IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE, BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 422 OF 2008

Sitaram s/o Natha More
Age 45 years, Occ. Agriculture
R/o. Khandala, Tal. Shrirampur
District Ahmednagar ...Appellant

Versus

The State of Maharashtra
(copy to be served on the Public
Prosecutor and Government Pleader
High Court, Bench at Aurangabad) ...Respondent

.....

Mr. A.B. Kale, advocate for the appellant

Mr. N. R. Shaikh, A.P.P. for respondent .

.....

CORAM: S.B. DESHMUKH &
S.S. SHINDE, JJ.

DATE OF RESERVATION
OF JUDGMENT : 11.06.2010

DATE OF PRONOUNCEMENT
OF JUDGMENT : 17 .06.2010

ORAL JUDGMENT (PER SHINDE, J.)

1 This appeal is filed challenging the final judgment and order dated 17.6.2008, passed in Sessions Case No. 19 of 2007, by the

learned Additional Sessions Judge, Shrirampur, District Ahmednagar.

2 The application for leave to appeal was allowed by this Court, thereby appeal was admitted. However, the application for bail came to be rejected. Originally there were three accused persons. However, the Additonal Sessions Judge, Shrirampur, by the impugned judgment, has acquitted other two accused persons i.e. accused Nos. 2 and 3 and against the said acquittal, application filed by the State for leave to appeal has been rejected by this Court on 8.4.2009. Therefore, the present appeal is filed only on behalf of original accused No.1 Sitaram Natha More.

3 All three accused persons were charged for offences punishable under Sections 302 r.w. 34 of I.P.C. It is the case of the prosecution that deceased Alka Sitaram More wife of accused No.1 i.e. present appellant was residing alongwith accused No.1 and two children viz. Rajendra and Balu in the house allotted by Government of Maharashtra under Indira Awas Scheme. Accused No.2, Shivaji Natha More is brother-in-law and the accused No.3 Rahibai is mother-in-law of deceased Alka.

4 It was alleged by Alka that since the date of marriage, accused persons were not treating her well and always used to ask her to leave

matrimonial home and go to her parents place. However, Alka tolerated accused persons and was living in the matrimonial home. According to the prosecution case, on 14.1.2007, deceased Alka was at home at about 10.00 a.m.. Accused No.1 Sitaram and accused No.2 Shivaji, both returned home in drunken state. Both started abusing deceased Alka and demanded money for drinking liquor. Deceased Alka requested them not to abuse her and expressed her inability to pay money for the liquor. Accused No.2 gave call to his mother, Rahibai i.e. accused No.3 and all of them entered in the house of accused No.1. Accused No.2 and 3 caught hold deceased and accused No.1 lifted a plastic can containing kerosene and he poured kerosene on the person of Alka and ignited match stick and threw it on the person of deceased Alka. As a result of this, Alka got burn. She made hue and cry and accused Nos. 1 and 2 poured water on her person and thereby tried to extinguish the fire. Alka went to her mother's house on foot at Khandala. She narrated entire incident to her mother and her mother took her to Sahakar Kamgar Hospital, Shrirampur for treatment.

5 Doctor Sharad Madhav Satpute, P.W.10, treated deceased Alka in the said hospital. He sent memo of information to police Officer Shrirampur police station. A.S.I. Gangadhar Vishnu Auti, visited the hospital and inquired from Dr. Satpute about the fitness of deceased to

make statement. Accordingly Dr. Satpute, examined deceased Alka and certified that Alka is in fit condition to make statement. Thereafter, P.W.2 A.S.I. Auti recorded statement of Alka in the hospital in presence of Medical Officer. Medical Officer made endorsement on the statement of Alka Sitaram More that she was conscious and well oriented to give statement. The said statement was recorded on 14.1.2007. On the basis of the said statement initially the offence was registered under Section 307 r.w. Section 34 of I.P.C. against three accused persons.

6 P.W.2 A.S.I Auti gave request letter to Taluka Executive Magistrate for recording dying declaration of Alka. In pursuance to the said request letter, P.W.9 Namdeo Sampat on 14.1.2007 visited Sahakar Kamgar Hospital for recording the dying declaration. Dr. Satpute examined deceased and endorsed that she is in a position to give statement. P.W.9 recorded the statement of Alka and said statement was read over to her and thereafter he took her thumb impression of right hand on the dying declaration. The said dying declaration was exhibited as Exh.54. The said dying declaration was recorded in question and answer form by P.W.9. Deceased Alka disclosed in her dying declaration that her husband demanded money from her for drinking liquor and on refusal, her husband poured kerosene on her person and set her on fire. At that time, her brother in

law i.e. original accused No.2 and mother-in-law accused No.3 were present and both have helped her husband in setting her on fire.

