

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.110 OF 2012

Parmeshwar s/o. Baburao Ghogare,
Age 29 Years, Occu. Labour,
R/o. Tungi [Bk], Taluka AUSA,
District Latur

.. APPELLANT
Accused No.1

VERSUS

The State of Maharashtra,
Through SHO Police Station
AUSA, Taluka AUSA,
District Latur.

.. RESPONDENT

...
Mr. N.P.Patil Jamalpurkar, Advocate for Appellant
Mr. S.A.Ambad, APP for Respondent – State

...
**CORAM : S.S. SHINDE &
N.W.SAMBRE, JJ.**

**RESERVED ON : 16.12.2014
PRONOUNCED ON : 29.01.2015**

JUDGMENT [PER S.S.SHINDE, J.]:-

1. This Appeal is filed by the appellant – original accused No.1, challenging the Judgment and Order dated 20.12.2011 passed by the Additional Sessions Judge, Latur in Sessions Case No.26/2011, thereby convicting the

appellant [original accused No.1] for the offence punishable under Section 302 of Indian Penal Code and sentencing him to under go imprisonment for life and to pay fine of RS.500/- [Rs. Five hundred], in default to suffer rigorous imprisonment for six [6] months.

2. The case of the prosecution, in brief, is as under:

(a) Complainant Kalpana Parmeshwar Ghogare, r/o. Tungi [Bk], Tq. Ausa was the wife of accused No.1. She was married to accused No.1 prior to four years of the incident and has two daughters namely Sneha and Gokuli. Accused No.2 Baburao is her father-in-law, accused No.3 Sakhubai is her mother-in-law and accused No.4 Sunita is her sister-in-law. On 22.12.2010, at about 10.00 p.m., accused No.1 made demand of Rs.40,000/- and ill treated complainant. All accused used to abuse her for not complying with demand of dowry. According to prosecution all the accused with common intention caught hold of her and accused No.1 poured kerosene on her person and set her ablaze with match stick, due to which she sustained

burns all over her body and thereafter her husband i.e. accused No.1 shifted her to the Rural Hospital at Ausa. The doctor gave primary treatment and gave reference letter to Civil Hospital, Latur, where she was admitted subsequently. She made statement to the Police Officer, A.S.I. Ranzunzare, who was on duty in the Hospital at the relevant time, in presence of the Medical Officer. On the basis of said statement, Crime No.109/2010 under Sections 307, 498-A and 504 r.w. Section 34 of Indian Penal Code is registered in Ausa Police Station. During the treatment, Kalpana succumbed to her injuries in Civil Hospital on 25.12.2010. Hence, Section 302 of Indian Penal Code was added and section 307 of Indian Penal Code came to be deleted.

(b) During the course of investigation, the Investigating Officer drew panchnama of spot of offence and seized muddemal articles. He recorded statements of the brother of deceased Kalpana, collected dying declaration recorded by Executive Magistrate and seized the clothes of accused, which according to prosecution they used while committing the offence, under panchanamas as per provisions of Section 27 of the Indian Evidence Act. He

collected postmortem notes, inquest panchanama and other relevant documents and forwarded muddemal property to the Regional Forensic Science Laboratory, Aurangabad. On completion of investigation, sufficient evidence was found against the accused. All the accused came to be charge sheeted.

(c) Charge Exh.7 was read over and explained to the accused to which they pleaded not guilty and claimed to be tried. Their defence was of total denial and false implications. They also raised defence of suicidal burns as accused No.1 sustained loss in business and was addicted to liquor.

