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**(2013) 04 BOM CK 0123**

**In the Bombay High Court**

**Case No : Criminal Appeal No. 332 of 2007**

Navnath Nagnath Khune and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

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**Date of Decision : 03-04-2013**

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 302, 34, 498A

**Citation :** (2013) 4 ABR 918 : (2014) ALLMR(Cri) 2553

**Hon'ble Judges :** V K. Tahilramani, J;P.D. Kode, J

**Bench :** Division Bench

**Advocate :** Prakash Naik, for the Appellant; M.M. Deshmukh, APR, for the Respondent

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**Judgement**

V.K. Tahilramani, J.—The present appeal is directed against the judgment and order dated 25.01.2007 passed by the Addl. Sessions Judge, Pune in Sessions Case No. 160 of 2005. By the said judgment and order, the learned Sessions Judge convicted the appellants u/s 302 read with 34 of IPC and sentenced them to suffer imprisonment for life and fine of Rs. 2000/- each, IDSI for two months. The appellants are further convicted u/s 498-A read with 34 of IPC and sentenced to R.I. for two years and fine of Rs. 1000/- each, IDSI for 15 days. The learned Sessions Judge directed that the substantive sentences of imprisonment shall run concurrently.

For the sake of convenience, we shall refer to the appellants as they were referred to before the trial Court i.e. appellant No. 1 Navnath Khune as accused No. 1, appellant No. 2 Putalabai Khune as accused No. 2 and appellant No. 3 Lochana Chaudhari as accused No. 3.

The prosecution case briefly stated, is as under:--

(a) PW 1 Vijay was the father of Sheetal (deceased). Sheetal was married to accused No. 1 Navnath in the year 2002. After marriage, Sheetal went to reside at Bibvewadi, Pune with her husband and mother-in-law i.e. accused Nos. 1 and

2. Accused No. 3 is the sister of accused No. 2. She was residing near the house of accused Nos. 1 and 2. Sometime after the marriage, accused Nos. 1 to 3 started ill-treating Sheetal on the ground that they were not given proper gifts and no dowry was paid in the marriage. Eventually, police complaint was made by PW 1 Vijay in relation to the cruelty meted out by the accused to his daughter, therefore, Sheetal came to her father's house i.e. house of PW 1 Vijay to reside. Thereafter, compromise took place between the parties and Sheetal went back to reside with accused Nos. 1 and 2 in their house.

(b) On 18.08.2004 at about 09.00 p.m., accused Nos. 1 and 2 were in the house. They were abusing Sheetal. Sheetal shouted and replied back to her husband and mother-in-law i.e. accused Nos. 1 and 2. Therefore, they got angry. Accused No. 3 also came home at that time. Accused No. 2 then handed over kerosene can to accused No. 1. Accused No. 1 poured kerosene on the body of Sheetal and accused No. 2 set her on fire. Accused No. 3 uttered the words, "Now die". Thereafter, fire was extinguished and accused No. 1 took Sheetal to the hospital and got her admitted.

(c) In the hospital, PW 5 Dr. Balwantkar examined Sheetal. At that time, Sheetal told him that her husband and her mother-in-law had burnt her by pouring kerosene on her body. The said history given by Sheetal was recorded in case papers (Exh. 64). Thereafter, PW 8 PSI Desai recorded the dying declaration (Exh. 76) of Sheetal. In the said dying declaration, Sheetal stated that her husband i.e. accused No. 1 poured kerosene on her, her mother-in-law i.e. accused No. 2 set her on fire and accused No. 3 who was in the house at that time said, "Now die". This dying declaration was treated as FIR. Thereafter, investigation commenced. Further supplementary statement of Sheetal came to be recorded which is at Exh. 53. This was also recorded by PW 8 PSI Desai. In the said dying declaration, Sheetal implicated two more accused persons i.e. accused Nos. 4 and 5. Sheetal expired on 23.08.2004. Her body was sent for postmortem. PW 9 Dr. Suryawanshi conducted the postmortem on the dead body of Sheetal. According to him, the cause of death was septicemia shock due to 50% superficial to deep burns infected at places. After completion of investigation, charge-sheet came to be filed.