7 On 15.1.2007, Investigation Officer visited the spot of incident and drew spot panchnama at Exh.40. On the spot he found burnt Saree, petticoat, blouse, green plastic can (empty). He also noticed one currency note of Rs.100 and one currency note of Rs.5 in the half burnt Saree. All clothes were having smell of kerosene. All these articles were seized and affixed the label of inquest panchnama.

8 All accused were arrested. Investigating Officer seized shirt, pyjama of the accused No.1. Both clothes were having smell of kerosene. Investigating Officer also seized clothes from other accused persons. On 1.2.2007, P.S.I. Yashwant Nivrutti Honmane, received memo from Sahakar Kamgar Hospital regarding death of Alka More and therefore he converted the offence from Section 307 to Section 302 of I.P.C. He visited the hospital and prepared inquest panchnama vide Exh.43. He gave letter to the Medical Officer for conducting post mortem report and accordingly post mortem was conducted by the Medical Officer. Muddemal articles were sent to the Chemical Analyzer. The report of the same was received on 7.4.2007. Charge sheet was submitted to the learned J.M.F.C. Shrirampur and the case was committed to the court of Sessions for trial.

9 Learned Sessions Court framed charge under Section 302 r.w. 34 of I.P.C. Accused denied the charge and in order to prove their innocence, accused No.1 examined his sister Sumanbai and witness Mandabai. After recording evidence and after hearing respective counsel for the parties, learned Sessions Judge Shrirampur framed as many as four points of its determination and adjudication.

On the basis of two written dying declarations, corroborated by two oral dying declarations and with all other evidence brought on record by the prosecution, including Chemical Analyzer's report, evidence of Medical Officer as well as Investigating Officer, the Additonal Sessions Judge, Shrirampur came to the conclusion to convict the accused No.1 Sitaram i.e. present appellant. However, in case of accused Nos.2 and 3, the Additional Sessions Judge gave benefit of doubt to the said accused persons since there was variance in the version of Alka about the overt act attributed to accused Nos.2 and 3.

As stated earlier, the present appeal was admitted. However, bail was refused to the appellant herein and as a result of it the appellant is undergoing the sentence in jail.

10 Learned counsel appearing for the appellant submitted that entire case of the prosecution rests upon two dying declarations recorded by P.W.2, A.S.I. Auti and P.W. 9 Circle Inspector Namdeo Baburao Satpute. According to the counsel for the appellant, there is inconsistency in two dying declarations. The said inconsistency is regarding the act attributed to the accused persons. The learned counsel would submit that since there is inconsistency in dying declarations, the Sessions court has acquitted accused Nos. 2 and 3 and this court has confirmed the said acquittal order and therefore, the present appellant also deserves to be granted benefit of doubt in view of the inconsistency in two dying declarations. It is further submitted that on first dying declaration recorded by A.S.I. Auti, the toe impression is obtained by him on the said dying declaration. Learned counsel would submit that it is the case of the prosecution as stated by A.S.I. in his evidence and also from the dying declaration as well as inquest panchnama that both the hands of deceased Alka were burnt and thus the toe impression was obtained on the first dying declaration Exh.37. However, on the second dying declaration which was recorded at Exh.54 by the Circle Inspector on 14.1.2007 at 11.15 p.m., thumb impression of the victim Alka was taken. Therefore, learned counsel for the appellant would submit that if the prosecution approaches the case in first hand with the understanding that both the hands of deceased Alka were burnt and therefore, toe impression was

obtained by A.S.I. Auti while recording first dying declaration at Exh.37 and on the second dying declaration thumb impression of Alka was taken. The second dying declaration recorded by Circle Inspector, creates full doubt and suspicion in the mind about its truthfulness and ultimately both the dying declaration are not reliable. Therefore, learned counsel would submit that when the prosecution itself is not clear about its case and thus the benefit of doubt deserves to be given to the present appellant. It is further submitted that Additional Sessions Judge ought to have taken into consideration the irregularity and illegality committed in the investigation by the Investigating Officer. It is further submitted that prosecution failed to examine independent witnesses from the spot. Though the statements of son of deceased was recorded the said witness is not examined before the Court. It is further submitted that the prosecution has miserably failed to establish the case beyond reasonable doubt and therefore, the appellant deserves to be acquitted from the charges levelled against him. It is further submitted that though independent witness declared hostile, their evidence cannot be ignored. It is further submitted that burn injuries sustained by the accused appellant have not been explained by the prosecution. There is no any eye witness to the incident. There is absence of motive and intention and since co-accused are acquitted, the present appeal deserves to be allowed by setting aside the impugned judgment and order of the Sessions Court, Shrirampur.

