

(2022) 09 BOM CK 0125
In the Bombay High Court
Case No : Criminal Appeal No. 117 Of 2015

Vijay Radhaji Bhandare

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 26-09-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 235(2)
Indian Penal Code, 1860 — Section 300, 302, 304, 304II

Citation : (2022) 09 BOM CK 0125

Hon'ble Judges : A.S. Gadkari, J; Milind N. Jadhav, J

Bench : Division Bench

Advocate : Abhaykumar Apte, H.J. Dedhia

Final Decision : Partly Allowed

Judgement

Milind N. Jadhav, J

1. This Criminal Appeal questions the legality of Judgment and Order dated 10.11.2014 passed by learned Additional Sessions Judge, Pune in Sessions Case No. 347/2011 (for short "Trial Court"), convicting Appellant under Section 235(2) of Code of Criminal procedure, 1973 (for short "Cr.PC"), for offence punishable under Section 302 of the Indian Penal Code (for short "IPC") and sentenced to suffer life imprisonment and to pay fine of Rs. 5,000/- (Rs. Five Thousand Only) in default thereof to suffer simple imprisonment for six months.

2. We have heard Mr. Abhaykumar Apte, learned Advocate for accused and Mr. H. J. Dedhia, learned APP for the State and with their able assistance perused the evidence and record in the present case.

3. Appellant is convicted for committing murder of his wife Sindhubai by setting her ablaze.

Prosecution case is based on oral dying declaration and two written dying declarations given by Sindhubai, which have been accepted by the Trial court for

convicting Appellant. Appellant shall be hereinafter referred to as accused for convenience.

4. Facts which emerge from record of the case are as under:-

4.1 Deceased Sindhubai and accused were married since long and resided with their son Sumit (20 years old) at Mulik Vasti, Survey No.14 Ramwadi, Pune. Sindhubai worked as maid servant; Sumit worked as waiter in hotel Sodhi and accused is a mason. Accused was heavily addicted to drinking and used to question chastity of Sindhubai.

4.2 According to prosecution, on 31.12.2011 at about 04:30 p.m. Sindhubai reached home from work; at that time accused was present at home in drunken condition. He started abusing her and provoked a quarrel by accusing her that she had slept with some person. Thereafter Sindhubai kept a vessel on the stove for preparing tea, but in rage accused kicked the stove and accused Sindhubai of maintaining illicit relationship with Sumit (their son). Thereafter around 6:00 p.m. accused poured kerosene on Sindhubai and set her ablaze with a matchstick. On hearing her screams neighbours gathered at the spot and called Sumit. Sindhubai was taken to Sassoon Hospital by Sumit and neighbours.

4.3 On receiving information about crime, PW-6 PSI Pralhad Holkar from Yerewada Police Station, Pune rushed to hospital and recorded first dying declaration on 31.12.2012 at 11:45 p.m. (Exh. 33). Thereafter on 01.01.2013 at about 3:30 a.m. second dying declaration (Exh. 34) was recorded by him in the presence of DW-2. Both statements were duly endorsed by PW-7 Doctor. Sindhubai succumbed to her injuries on 02.01.2011 at about 06:30 a.m.

4.4 PW-5 - Mr. Suresh Gholap (Investigating Officer) took over investigation and visited the spot of incident and drew the spot panchanama (Exh. 26). He seized one bottle containing kerosene, one cloth and one wheel company matchstick box from the spot of the incident. Police Head Constable Mr. Saswade seized clothes of deceased and drew the inquest panchanama.

4.5 Autopsy of dead body of Sindhubai was performed by Dr. Ajay Taware (PW-4) and Dr. Chakurkar. Their opinion for cause of death was "shock due to burn." PW 5 API Mr. Suresh Gholap arrested accused and recorded statements of witnesses. He forwarded the seized articles to the office of Chemical Analyser, Pune for C.A. Report. After completion of investigation he collected the relevant documents and submitted chargesheet in Court of learned Judicial Magistrate First Class, Court No. 5, Pune. Since offence under Section 302 is exclusively triable by Court of Sessions, learned JMFC committed case for trial to Sessions Court.

4.6 Charge below Exh. 3 was framed against accused for offence punishable under Section 302 IPC. It was read over and explained to him in vernacular; he denied the charge, pleaded not guilty and claimed to be tried.