(d) On behalf of prosecution, in all seven witnesses have been examined. Vilas Arjun More [PW-1], whose testimony is at Exh.47 is the panch witness about the seizure of clothes of accused, but he turned hostile to the prosecution and did not support prosecution case. The prosecution did not examine the witnesses namely Dr.Bansode, Anil Sagar and Ismail Babu Shaikh. Prosecution examined Balaji Shankar Badage, the brother of

deceased, [PW-2], his testimony is at Exh.50; Sunil Pralhadrao Kulkarni, [PW-3], whose testimony is at Exh.53, is the chairman of the Tantamukti Committee of village Tungi [Bk], before whom the matter was settled between accused No.1 and deceased by her relative; Narayan Ranzunzare [PW-4], A.S.I.is the Police Officer, who was on duty on 23.12.2010, who recorded dying declaration-cum-complaint of Kalpana, in presence of Dr.Avinash Kawale. He proved the complaint Exh.57 and the endorsement by Dr.Kawale Exh.56. He also proved the letter Exh.58, with which he forwarded all the papers to AUSA Police Station. Uttam Babasaheb Pujari [PW-5] is the A.P.I. who carried out investigation in this case and drew panchanama of spot of offence Exh.44 and seized muddemal articles No.9 to 13 under the said panchanama. He also seized the clothes of the accused under the disclosure statements individually made by the accused, which are at Exh.64 to 69 as per provisions of Section 27 of the Evidence Act. He also recorded supplementary statement of deceased Kalpana as per her say, and as she succumbed to injuries on 25.12.2010, he added Section 302 of Indian Penal Code. He also collected inquest panchanama, postmortem notes and

forwarded muddemal property to C.A. Vilas Shivaji Jogdand [PW-6] is the Naib Tahsildar i.e. Executive Magistrate, whose testimony is at Exh.72. He recorded dying declaration of deceased Kalpana as per her say, which is at Exh.73. Dr.Avinash Kawale [P.W.7] is the Medical Officer, who examined the deceased Kalpana on 23.12.2010 and made endorsement on her dying declaration recorded by A.S.I. Ranzunzare [PW-4] and Vilas Jogdand [PW-6]. The compilation of Police case papers is at Exh.77 and the C.A. Reports are at Exh.79 to 84. This is the evidence on behalf of the prosecution. Accused did not adduce any evidence in defence.

3. The learned counsel appearing for the appellant submits that, the Sessions Judge has committed error in convicting the appellant solely on the ground of evidence of dying declaration, when there is no other evidence on record. It is submitted that, the case based upon two dying declarations, alleged to have been recorded by the Police Officer and another one by Executive Magistrate. The theory narrated in these two dying declarations on different dates are contrary to each other and therefore, the Additional

Sessions Judge acquitted accused nos. 2 to 4, but at the same time, these dying declarations are accepted while recording conviction of accused no.1. It is further submitted that, in the present case recording of alleged two dying declarations appear to be suspicious because there is no mention about recording of these two dying declarations, in the case papers maintained by the Medical Officer who treated deceased Kalpana.

4. The learned counsel appearing for the appellant further submitted that, it should have been seen that, in the matter where prosecution relies solely on Dying Declaration to establish involvement of accused persons in the alleged incidence, it is necessary for the prosecution to establish that the Dying Declaration reveal true state of affair in relation to the cause of death. It is submitted that, it should have been seen that, the prosecution has failed to prove ill-treatment by accused no.1 to his wife and therefore, rightly acquitted him. It is submitted that, the prosecution has also failed to prove motive for commission of offence by accused no.1. In such situation, the statement made by deceased in two dying declarations should have been appreciated with

great caution while coming to the conclusion of guilt of accused no.1. It is further submitted that, it should have been seen that, the important circumstances came on record that, the accused no.1 himself has admitted his deceased wife Kalpana in Primary Health Center, AUSA and thereafter in Civil Hospital, Latur. From this conduct of the accused no.1 possibility of committing suicide by the deceased cannot be ruled out in absence of direct evidence on record against the accused no.1.

