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**(2013) 01 BOM CK 0010**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 284 of 2009**

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| Shrikrishna Jagan Hiwarale | Vs | APPELLANT  |
| State of Maharashtra       |    | RESPONDENT |

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**Date of Decision :** 29-01-2013

**Acts Referred:**

**Citation :** (2013) ALLMR(Cri) 3834

**Hon'ble Judges :** A.P. Lavande, J;A.B. Chaudhari, J

**Bench :** Division Bench

**Advocate :** Harshal Bobde, for the Appellant; R.S. Nayak, APP, for the Respondent

**Final Decision :** Partly Allowed

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## Judgement

A.B. Chaudhari, J.—Being aggrieved by the Judgment and Order dated 16-12-2008 passed by the Adhoc Additional Sessions Judge-4, Nagpur, in Sessions Trial No. 314 of 2008, convicting the appellant for the offence punishable u/s 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 5,000/- in default to suffer further R.I. for six months, the present appeal was filed by the original accused - appellant Shrikrishna Jagan Hiwarale. In support of the appeal, the learned Counsel for the appellant made the following submissions.

(i) That the learned Trial Court committed an error in convicting the appellant for the offence punishable u/s 302 of the I.P.C. on clear misapprehension of prosecution evidence.

(ii) That it ought to have been seen by the learned Trial Court that the alleged eye witnesses namely PW-4 Vinod Krishna Hiwarale did not support the prosecution and the evidence of the said hostile witness could not have been relied upon merely because he stated involving the appellant in the cross examination made by the prosecution.

(iii) In this connection, it ought to have been seen in the further cross

examination by the Advocate for the accused - appellant that he did not support the prosecution.

(iv) That the learned Trial Judge committed an error in relying upon the evidence of PW-3 Umesh Vitthal Deogade on the alleged oral Dying Declaration, when as a matter of fact, in the cross examination, he stated that the deceased Lata did not tell him anything.

(v) The learned Trial Court committed an error in relying upon the Dying Declarations which remained only evidence with the prosecution. There is a finding recorded by the Trial Court that the evidence of PW- 5 Prakash Babanji Pandav did not help the prosecution.

(vi) The evidence of PW-3 Umesh is liable to be discarded in view of the cross examination. The learned Trial Court has relied upon PW- 3 Umesh Deogade and PW-5 Prakash Pandav on oral Dying Declaration. The Counsel then argued that PW-6 Bablu Wankhede also has been relied upon by the Trial Court only on the ground that he had no interest in the prosecution or against the accused which is not correct in the matter of assessment of evidence. He has also been relied upon for the purposes of oral Dying Declaration which is illegal.

(vii) The learned Trial Court Committed an error in relying upon the Dying Declaration Exh. 26 and Exh. 30, when as a matter of fact, both the Dying Declarations were required to be rejected in view of the serious discrepancies between them and inconsistencies which can be demonstrated before the Court. As a matter of fact, the deceased Lata had suffered 66% bodily injury and, therefore, it was impossible for her to give a Dying Declaration. In other words, she was not in a mentally fit state to give the Dying Declarations.

(viii) In the alternate, the learned Counsel argued that at any rate, looking to the evidence available on record, no offence u/s 302 of the Indian Penal Code can be said to have been made out or committed by the appellant and therefore, the offence u/s 304 Part-II of I.P.C. alone can be made out. The learned Counsel for the appellant prayed for acquittal of the accused appellant.

2. Per contra, the learned APP supported the impugned Judgment and order and prayed for order of conviction and dismissal of appeal. He argued that there is voluminous evidence in the form of various Dying Declarations with which no fault can be found out. Not only that, but there are two oral Dying Declarations which have been believed by the learned Trial Court in addition and thus, there is evidence in the form of corroboration also. The appellant behaved in a cruel manner with his wife and burnt her and, therefore, the appeal is liable to be dismissed.

3. With the assistance of the learned Counsel appearing for the rival parties, we have gone through the entire evidence recorded by the learned Trial Court. We have perused the impugned Judgment and order. We have heard the learned Counsel for the rival parties.

4. The incident occurred on 9-5-2008, at about 19 hours. As per the prosecution evidence, the accused appellant was in the habit of consuming liquor and assaulting his wife deceased Lata. On the day of the incident also, he assaulted deceased Lata because she had not prepared eggs Bhurji for the appellant. The appellant quarreled with her, assaulted her and poured Kerosene from a can on her person and set her on fire with a small sack cloth. After the incident that took place at about 7 p.m. in the night, she was reached in the Medical College and Hospital, Nagpur. Upon requisition given by the Police Station Officer to PW-9 Sunil Rawanhate, her Dying Declaration was recorded at 11.50 p.m. The said Dying Declaration is at Exh. 26, which is duly proved by PW-9 Sunil Rawanhate.

5. We have perused the Dying Declaration Exh. 26 as well as evidence of PW-9 Sunil. We find from his evidence and the Dying Declaration that he asked about six questions to her to find out her mental state of mind to give Dying Declaration, and she answered the questions properly, which fact he recorded in the Dying Declaration itself. Then he asked the questions about the incident and she answered by saying that her husband used to assault her after consuming the liquor. On the date of the incident also, he came after consuming liquor, quarreled with her, and assaulted her. He then poured Kerosene on her person and lighted a sack cloth meant for wrapping betel leaves with the fire in the hearth and set her on fire. As the fire caught, she shouted loudly. Thereupon, her mother-in-law Sitabai came and extinguished the fire by catching her and she also sustained burn injuries. Her younger son poured water on her person and the neighbours and her son brought her in the Hospital.