5. Prosecution examined 7 witnesses in all to bring home the guilt of accused; PW-1 Sumit Bhandare, son of Sindhubai and accused did not support prosecution

case and was declared hostile.

6. PW 2 Subhash Popat Shinde is panch witness to seizure panchnama (Exh. 18) of clothes of accused. PW-3 Bhaskar Namdeorao Rokade is father of Sindhubai who deposed that after receiving the information of incident he rushed to the hospital where Sindhubai informed him that accused had poured kerosene on her and set her on fire. This is the oral dying declaration.

7. PW-4 Dr. Ajay Taware conducted autopsy and prepared and proved the postmortem report (Exh.22). He has noted the following injuries in the PM report:-

"Superficial to deep burns seen over body parts as under:

Head, neck, and face (9%)

Chest (9%)

Abdomen (5%)

Back (12%)

Upper limb right (9%)

Upper limb left (9%)

Lower limb right (10%)

Lower limb left (8%)

Genitals (0%)

Total (71%)

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(2) Two venesection injuries over both ankles.

(3) Venesection Injury with two stiches over right cubital fossa."

8. PW-5, Suresh Maruti Gholap, IO conducted investigation.

PW 6, PSI Prahlad Narayan Holkar recorded the first dying declaration of Sindhubai at 11:45 p.m. He deposed that on 31.12.2010 at about 10:00 p.m. after receiving information he rushed to the Burn Ward of Sassoon Hospital, Pune and met Sindhubai; that before recording her statement he made enquiry with PW-7 Doctor about her consciousness and PW-7 informed him that she was conscious and able to give her statement. PW-6 recorded her statement and read out the contents thereof to her and thereafter Sindhubai put her thumb impression on the statement and the doctor put his endorsement and signature on the same. The second dying declaration was recorded by PW-6 in the presence of DW-2 at 3:30 a.m. and similarly endorsed by PW-7. In both

statements, Sindhubai stated that accused was in a drunken condition, they both quarreled and he doused her with kerosene and set her ablaze.

It is seen that deposition of PW-3, PW-6 and PW-7 suggest that the case is based on the two dying declarations.

9. Defense in the present matter has relied on deposition of two defence witnesses namely DW-1 Milind Shinde (neighbor of accused) and DW-2 Elizabeth Vergis (Special Executive Magistrate). DW-1 received information about the incident and he reached the spot and found Sindhubai having suffered burn injuries and was unconscious. He alongwith Bharat Bhandari and Gulab Suttar (neighbours) shifted Sindubai to Sassoon Hospital. DW-2 has however deposed that police did not call her for recording statement of Sindhubai; that in the intervening night of 31.12.2010 and 1. 01.2011, she was in the church and police called her to Ramwadi Police chowky and asked her to give her signature on the statement which was required for true copy.

10. In the present case, defense has examined two witnesses. DW-1, neighbour of Sindhubai and accused. He has deposed that accused had no vices and was happily cohabiting with Sindhubai. He has further deposed that he took Sindhubai to Sassoon General hospital after the incident. DW-2 is Elizabeth Joseph Vergis, Special Executive Magistrate appointed by Government of Maharashtra and she has deposed that the second dying declaration (Exh. 34) was not recorded in her presence; she has stated that police called her at Ramwadi Police chowky and asked her to put her seal on blank paper as they required it for true copy. That apart, deposition of Sumit, PW-1, son of Sindhubai, though the prosecution has declared him hostile, is required to be seen as far as his deposition upto the stage of his turning hostile. Sumit in his deposition has stated that on the date of incident in the evening he received a telephonic message that his mother had sustained burn injuries, he therefore rushed home and found Sindhubai lying in burnt condition. He has stated that Sindhubai informed him that she had on her own accord poured kerosene on herself and set her ablaze. He has been declared hostile hereafter. Medical case papers of admission of Sindhubai to Sassoon hospital have been proven in evidence by PW-7 Dr. Pravin Survase vide Exh.46. Perusal of Exh 46 reveals that Sindhubai was admitted to Sassoon General Hospital, Pune by Sumit Bhandare and gave history by herself stating that she suffered homicidal burns in her home where accused poured kerosene over her and burnt her.

11. Prosecution in the present case has undoubtedly established that accused was suspecting the character of deceased, that he intentionally and knowingly committed her murder by pouring kerosene on her and set her ablaze.