2. Charge came to be framed against the appellants i.e. accused Nos. 1 to 3 and accused Nos. 4 and 5 under Sections 498-A simpliciter or u/s 498-A read with Section 34 of IPC and u/s 302 simpliciter or u/s 302 read with 34 of IPC. The accused pleaded not guilty to the said charge and claimed to be tried. The defence of the appellants is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge acquitted accused Nos. 4 and 5 of all the offences, however, the learned Sessions Judge convicted and sentenced the appellants i.e. accused Nos. 1 to 3 as stated in paragraph 1 above, hence, this appeal.

3. We have heard the learned Advocate for the appellants and the learned APP for the State. After giving our anxious consideration to the facts and

circumstances of the case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that accused No. 1 Navnath poured kerosene on Sheetal and accused No. 2 Putalabai set her on fire.

4. The conviction of the present appellants is mainly based on the dying declaration Exh. 76 given to PW 8 PSI Desai and the dying declaration given to PW 5 Dr. Balwantkar which is at Exh. 64. PW 8 PSI Desai has stated that at about 3.30 a.m., she received a telephone call that one Sheetal is admitted in Sassoon Hospital with burn injuries. She reached Sassoon Hospital at about 05.00 a.m. She contacted the doctor on duty. The doctor examined the patient and stated that she is in a condition to give a statement. Then PSI Desai asked few questions to Sheetal and ascertained that she was in a condition to give a statement. According to PW 8 PSI Desai, the sum and substance of the statement was that her husband and her mother-in-law were quarrelling with her since morning on that day and were insisting that she should leave her husband. When Sheetal stated that she would not leave, they assaulted her by pouring kerosene on her and setting her on fire with a match stick. Her mother-in-law's sister i.e. accused No. 3 at that time said, "Now die". Thus, accused No. 3 abetted accused Nos. 1 and 2 by saying that Sheetal should die. However, it is seen that this dying declaration (Exh. 76) is recorded second in point of time. The first dying declaration was recorded by PW 5 Dr. Balwantkar. PW 5 Dr. Balwantkar has stated that patient Sheetal was brought to the hospital at about 12.30 a.m. He asked the patient the history and the patient narrated the history that her husband and her mother-in-law had burnt her by pouring kerosene on her body and set her on fire with a match stick. The patient further told him that after she caught fire, her husband extinguished the fire and she was brought to Sassoon Hospital. The said history was recorded by PW 5 Dr. Balwantkar. It is at Exh. 64. Thereafter, Sheetal has given another dying declaration which is at Exh. 53. This was given to PW 8 PSI Desai. In this dying declaration, Sheetal has implicated original accused Nos. 4 and 5 who have been acquitted. Thus, it is noticed that initially, Sheetal has only implicated accused Nos. 1 and 2, thereafter she has implicated accused No. 3 and after that she has implicated accused Nos. 4 and 5 also. Thus, it is seen that at every stage, Sheetal has implicated more and more accused persons. Looking to the fact that in the first dying declaration Exh. 67, Sheetal has made no reference at all to accused No. 3 and thereafter, she has gone on implicating more and more accused persons, on account of which, original accused Nos. 4 and 5 have been acquitted; we are of the opinion that accused No. 3 will also have to be acquitted of the offence u/s 302 of IPC.

5. Besides the dying declaration Exh. 76, Exh. 64 and Exh. 53, the prosecution is relying on oral dying declarations made to PW 1 Vijay, the father of Sheetal and PW6 Thokal, a neighbour. PW 1 Vijay has stated that he was informed that his daughter had sustained burn injuries in her matrimonial home and she is admitted in Sassoon Hospital. He went to the hospital and made inquiry with his