Learned counsel in support of his submissions, placed reliance on the reported judgment of the Hon'ble Apex Court in the case of ***Mehiboobsab Abbasabi Nadaf Vs. State of Karnataka, reported in AIR 2007 SC 2666*** and submitted that if there is inconsistency in two dying declarations and if the some of the accused are already acquitted on that ground, rest of the accused are also liable to be acquitted. Learned counsel invited our attention to the order passed by this court acquitting original accused Nos. 2 and 3 and submitted that since two dying declarations were inconsistent, this Court has refused to grant leave to file appeal against original accused Nos. 2 and 3 and thus the present appellant deserves to get benefit of the said observations in that order passed by this Court on 8.4.2009. Learned counsel further placed reliance on the reported judgment of this Court in the case of ***Deorao s/o Sonbaji Bhalerao and Anr Vs. State of Maharashtra, reported in 2008 4 Mh.L.J. (Cri.) 474*** to contend that, if there is sole piece of evidence in the form of dying declaration and there is no other evidence, the conviction on the basis of sole dying declaration will have to be reversed. Learned counsel further invited our attention to the reported judgment of the Supreme Court in the case of ***Gura Singh Vs. State of Rajasthan, reported in AIR 2001 SC 330*** to contend that though the witnesses are declared hostile, their testimony need not be excluded entirely or rendered unworthy for consideration. Learned counsel further invited our attention to the

reported judgment of the Supreme court in the case of ***State of U.P. Vs. Madan Mohan and others, reported in AIR 1989 SC 1519*** and contended that if the independent witness from the locality are not examined and if the prosecution has suppressed the genesis of the incident and if there is no explanation by prosecution regarding injury on the person of one of the accused and the prosecution version about occurrence is deferring from version in dying declaration, the accused is entitled for acquittal. On the basis of the aforesaid submissions learned counsel for the appellant submitted that the appeal deserves to be allowed.

11 On the other hand, learned A.P.P. appearing for the State submitted that the Additonal Sessions Judge Shrirampur after taking into consideration two written dying declarations as well as two oral dying declarations made before mother of the victim and rickshaw driver and after recording evidence of investigating Officer and Medical Officer and after having been satisfied that there is corroboration to the statements made by the victim in the dying declaration, convicted the present appellant (accused No.1) and therefore, there is no scope to entertain this appeal. Learned A.P.P. invited our attention to both the dying declarations Exh.37 and Exh.54 recorded by the ASI Auti and Circle Inspector respectively and submitted that the overt act/role attributed to the original accused No.1 is consistent in both the dying

declarations and the same has been corroborated by two oral dying declarations. Learned A.P.P. further invited our attention to the spot panchnama, seizure panchnama, seizure of clothes of accused No.1 and C.A. report. Learned A.P.P. submitted that when in all four dying declarations victim Alka has stated that accused No.1, her husband, Sitaram demanded money for purchase of liquor and on refusal he poured kerosene on the person of Alka and set her on fire. He further submitted that none of the judgments cited by the counsel for the appellant are applicable in the facts and circumstances of this case. He submitted that in the instant case not only there are dying declarations which are consistent in their material particulars and overt act attributed to the appellant, however, the clothes of the appellant are having kerosene smell as is evident from the C.A. Report. Learned A.P.P. invited our attention to the statement of accused recorded under Section 313 of Cr.P.C. and submitted that though adverse circumstances were put to the accused in the statement recorded under Section 313, the accused gave evasive answers. It is further submitted that question No.24 was asked in respect of seizure of clothes of accused and he has admitted that his clothes were seized. Learned A.P.P. further submitted that the appellant in his statement recorded under Section 313 of Cr.P.C., has stated that, at the time of incident he was not in the house and he came later on and tried to extinguish the fire, is falsified by the other evidence brought on

record by the prosecution. Learned A.P.P. in support of his contention placed reliance on the reported judgment of the Hon'ble Supreme Court in the case of ***Maniben Danabhai Tulshibai Maheria Vs State of Gujarat, reported in 2007(7) Scale 93.*** Therefore, learned A.P.P. would submit that the appeal is devoid of merits and the same may be dismissed.