5. It is further submitted that, the Medical Officer – Dr. Avinash Shahajirao Kawale in cross examination has stated that, Kalpana is having deep burns. Medical Officer i.e. PW-7 in his cross examination admitted that, superficial deep burns are painful. In superficial burns the skins peels off after becoming black due to painkiller and sedatives, patient become drowsy. At 4 a.m. On 23.12.2000, 30 milligram of sedative, forthwith, in divided doses was administered to the patient and it is sedative, which controls brain functions. The learned counsel further submitted that, if the evidence of the Medical Officer is perused carefully it can safely be stated that, Kalpana was

not in a fit state of mind to give dying declaration. It is submitted that, in view of the evidence of the Medical Officer, it was impossible to take impression of toe of left leg of Kalpana. The learned counsel in support of aforestated contention placed reliance in the case of **Surinder Kumar Vs. State of Haryana**¹ and in particular para 13 thereof. The learned counsel also placed reliance in the case of **Chacko Vs. State of Kerala**² and submits that, the benefit of doubt deserves to be given to the appellant. He further submits that, on minute scrutiny of the timings of recording two dying declarations, the time is overlapping, and therefore, it creates serious doubt in the mind about actual recording of two dying declarations of the deceased Kalpana. Therefore, relying upon the grounds taken in the appeal memo and Notes of evidence, the learned counsel for the appellant submits that, the Appeal deserves to be allowed.

6. On the other hand, the learned Additional Public Prosecutor relying upon the evidence of the prosecution witnesses and in particular the evidence of

1. 2011 (10) SCC 173

2. 2003 (4) Supreme 262

PW-2 and PW-3, two Dying Declarations, the evidence of Investigating Officer, Executive Magistrate and the Medical Officer submits that, two Dying Declarations at Exhibit – 57 and 73 are proved by the prosecution beyond reasonable doubt submits that, the trial Court has rightly convicted the appellant and hence this Court may not interfere in the impugned judgment and order.

7. We have given careful consideration to the rival submissions advanced by the learned counsel appearing for the parties. With their able assistance, perused the entire evidence. It appears that, the trial Court framed the charge against four accused persons under Section 498A r/w section 34 of I.P. Code and also under Section 302 r/w section 34 of I.P. Code. The trial court after considering the entire evidence brought on record by the prosecution and defence taken by the accused gave benefit of doubt to accused nos. 2 to 4, however, convicted accused no.1 i.e. husband of victim Kalpana.

PW-2 Balaji Shankar Badge is the brother of Kalpana. His evidence is recorded by the trial Court at

Exhibit – 50. In his evidence before the Court he stated that, deceased Kalpana was his sister. She married to accused no.1 Parmeshwar about 5 years prior to the incident. She was residing jointly with accused nos. 1 to 4 after marriage. She was treated properly for about one year and thereafter accused started illtreating her on the count that, she could not conceive child. His sister Kalpana used to tell him about illtreatment on phone as well as personally, whenever they used to meet on the occasion of festivals. They convinced Kalpana that, they will ask accused to treat her properly. This witness stated that, thereafter his sister delivered two daughters. Thereafter accused started illtreating her on the count as to why she has not given birth to a son. Thereafter accused no.1 used to demand money under influence of liquor. At the time of festival of Nag Panchami of the year 2010, accused drove away his sister to bring money. His sister stayed at their house up to festival of Mahalaxmi. Accused no.1 and his friend Pappu Jadhav came to their house. Accused no.1 stated that he will stop gambling and will seriously do business. He demanded Rs. 20,000/- and a vehicle for conducting business. The father of this witness provided him Rs. 20,000/- and Luna Moped. Thereafter,

accused no.1 took with him his sister. This witness further stated that, his sister was treated properly for about 3 to 4 months. Thereafter accused No.1 asked her to bring Rs.40,000/- from maternal house of Kalpana and used to beat her under influence of liquor. At the time of festival of Diwali when his sister came to their house, she told him that, accused were asking her to sign the sale deed in respect of their field or bring Rs.40,000/- from maternal house. After Diwali when his sister returned to home, accused Nos. 1 to 4 started saying that as she has not signed sale deed, they will not allow her to live happy life and make her life miserable. If so required they will spend entire amount, which they may get by selling the land. This fact was disclosed to him on telephone by his sister.