6. Perusal of the cross examination of PW-9 Sunil, to our mind, has not at all shaken his testimony and on the contrary, he has confirmed the Dying Declaration recorded by him. As to the fitness of the deceased Lata, at the time of recording Dying Declaration, not only that recorder assessed her mental fitness himself, but then there is a evidence about fitness of the deceased Lata. The concerned doctor has recorded accordingly the fitness of the patient to give Dying Declaration vide Exh. 27-A.

7. We are, therefore, fully satisfied that the said Dying Declaration Exh. 26 is duly proved and it does not suffer from any infirmity. The next Dying Declaration is at Exh. 30. PW-10 Police Sub Inspector Sudhir Mahadeorao Ghonamode had received a telephonic message and thus, he went to the Medical College and Hospital, Nagpur to record the statement of Lata and Sita since both were injured due to burn. He gave requisition Exh. 29 to the Incharge Medical Officer who certified by his endorsement vide Exh. 29-A that Lata was fit to give Dying Declaration. He recorded Dying Declaration at about 1 p.m. in the presence of Medical Officer and after recording the Dying Declaration Exh. 30, same was dispatched by him. The submission made before us that Exh. 30 is required to be rejected does not appeal to us since there is no cross examination of PW-10 Ghonamode on this aspect That apart, Exh. 30 was made at the first point of time and as also held by us, she was mentally fit and conscious when her latter

Dying Declaration was recorded at Exh. 24 that has been established by the prosecution by leading evidence of PW-29.

8. We have ourselves seen Exh. 30 recorded by the said Police witness and we have also gone through the cross examination of this witness PW-10 PSI Ghonamode. Nothing tangible has been brought on record to reject his evidence. We, thus, find that both the Dying Declarations are fully believable and there is no need for searching out for corroboration for those two Dying Declarations. That apart, even then, the evidence of PW-6 Bablu is also important because he is an independent witness residing near the house of the appellant accused. He deposed that he was going to his house. At that relevant time, he saw Lata in burning condition and, therefore, he went there. She told him that her husband had burnt her and asked him whether she would die. Thereupon, PW-6 Bablu told her that nothing would happen to her. Then she was taken on the motor vehicle of Ballewar and then he took her to the Medical College and Hospital, Nagpur. She also told him at that time that the incident had occurred on the ground of preparation of eggs.

9. We have gone through the cross examination of this independent witness. We find in the cross examination that his evidence is not shaken. He is a neighbour and is an honest witness who fulfilled his Dharma of neighbourhood and took her on his motorcycle and also remained in the Medical College and Hospital, Nagpur for the whole night. We are not prepared to discard the testimony of this witness since there is nothing in the cross examination to do so. We, therefore, fairly believe this witness and hold ultimately that overall evidence of the prosecution discussed by us above proves his case beyond reasonable doubt and it is only the appellant who set Lata on fire due to which she died. The next question before us is what is the offence that is made out. Perusal of the prosecution evidence itself shows namely the Dying Declarations and the evidence of her son that on the fateful evening, as usual, the appellant in a drunken condition entered the house, asked Lata to prepare Eggs Bhurji. She refused and resisted and then there was a quarrel between them. They quarreled for quite some time and then the appellant poured kerosene on her person and set her on fire. We thus, find that as a result of the aforesaid events which preceded the incident, the offence took place, but then we find that the appellant had no intention to commit murder of his wife. On the contrary, he was a habitual drunkard returning home in the evening under the influence of alcohol and always assaulting his wife. There are grown up children and deceased was 40 years old. She tolerated that for all the years after her marriage and that was a routine affair for them. It is only on the date of the incident after the quarrel took place between them in a sudden spurt, he poured kerosene and set her on fire. Viewed from that point of view, according to us, the appellant did not want to commit her murder. He is however, guilty of the offence punishable u/s 304 Part-I of the Indian Penal Code since he was having full knowledge that by pouring kerosene or setting Lata on fire she would die. We thus, hold that the offence u/s 304 Part-I and not u/s 302 of the Indian Penal Code stands proved. Accordingly, we pass the following order.

## ORDER

(A) Criminal Appeal No. 284 of 2009 is hereby partly allowed.

(B) The conviction of the accused recorded by the Ad Hoc Additional Sessions Judge-4, Nagpur, vide Judgment and order dated 16th December, 2008, delivered in Sessions Trial No. 314 of 2008, convicting the appellant - accused for the offence punishable u/s 302 of the Indian Penal Code is quashed and set aside and instead the accused is convicted for the offence punishable u/s 304-I, Indian Penal Code, and sentenced to undergo Rigorous Imprisonment for ten years and to pay a fine of Rs. 5,000/- (rupees five thousand only), and in default, to undergo Rigorous Imprisonment for six months.

(C) The accused shall be entitled to set off for the period of detention undergone in terms of Section 428, Criminal Procedure Code.

(D) As far as the order passed by the learned Trial Court for disposal of property is concerned, it is maintained.

(E) Appeal stands disposed of accordingly.