12 With the assistance of learned counsel appearing for the appellant and learned A.P.P. for the respondent-State, we have carefully perused the record and proceeding. We have also perused both the dying declarations as well as evidence of witnesses and also spot panchnama, C.A. report and entire evidence brought on record by the prosecution. We find that there is no dispute that the offence in question took place on 14.1.2007 at about 10.00 a.m. in the residential house of accused No.1. It is an admitted position that deceased Alka was wife of accused No.1. It is also admitted position that the clothes were seized from accused immediately. It is also not in dispute that accused persons did not make attempt to take victim to the hospital.

13 The main peace of evidence is in the form of Exh.37 and Exh.54 i.e. two written dying declarations recorded by A.S.I. Auti and Circle Inspector. On careful perusal of Exh.37 it is clear that deceased made categorical statement that accused Nos. 2 and 3 alongwith accused

No.1 entered in the house and caught hold on her and thereafter accused No.1, her husband i.e. appellant herein poured kerosene on her person and set her on fire. In the first dying declaration, the role attributed to the accused Nos. 2 and 3 is only that they first caught hold of her and accused No.1 alone poured kerosene on her person and set her on fire. Another dying declaration was recorded by the Circle Inspector on 14.1.2007 in between 11.15 p.m. to 11.30 p.m. in questions and answers form. The said dying declaration is at Exh.54. In the said dying declaration, it is categorically mentioned that husband of the deceased demanded money for drinking liquor and on refusal, her husband poured kerosene on her person and set her on fire. The first dying declaration as well as second dying declaration has been proved by the prosecution beyond reasonable doubt by leading evidence before the Additional Sessions Judge, Shrirampur. On perusal of evidence of P.W.2 Gangadhar Vishnu Auti and evidence of P.W.10 Sharad Madhavrao Satpute, Medical Officer and also the evidence of P.W.9, it is abundantly clear that Medical Officer has certified on both the dying declarations that deceased Alka was in fit condition to give such dying declarations. Therefore, there is no substance in the contention of the counsel appearing for the appellant that victim Alka was not mentally and physically fit to give the said dying declarations. The contention of the counsel for the appellant that toe impression was taken at the time of recording the first dying

declaration and thumb impression was taken at the time of recording the second dying declaration and therefore, both the dying declarations are not trustworthy, is required to be rejected. The first dying declarations at Exh.37 was recorded by A.S.I. (P.W.2) and it was his understanding that both the hands of the victim are burnt and therefore, she may not be able to give thumb impression and he obtained toe impression on the first dying declaration. On perusal of first dying declaration Exh.37, it appears that toe impression on the said dying declaration is taken. There is nothing to suggest or indicate on record that Doctor who is expert in the subject said that, since both the hands of the victim are burnt she is not able to give thumb impression. In fact, it was understanding of the concerned A.S.I. who recorded the dying declaration that both the hands of the victim are burnt and therefore, she may not be able to give thumb impression and therefore, toe impression was obtained on the dying declaration. In the evidence of Doctor as well as Investigating officer, there is nothing to suggest that defence counsel made endeavour to ask as to why toe impression was obtained on the first dying declaration and thumb impression on the second dying declaration. In the evidence of Medical Officer also there is nothing to suggest that both the hands of the victim were in burnt condition and she was not able to give thumb impression. In fact, the endorsement of Doctor on both the dying declarations clearly show that the victim was in a fit

condition to give dying declarations. Therefore, contention which is raised for the first time before this court is without any basis or without making any attempt by asking the question in that regard either to the Investigating Officer or to the Medical Officer before the trial Court. Therefore, the said contention of the appellant deserves to be rejected. The trial Court has categorically discussed about both the dying declarations and the evidence of A.S.I. who recorded first dying declaration and Circle Officer, who recorded the second dying declaration and also evidence of Medical Officer and recorded the finding that both the dying declarations has been duly proved by the prosecution.

14 On careful perusal of both the written dying declarations, it is abundantly clear that the dying declarations are consistent so far as role attributed to the present appellant is concerned. It is true that there is some variance regarding the role attributed to accused Nos. 2 and 3, however, in both the dying declarations deceased Alka has stated that the husband asked money for drinking liquor and on refusal he poured kerosene on her person and set her on fire. Therefore, the role attributed to the present appellant, who is accused No.1, finds place in both the written dying declarations and also in two oral dying declarations made before the mother (P.W.7) and Rickshaw driver (P.W.6). Therefore, the trial Court has rightly held that both the written

dying declarations are consistent so far as the role attributed to present appellant is concerned. The trial Court has also rightly held that two written dying declarations are corroborated by two oral dying declarations made before the mother of the victim as well as Rickshaw puller P.W.6.