He further stated that, he and his parents went to village Tungi and reported about ill-treatment to the Chairman of Tanta Mukti Samitee of the village. He called all the concerned persons and asked them not to ill-treat his sister. Accused Nos. 1 to 4 agreed before the Sarpanch and Chairman of Tanta Mukti Samittee that they will not illtreat her sister. His sister stayed with the accused and

they came back to their village.

He further stated that, on 22.12.2010 they were at their home. At about 10 p.m. he received phone call of Sarpanch of village Tungi, that his sister has been burnt and she was taken to the Hospital at Ausa. They immediately hired a vehicle and came to Ausa. They came to know that his sister has been referred to Civil Hospital, Latur, hence, they came to Latur. They saw his sister Kalpana and she was completely burnt. When they asked her as to how this has happened, she told that accused No.1 to 4 poured kerosene on her person and accused No.1 set her ablaze as she refused to sign sale deed and bring Rs.40,000/- from maternal house. His sister succumbed to her injuries on 25.12.2010. He identified accused No.1 to 4 who were present present before the Court.

8. PW -2 stated in his cross-examination that, accused no.1 was doing business of clothes. He used to operate from his house, and he used to sell clothes in weekly Bazars of nearby villages. Since last one year, prior to the incident in question, accused no.1 was residing

separately from his parents, in the house of one Mr. Jadhav on rental basis. Accused no.1 used to keep some of clothes for business purpose at his house and some at the house of his parents.

It appears that, on the basis of evidence led by the accused in their defence that, they are living separately and also the admission of PW-2 that, the accused no.1 started residing separately from his parents in the house of one Jadhav on rental basis since prior to one year of the incident, the trial Court gave benefit of doubt to other accused on the ground that, they were residing separately in the house which is at a distance of 500 meters from the house of accused no.1.

9. PW-2 in his cross-examination reiterated his version in examination-in-chief that, they gave money as well as Luna Moped for business to accused no.1, as he assured them that, he will stop consuming liquor. He has specifically denied the suggestion that, accused no.1 has repaid amount of Rs.4000/- to 4500/-. He has further stated that, accused no.1 always use to consume liquor and

used to illtreat his sister. In his cross-examination he denied the suggestion that, Kalpana committed suicide. In his cross-examination, he specifically denied the suggestion that, he is deposing falsely that, his sister told him that, accused poured kerosene on her person and accused no.1 set her ablaze.

10. The evidence of PW-2 unequivocally indicates that, there was demand of money by accused no.1 and inspite of giving him Rs. 4.5 thousand and Luna, he was not satisfied and he was again demanding Rs. 40,000/- and as a result, on the fateful night of incident, the appellant poured kerosene on Kalpana and set her ablaze.

11. The prosecution examined PW-3 – Sunil Pralhadrao Kulkarni. At the relevant time, he was working as President of Tantamukti Samittee of village Tungi (Bk). In his evidence he has stated that, he knew all the accused as they belonged to his village. The name of wife of accused no.1 Parmeshwar was Kalpana. Since last 4 years he is working as President of Tantamukti Samittee of village

Tungi (Bk). The parents of Kalpana had been to him to complain against accused no.1 stating that, accused no.1 used to raise quarrel with their daughter under influence of liquor. He called Parmeshwar and asked him to behave properly. He started behaving properly with the deceased and did so for 4 to 5 months, subsequently he resumed his previous behaviour of raising quarrel under influence of liquor. Parmeshwar and his wife used to reside separately prior to the incident, at his behest. Thereafter he has not received any complaint in respect of accused No.1 Parmeshwar. He further stated that, on the date of incident, accused no.2 came to him at about 10 to 11 p.m. and told accused no.2 that, wife of accused no.1 sustained burn injuries. Thereafter, he engaged *Tum-Tum* i.e. rickshaw, and sent the injured to the hospital along with the accused.