From the record of the case, it is seen that Sindhubai was admitted to Sassoon Hospital on 31.10.2012 at 8:52 p.m. It is seen that PW-3 father of Sindhubai on learning about the incident reached Sassoon hospital where Sindhubai gave an oral dying declaration to him stating that accused had poured kerosene on her

and set her ablaze. That apart, the two dying declarations recorded vide Exh. 33 and Exh. 34 clearly spell out that accused suspected her chastity and accused her of having illicit relationship with Sumit and therefore set her on fire. Both these statements (Exh. 33 & 34) are by Sindhubai herself. There is no doubt that the oral dying declaration and the two written dying declarations are consistent with each other nor there is any infirmity or suspiciousness in the said statements.

12. However from a minute perusal of the evidence of prosecution witnesses as well as the two written dying declarations (Exh. 33 and 34), it is seen that accused was already present in the house at around 4:30 p.m. in a drunken state and this factual circumstance cannot be lost sight of. In that state of mind, accused confronted Sindhubai and accused her of infidelity and had a quarrel with her. The incident occurred at around 6:00 p.m. It has come in evidence that before the incident, Sindhubai had kept a vessel on the stove for preparing tea and accused being in an enraged stage kicked the stove during the quarrel with her. Admittedly both written dying declarations given by Sindhubai clearly state that accused was in an inebriated drunken state at that time. The quarrel between them is also stated to have happened before the incident by Sindhubai. This clearly shows that accused in a fit of rage during the quarrel kicked the stove and being enraged committed the crime. Certainly the spot panchnama Exh.26 does not give credence to the theory of Sindhubai having met with an accidental death. Further there was no bursting of the stove also as can be seen from the spot and seizure panchnama. Trial Court has convicted and sentenced accused for committing the offence of murder as defined in Section 300 IPC under the provisions of Section 302 IPC. However giving due consideration to the aforementioned reasons, we are of the opinion that the judgment of the Trial Court calls for reconsideration.

13. Exception 4 to Section 300 IPC outlines a situation where culpable homicide does not amount to murder. There are three requirements for this exception to apply viz.

- (i) The act of killing is committed without premeditation;
- (ii) The act of killing is committed in sudden fight in a heat of passion upon a sudden quarrel; and
- (iii) The offender should not have taken undue advantage or acted in a cruel or unusual manner.

14. From the discussion herein above and appreciation of the evidence on record, we are of the firm opinion that the aforementioned three requirements of Exception 4 to Section 300 IPC squarely apply to the facts and circumstances of the present case and stand satisfied as under:-

- (i) from appreciation of the two written dying declarations relied upon by prosecution, it is clearly discernible that there was no premeditation, preparation

and / or intention harboured by accused to commit the murder of Sindhubai. In the two statements given by Sindhubai, it is stated that accused was present in the house in a drunken state and picked up a quarrel with her by accusing her for infidelity;

(ii) secondly the two statements themselves refer to a quarrel between accused and Sindhubai. Considering the fact that Sindhubai was accused of infidelity, accused on the sudden spur of the moment and in a heat of passion kicked the stove and in a fit of rage committed the crime;

(iii) thirdly and admittedly accused did not behave in an unusual manner or took undue advantage or acted in a cruel manner after the incident.

15. The act of accused could be said to have caused death of Sindhubai but the same in our considered opinion, does not travel beyond the offence of culpable homicide not amounting to murder in reference to the facts of the present case. Punishment for culpable homicide not amounting to murder has been prescribed under Part II of Section 304 IPC. For the reasons given herein above and in the facts and circumstances of the present case, it is concluded that the act committed by accused falls within the ambit of Part II of Section 304 IPC. As such, the Trial Court erred in convicting and sentencing the accused for offence of murder under Section 302 IPC. The accused deserves to be given the benefit of exception 4 of Section 300.

16. In view of the above discussion and findings, we are of the firm opinion that accused in a drunken state of mind and heat of passion, acted in a manner that he knew is likely to cause death of Sindhubai but without the intention to kill her.

Hence the following order:-

(i) The conviction of the appellant under Section 302 IPC is set aside; instead Appellant is convicted under Section 304 Part-II IPC and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 25,000/-, and in default thereof to suffer further rigorous imprisonment for six months;

(ii) Appellant was arrested on 01.01.2011. Since he has undergone the sentence awarded above, he shall be released from prison forthwith unless required in any other case / cases.

(iii) Appeal is partly allowed in the aforesaid terms.

17. All the concerned to act on an authenticated copy of the present Judgment and Order.