While considering the case based upon the dying declarations the observations of the Hon'ble Supreme Court in the case of ***Khushal Rao Vs. State of Bombay, reported in AIR 1958 SC 22*** can be usefully referred to in the present case. In para 16, the Supreme Court held thus;-

> *"(i) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated, (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made, (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence, (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence, (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which*

depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the realibility of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."

More or less the same principle has been reiterated by the Hon'ble Supreme Court in the case of ***Thurukanni Pompiah and Anr. Vs. State of Mysore, reported in AIR 1965 SC 939***.

15 Coming to the first judgment relied upon by the learned counsel for the appellant in the case of ***Smt. Kamla Vs. State of Punjab, reported in AIR 1993 SC 374,*** it appears that in the said case, four dying declarations were made by deceased revealing glaring inconsistency vis-a-vis naming the culprit. On perusal of the para 4 of the said judgment, it clearly reveals that four different versions were given in the said dying declaration. On careful perusal of para 8 of the said judgment, it is noticed that in the first dying declaration it was

stated that her mother-in-law sprinkled kerosene oil from behind and burnt her. In the next statement she is alleged to have stated that her clothes got burnt catching fire from the stove, thereby indicating that it was an accident. In the third statement, she was rather vague as to who exactly poured kerosene oil and set fire on her and she only stated that it could be possible that her mother-in-law and father-in-law might have set the fire after pouring kerosene oil. In the fourth statement she stated that she turned to the store and she heard her mother-in-law and suddenly they poured kerosene oil and they set her on fire. Therefore, it appears that four dying declarations in that case were totally inconsistent with each other. As a consequence, the Hon'ble Supreme Court held that those are not trustworthy. However, in the present case, in two written dying declarations as well as in two oral dying declarations the victim Alka has categorically stated that husband demanded money for drinking liquor and on refusal he poured kerosene on her person and set her on fire. The role attributed to accused No.1 appellant is consistent in all dying declarations.

It is not in dispute that the appellant is husband of deceased and the said incident took place in the house of the appellant and deceased Alka at 10.00 a.m. On 14.1.2007. The accused himself has claimed that, he tried to extinguish the fire. Therefore, his presence at spot is duly proved. There is nothing to indicate that at the relevant

time deceased Alka was cooking food or anything.

It has come on record that, there is hearth in the premises of the house of the accused and Alka for cooking purposes. Therefore, in all dying declarations, the role attributed to the appellant husband is consistent and therefore, present case stands on different footing than the case cited supra by the counsel appearing for the appellant.

16 The another judgment, which is relied by the counsel for the appellant in the case of ***State of Punjab Vs Gian Kaur and another, reported in AIR 1998 SC 2809***. In that case, there was dowry death. In that case the wife had suffered 100% burn injuries all over body and both the thumbs were burnt. Two doctors were examined in that case. Dr. Aneja had performed post mortem who had categorically stated that there were 100% burn over her body and both the thumbs of victim were burnt. Another Doctor Ajay Sahani was not believed by the High Court. The High court on scrutiny of the evidence of both doctors found that there is inconsistent evidence and in view of said inconsistent evidence, the High Court granted benefit of doubt to the respondent-accused in that case. In the case on hand, doctor is consistent in his evidence and Doctor has stated that while recording first dying declaration as well as second dying declaration, the victim Alka was is conscious and in a fit condition to give such dying

declaration. It is true that toe impression was taken on the first dying declaration and thumb impression was taken on second dying declaration. There is nothing to suggest either in the examination of the prosecution witnesses who recorded those dying declaration or in the evidence of Medical Officer that such discrepancy was tried to be suggested by the defence to the prosecution witnesses and prosecution witnesses have offered their comments. There is nothing to suggest in the evidence of Medical Officer that both the hands of Alka were totally burnt and she was not able to give thumb impression. Merely because toe impression was obtained on first dying declaration by ASI Auti and thumb impression was obtained on the second dying declaration by Circle Inspector cannot nullify the effect of the dying declarations and more particularly in view of the fact that, Medical Officer on both the dying declarations has made endorsement that patient/victim Alka is conscious and in a fit condition to give dying declarations. Therefore, there is no substance in the contention of the counsel for the appellant that the dying declaration are inconsistent and not trustworthy merely because on the first dying declaration toe impression is obtained and on second dying declaration thumb impression is obtained. In fact there is no any inconsistency as suggested by the counsel appearing for the appellant. Therefore, reliance placed by the counsel for the appellant in the case of ***State of***

