellant planned that he would go home and kill his wife. The conduct of the Appellant post the incident, viz., to pour water in an attempt to douse the flames, cover her with a bedsheet and to accompany her to a Civil Hospital strongly suggests that he wanted to save her. The whole thing just went out of the control.

38. Even though we find no good reason to discard the dying declaration of the victim and the complaint corroborating the same, but considering the fact that the Appellant was in an inebriated state, while committing the said act of setting Shama Shaikh on fire and then making frantic attempts to save and treat her leads us to believe that the Appellant probably would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had intended her to die, he would not have made the efforts to rescue/save her. Following the principles laid down in the case of Kalu Ram Vs. State of Rajasthan (supra), we are inclined to believe that the Appellant though thought of inflicting burns on the victim and to frighten her, but the situation slipped out of his control and became fatal. The Appellant would not have intended to inflict the injuries which the victim sustained on account of his act with an intention to cause death and, therefore, we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder. We, therefore, alter the conviction from Section 302 of the IPC to Section 304 Part II of the IPC.

39. Our aforesaid view also draws strength from the decision of this Court in the case of Hanumant Bhiva Chavan Vs. State of Maharashtra (supra), where in almost similarly placed circumstances, this Court relying upon the Hon'ble Supreme Court decision in the case of Kalu Ram Vs. State of Rajasthan; (2000) 10 SCC 324 set aside the conviction of the Appellant under Section 302 of the IPC and instead of convicting him under Section 304-I IPC for the said offence, sentenced him to rigorous imprisonment of 10 years and fine of Rs.1,000/-, in default rigorous imprisonment for one year. The relevant paragraphs in the said judgment are quoted as under :-

"11. That Vandana died a homicidal death is seen from the evidence of PW 6 Dr. Surwase as well as the other evidence. Dr. Surwase is the doctor who conducted the postmortem on the dead body of Vandana. He has stated that in his opinion, the cause of death of Vandana Chavan was shock due to 77% burns. This along with three dying declarations and oral dying declaration show that the death of Vandana was homicidal.

12. No doubt the evidence on record shows that it was the appellant who set his wife on fire, however, the pivotal question which arises in the facts and circumstances of this case is, what is the nature of the offence proved against the appellant? Ms. Kuttikrishnan, the learned Advocate for the appellant submitted that the appellant had no intention to cause the death of his wife Vandana which is seen from the fact that after Vandana caught fire, the appellant extinguished the fire and took Vandana to the hospital. To show that the appellant extinguished the fire, Ms. Kuttikrishnan placed reliance on dying declaration Exh. 40. In this dying declaration, Vandana has stated that her husband poured water on her and extinguished the fire. Ms. Kuttikrishnan also drew our attention to the evidence of PW 5 Dr. Waghmode who has stated that it is true that the appellant had also sustained burn injuries while extinguishing the fire. In order to show that the appellant took Vandana to the hospital, Ms. Kuttikrishnan placed reliance on the dying declaration Exh. 62 and on the evidence of PW 5 Dr. Waghmode and the investigating officer PW 9 PSI Nemane. We have perused the said dying declaration and the evidence of PW 5 Dr. Waghmode and PW 9 PSI Nemane. In the dying declaration Exh. 62, Vandana has stated that her husband took her in an auto rickshaw and admitted her in the hospital. PW 5 Dr. Waghmode has stated that the patient was brought to the hospital by her husband Hanumant Chavan. The investigating officer PSI Nemane has stated that it is true that the appellant shifted Vandana to the hospital. Thus, from the evidence discussed above, it is seen that after his wife caught fire, the appellant extinguished the fire and took his wife to the hospital. This conduct cannot be seen divorced from the totality of the circumstances. Very probably the appellant would not have anticipated that the act done by him would have escalated to such a proportion that Vandana might die. If he had ever intended her to die, the appellant would not have immediately thrown water on her and extinguished the fire and thereafter, rushed her to the hospital in an effort to save her. It was obvious that the appellant realized his folly and was filled with remorse, therefore, he

extinguished the fire and took Vandana to the hospital. In view of the evidence on record, we are inclined to think that all that the appellant thought of was to inflict burns and not to kill her but unfortunately the situation slipped out of control and it went to a fatal extent. Similar facts arose in the case of Kalu Ram Vs. State of Rajasthan; (2000) 10 SCC 324. In this case also, the accused had poured kerosene on his wife and set her on fire, however, on finding the flames faring up, he poured water on her to save her. In the said case, the Supreme Court held that the case would not be covered by Section 302 of IPC but it would be covered under Section 304-II of IPC.

13. In view of the above facts and circumstances, the conviction of the appellant under Section 302 of IPC is set aside, instead, the appellant is convicted under Section 304-I of IPC and for the said offence, he is sentenced to rigorous imprisonment for 10 years and fine of Rs. 1000/-, in default R.I. for one year.

14. The conviction and sentence imposed by the learned Ad-hoc Additional Sessions Judge, Malshiras by Judgment and Order dated 13.4.2011 passed in Sessions Case No. 9 of 2009 is accordingly modified."

40. In view of the above discussion, we set aside the conviction of the Appellant under Section 302 of the IPC and instead the Appellant is convicted under Section 304 Part II of the IPC and for the said offence, he is sentenced to rigorous imprisonment for eight years and fine of Rs.2,000/- and in default rigorous imprisonment of one month.

41. The conviction and sentence imposed by the learned Additional Sessions Judge by judgment and order dated 28th June, 2017 passed in Sessions Case No.586 of 2014 is accordingly modified.

42. The Appeal is allowed to the aforesaid extent.

43. Office to communicate this order to the Superintendent of Police of the prison where the Appellant is lodged.

44. All parties to act on the authenticated copy of this order.