daughter Sheetal. Sheetal told him that in the night, her husband, her mother-in-law and her cousin mother-in-law i.e. accused No. 3 had poured kerosene on her and set her on fire. PW 1 Vijay has not only deposed about the oral dying declaration made by Sheetal but he has also deposed about ill treatment, harassment and cruelty at the hands of the three appellants to Sheetal. PW 6 Thokal has also deposed about the ill treatment and harassment to Sheetal by the accused persons. He has categorically stated that Sheetal used to tell him as well as her parents about the ill treatment and cruelty to her by the accused persons. PW 1 Vijay has stated that Sheetal's husband, her mother-in-law and cousin mother-in-law i.e. accused Nos. 1 to 3 were ill treating Sheetal by saying that in the marriage, they were not given proper gifts and that no dowry was paid in the marriage, hence, they were abusing and ill treating her. He then along with his wife had been to the house of accused persons and persuaded them that he could not afford to give anything more. One month after that his daughter Sheetal telephoned him and told him that she was beaten by her husband, her mother-in-law and cousin mother-in-law saying that though her parents had been to their house, they had not given any gift. Thereafter also, the three accused used to ill treat his daughter. He then went to the Police Station and lodged complaint against the accused persons. His daughter then came to his house to reside. However, thereafter, compromise was arrived at and Sheetal went to her matrimonial house. Thereafter also, the ill treatment continued. Thus, the evidence of PW 1 Vijay and PW 6 Thokal shows that all the three accused persons used to ill treat Sheetal.

6. Advocate Mr. Naik representing the appellants submitted that the act of the accused would not fall u/s 302 of IPC but it would fall u/s 304-II of IPC. He submitted that the accused had no intention to cause death of Sheetal. In support of this contention, he has placed reliance on the dying declaration Exh. 76 recorded by PW 8 PSI Desai. In the dying declaration Exh. 76, Sheetal has stated that her husband brought her to the hospital. Mr. Naik further placed reliance on dying declaration Exh. 64 recorded by PW 5 Dr. Balwantkar. Dr. Balwantkar has stated that Sheetal told him that accused No. 1 extinguished the fire. Thus, the evidence of PW 5 Dr. Balwantkar and PW 8 PSI Desai shows that accused No. 1 extinguished the fire and took Sheetal to the hospital.

7. No doubt, the evidence on record shows that it was the appellants who set Sheetal on fire, however, the crucial question which arises in the facts and circumstances of this case is what is the nature of the offence proved against accused Nos. 1 and 2. We have already observed earlier that we are not inclined to accept the prosecution case that accused No. 3 was also involved in the incident of setting Sheetal on fire on 18.08.2004. The dying declaration Exh. 76 shows that a quarrel had taken place between accused Nos. 1 and 2 and Sheetal. Thereafter, Sheetal shouted back at accused Nos. 1 and 2 whereupon accused No. 1 poured kerosene on Sheetal and accused No. 2 set her on fire. However, immediately after Sheetal caught fire, accused No. 1 extinguished the fire which is seen from the evidence of PW 5 Dr. Balwantkar. Thereafter, Sheetal was rushed

to the hospital by accused No. 1 which is seen from the dying declaration Exh. 76. Accused No. 2 made no attempt to stop accused No. 1 when he extinguished the fire or took Sheetal to the hospital. This conduct cannot be seen divorced from the totality of the circumstances. Very probably, the accused persons would not have anticipated that the act done by them would have escalated to such a proportion that Sheetal might die. If at all the accused had intended Sheetal to die, they would not have made attempt to extinguish the fire and rush Sheetal to the hospital.

8. In view of the evidence on record, we are inclined to think that all that the accused thought of was to inflict burns and not kill Sheetal but unfortunately the situation slipped out of their control and it went to a fatal extent. We stand fortified in taking this view by the observations of the Supreme Court in the case of Kalu Ram Vs. State of Rajasthan, , on which Mr. Naik has placed reliance. In the said case also similar facts arose and the Supreme Court held that the case would not be covered by Section 302 of IPC but it would be covered by Section 304-II of IPC.

9. In view of the above facts and circumstances, the conviction of the appellants u/s 498-A of IPC is maintained, however, we alter the conviction of the appellants from Section 302 of IPC to Section 304-II of IPC. Hence, the following order:-

#### ORDER

- i. The appeal is partly allowed.
- ii. Conviction of the appellants u/s 498-A read with Section 34 of IPC is maintained, however, sentence of imprisonment is reduced from two years R.I. to six months\\ R.I. Fine amount and in default sentence is maintained.
- iii. Accused No. 3 Lochana is acquitted of the offence u/s 302 read with 34 of IPC.
- iv. As far as accused Nos. 1 and 2 i.e. Navnath and Putalabai are concerned, the conviction u/s 302 read with Section 34 of IPC is set aside, instead, they are convicted u/s 304-II of IPC. For the said offence, they are sentenced to eight years imprisonment and fine of Rs. 2000/- I.D.S.I. for two months.