Punjab Vs Gian Kaur and another, reported in AIR 1998 SC 2809, is fully misplaced in the facts of this case. As stated earlier, in the above mentioned case, doctor who performed post mortem report has categorically stated that patient is 100% burnt and both the hands are totally burnt. There was also opinion given by another Doctor which was inconsistent with the evidence of Doctor, who had prepared the post mortem report. Therefore, in that case the High Court granted benefit of doubt to the respondent-accused therein and the Supreme Court was considering the case against the acquittal.

At this juncture, it would be appropriate to refer important observations of the Hon'ble Supreme Court in the case of ***Laxman Vs. State of Maharashtra, reported in 2002 6 SCC 710***. The judgment in this case is delivered by the five Hon'ble Judges. The Hon'ble Supreme Court in the said case has taken a view that while considering the evidentiary value of dying declaration hyper technical view should not be taken. The relevant portion in para 3 of the said judgment reads thus:

> *" A dying declaration can be oral or in writing and any adequate method of communication whether by words by sign or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When*

it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is provided by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

Therefore, while considering evidentiary value of the dying declaration no hyper technical view can be taken so as to discard the dying declaration. Merely because ASI has obtained toe impression on the first dying declaration and thumb impression is taken on the second dying declaration, would not nullify the effect of the said dying declarations in view of the fact that the medical Officer has made endorsement on both the dying declaration that the victim Alka was in

a fit state of mind to give said dying declarations.

17 Learned counsel for the appellant further invited our attention to the reported judgment of the Hon’ble Supreme Court in the case of ***State of Punjab Vs. Parveen Kumar, reported in AIR 2005 SC 1277.*** On the basis of the para 10 of the said judgment, counsel for the appellant submitted that if there are two dying declarations giving two different versions, serious doubt is created about truthfulness of the dying declarations. Learned counsel therefore, submitted that in the present case also both the dying declarations are not consistent and therefore, benefit of doubt is required to be given to the appellant. We are afraid that the observations of the Hon'ble Supreme Court in that case can be made applicable in the instant case. In the said case, the Hon’ble Supreme Court was dealing with the appeal against acquittal and only dying declaration was piece of evidence, which was brought on record by the prosecution. In the instant case, in two written dying declarations corroborated by two oral dying declarations, deceased Alka had categorically stated that husband demanded money for drinking liquor and on refusal he poured kerosene on her person and set her on fire. Therefore, the overt act attributed in respect of appellant husband is consistent in all dying declarations. In the instant case, written dying declarations are corroborated by two oral dying declarations. The C.A. report clearly suggests that

kerosene smell is found on the clothes of the accused. So therefore, in the instant case there is corroboration to the two dying declarations and therefore, the facts of this case and evidence available stands on different footing than in the case of ***State of Punjab (supra).*** Therefore, reliance placed by the counsel for the appellant on the said judgment is wholly misplaced.

18 The other judgments which are relied upon by the counsel for the appellant are different on the facts and are not applicable to the instant case. In the present case, there is consistency in the statement of deceased Alka in all dying declarations and specific overt act is attributed to the present appellant. Therefore, two written dying declarations are corroborated by two oral dying declarations are consistent in material particulars and over act attributed to the appellant and those are trustworthy qua the case of the appellant. The prosecution has duly proved two written dying declarations and also two oral dying declarations in respect of the present appellant. It is true that P.W.6 in his cross examination has stated that he has not stated before the police about role played by the original accused Nos. 2 and 3 and therefore, the Sessions Court has granted benefit of doubt to the original accused Nos. 2 and 3. It is also true that in two dying declarations overt act attributed to accused Nos. 2 and 3 was not consistent and as a consequence they were acquitted from all

charges. However, being the husband of deceased lady and the fact that the appellant was present at the time of incident in their own house, case of the appellant stands on different footing. It is relevant to mention that there was no attempt on the part of the appellant to take deceased Alka to hospital. The victim Alka had travelled to her mother's house and her mother had taken her to the hospital for treatment. This conduct of the appellant not to take Alka to the hospital cannot be easily brushed aside.

19 We have given due consideration to the submissions of the counsel for the appellant and perused the contents of the dying declarations at Exh.37 and Exh.54. We have also carefully perused the depositions of P.W.6 ad P.W.9, mother of deceased Alka. We have also carefully read the deposition of Investigating Officer, Medical Officer and also Circle Inspector. To satisfy ourselves, we have made endeavour to find out from the evidence on record that whether there is any inconsistency or variance in the statement of deceased Alka about the overt act attributed to the appellant. The careful scrutiny of written dying declarations as well as oral dying declarations and entire evidence brought on record, unequivocally indicates that the appellant-husband of the deceased Alka demanded money for drinking liquor and on refusal he poured kerosene on the person of Alka and set her on fire. The incident in question took place

at 10.00 a.m. in the house of appellant and Alka. It is not in dispute that the appellant, as he claimed to be present there for extinguishing the fire, did not take her to hospital. The spot panchnama Exh.40 was prepared on 15.1.2007. The said panchnama is duly proved by the prosecution through investigating Officer. On the spot, the Investigating officer found burnt Saree, petticoat, blouse, half burnt molten faint yellow Saree. Investigating Officer also seized half burnt yellow cloth pieces etc. Investigating Officer also noticed one currency note of Rs.100 and one currency note of Rs.5/- wrapped in the Saree. All these clothes were having smell of kerosene. All these articles were seized and affixed the labels and were sent to panchnama. The clothes of the appellant were seized. The appellant has admitted the seizure of his shirt and pyjama. The Investigating Officer has seized the clothes which were on the person of the deceased as well as the clothes from the accused persons were sent for C.A.. Exh.78 is the C.A. report which shows that the residues of kerosene on the clothes of accused person. Therefore, the trial court has observed in para 44 that, Had it been a fact that the deceased herself set her on fire by pouring kerosene on her person, then in that case there ought not to be residues of kerosene on the clothes of the accused persons. As it is not the contention of the accused persons that really the deceased herself poured kerosene while they were present in the house, nor it is their contention that at the time of pouring kerosene, some drops of

kerosene fell on their clothes. The trial Court in para 43 has also observed that there is no mention in the spot panchnama on the day of incident at about 10.00 a.m. deceased was preparing meal, in that case there would have been some residues of the meals or the preparations of meal. Such is not the position appearing from spot panchnama.

20 We have carefully perused the report received from Regional Forensic Science Laboratory, State of Maharashtra, Nashik sent to the Police Inspector, Police Station, Shrirampur, District Ahmednagar. Perusal of Exh.9 and 10 would show that partly burnt full pant wrapped in paper marked E-2 and partly burnt white full shirt wrapped in paper marked F-1 belongs to accused were sent to he Forensic Laboratory. The result of analysis as indicated in the said report about Article 9 and 10 shows that on testing, kerosene residues are detected on Articles 9 and 10. Therefore, C.A. report support the case of the prosecution.

21 We have also perused the statement of the appellant recorded under Section 313 of Cr.P.C. and we find that strange answers are given by the appellant. While replying question No.9 about the fact that mother of deceased Alka admitted her in the hospital, the appellant replied that he did not know about the same. When question

was asked to the appellant-accused about the fact that Alka More died due to severe burn injuries, the appellant accused replied that he did not know about the same.

The appellant accused has admitted about seizure of his clothes. Accused appellant has also admitted that the incident took place in his house at 10.00 a.m. On 14.1.2007. All adverse circumstances were put to the accused appellant including about the spot panchnama and seizure of the clothes of deceased and Rs.105/-, earth mixed with stones and simple earth smelling kerosene. However, the appellant has stated that the said panchnama is false. It is not in dispute that accused including the present appellant was arrested on 14.1.2007. the appellant while replying question 28 that, Do you want to say anything more? He replied that "I was in the home of my uncle and I came to know and I came to my house and tried to extinguish the fire".

22 Another contention raised by the counsel for the appellant that the prosecution has not explained the injuries sustained by the appellant is required to be rejected. In fact there is Medical certificate on record about the medical report of the examination of the appellant. In 313 statement also question was put to him about the said injuries. In this regard reliance placed by the counsel for the appellant on the

report judgment of the Supreme court in the case of ***State of U.P. Vs. Madan Mohan (supra)*** is wholly misplaced. The facts of that case are totally different. In the said case the Hon'ble Supreme Court came to the conclusion that the prosecution has tried to suppress the genesis of the incident.

23 Another submission of the learned counsel for the appellant that there are no eye witnesses to the incident and there was no motive and intention and therefore, the appellant should be acquitted, is required to be rejected. The prosecution is convincingly proved the dying declarations and also there is corroborative piece of evidence available in the instant case. Another submission of the counsel for the appellant that other two accused are acquitted and therefore, the appellant is also entitled for acquittal, deserves to be rejected. The Hon'ble Supreme court in the case of ***Maniben w/o Danabhai Tulshibai Maheria Vs. State of Gujarat, reported in AIR 2007 SC 1932***, in para 11 held thus:-

> *"The burn injuries were caused by kerosene as it also evident from the Report of the Forensic Science Laboratory (Exh.73). It may be true that the deceased gave her statement about the cause of her suffering injuries at about 12.45 in the morning before Dr. Ashish, but she gave her statement also before the Magistrate. Admittedly, there is no discrepancy in regard to the involvement of the appellant vis-a-vis her son*

Girishbhai. The only discrepancy which has been pointed out by Mr. Raichura was that in some of her statements, she had not stated the actual overt act played by appellant herein. In these statements, she merely had answered the questions put to her by different persons. When questions are put differently, answers would also appear to be different. On a first glance, it may appear that the detailed description of the offence is missing, but in our opinion the statement of the deceased must be construed reasonably."

Therefore, it follows from the aforesaid judgment, that when questions are put differently the answers would appear to be different. The statement of deceased must be construed reasonably.

If the dying declaration is consistent and specific about role played by the accused then in that case, conviction based upon the said dying declaration can be sustained. In the instant case also dying declarations are consistent and specific about the role played by the appellant accused.

24 The another point which tried to be convinced by the counsel for the appellant, that the second dying declaration was withheld for 53 days by the Circle Inspector and therefore, the said dying declaration cannot be relied upon, is required to be rejected. Merely because the dying declaration is sent belatedly that itself would not wipe out the

effect of the contents of the dying declaration, which is convincingly proved by the prosecution by bringing clinching evidence on record.

Coming to the another contention of the counsel for the appellant that evidence of hostile witnesses cannot be totally ignored, is required to be rejected in the facts of this case. The trial court has discussed in detail about the evidence of defence witness and rejected the same. In our considered opinion, the said evidence is not trustworthy. Another contention of the counsel for the appellant that some of the witnesses are not examined by the prosecution and therefore, the appellant is entitled for acquittal cannot be accepted, as the evidence brought on record by the prosecution is sufficient to convict the accused.

25 Taking over all view of the matter, we find that there are two written dying declarations and two oral dying declarations brought on record by the prosecution. The dying declaration Exh.37 and dying declaration Exh.54 recorded by ASI and Circle Inspector respectively do contain the endorsements of the doctor that deceased Alka was in a fit state of mind to give dying declarations. The prosecution has convincingly proved those dying declarations. The statement of Medical Officer, Investigating Officer, Circle Inspector and evidence of other witnesses before the Court has not shaken in the cross

examination. Evidence of P.W.6 Rickshaw driver clearly shows that deceased Alka made statement to her mother that the appellant demanded money for drinking liquor and on refusal he poured kerosene on the person of deceased and set her on fire. Evidence of mother of deceased Alka is also on record, which clearly mentions that while on the way to the hospital deceased Alka disclosed her about the incident in question. There is other evidence in the nature of spot panchnama, seizure of clothes of the appellant and C.A. report brought on record by the prosecution. The prosecution has proved its case beyond reasonable doubt qua the appellant. The judgment of the Hon'ble supreme Court in the case of ***Maniben w/o Danabhai Tulshibai Maheria Vs. State of Gujarat (supra)*** is clearly applicable in the present case. While appreciating the evidence it is to be borne in mind that if the dying declaration is consistent and specif about role played by accused and if the said dying declaration is proved by leading evidence before the Court, the said dying declaration can be basis for conviction. In the instant case, not only that the dying declarations are consistent about the role played by the appellant but there is also corroboration to the dying declarations.

26 It is also relevant to mention that the appellant being the husband of the deceased lady, did not make any attempt to take her to the hospital.

27 In the facts and circumstances of this case, in our opinion, the trial court has properly appreciated the evidence brought on record. After appreciation of the entire evidence on record and after giving full opportunity to the respective parties, the trial court has convicted the appellant-accused and acquitted remaining two accused persons. We do do not see any infirmity and perversity in the finding recorded by the Sessions Court. Therefore, this appeal is devoid of any merits and same stands dismissed.

(S. S. SHINDE. J.) **(S.B. DESHMUKH, J.)**

rlj/