In his cross-examination, he reiterated his version in chief that, there was dispute between the accused no.1 and deceased Kalpana on account of addiction of Parmeshwar to liquor. He further admitted that, the distance between the house of accused no.1 and house of accused no.2 is about 500 meter. On the date of the

incident, accused no.2 had been to him for asking him to request the rickshaw driver to carry his daughter-in-law Kalpana in the rickshaw to the hospital.

12. If the evidence of PW-2 and PW-3 is read in its entirety, it unequivocally indicates that, there was dispute between accused no.1 and Kalpana. There was continuous harassment at the hands of the accused no.1 on account of demand of money. In spite of the fact that, PW-2's family gave him an amount of Rs. 4.5 thousand and also Luna. PW-2 has stated in his evidence that, Kalpana told him that, soon before the incident accused no.1 was demanding Rs.40,000/-. Therefore, there was motive for commission of offence.

13. There are two Dying Declarations of Kalpana which are at Exhibit – 57 and Exhibit – 73 is recorded by the Executive Magistrate. Dying Declaration at Exhibit – 57 is recorded by PW-4 Narayan Bhujangrao Ranzunzare, working as A.S.I. Gandhi Chowk, Police Station, Latur at the relevant time. The said dying declaration was recorded on 23rd December, 2010 at about 5 a.m. Deceased Kalpana

in her dying declaration at Exhibit 57 stated that, she is in government hospital, Latur in Burns Ward for treatment. She is resident of Tungi (Bk), Tq. Ausa. Her marriage was solemnized four years back. Her parents place is Ambulga (Shilwant) Bk. Tq. Nilanga. Her husband's name is Parmeshwar. She has two daughters namely Sneha and Gokuli. Name of her mother-in-law is Sakhubai Ghogare and name of father-in-law Babu Ghogare. The husband is doing labour work for maintenance of the family.

14. On 22.12.2010 at about 10 p.m. in maternal house, the husband Parmeshwar asked Kalpana to bring Rs. 40,000/- from her parents and on account of that, there was harassment and illtreatment by husband Parmeshwar Ghogare, mother-in-law Sakhubai Ghogare, father-in-law – Babu Ghogare and sister-in-law Sunita Babu Ghogare. They abused Kalpana. Accused nos. 2 to 4 caught hold of Kalpana and accused no.1 poured kerosene on her person and set her ablaze so as to kill her. Nobody tried to extinguish the fire and due to burns, the hair of head, face, neck, both hands, chest, ribs, stomach, thigh, back and leg turned blackish - radish and skin was peeled off. She

sustained burn injuries all over the body. It is further stated in Dying Declaration that, her husband Parmeshwar took her to Government Hospital, Ausa by private Tumtum vehicle (Rickshaw) for treatment. She was treated there primarily and was taken to Civil Hospital at Latur by Ambulance. She has complained against husband, mother-in-law, father-in-law and sister-in-law. Her statement was read over to her, which she admitted that, said was as per her narration. On the said dying declaration, impression of toe of left leg of Kalpana was affixed. Upon careful perusal of the said dying declaration, there is endorsement of Medical Officer that, patient was fully conscious, oriented to time, place, person and her statement can be recorded. There is another endorsement by the Medical Officer that, statement is recorded in presence of him in between 5.00 to 5.30 a.m. Patient was conscious, oriented to time, place, person. The said endorsement is of Medical Officer. There is also signature of PW-4 - Narayan Bhujangrao Ranzunzare, who has recorded the said dying declaration. It appears that, on the basis of the said dying declaration, the First Information Report was recorded. It appears that, the said dying declaration was recorded between 5 to 5.30 a.m.

15. There is another dying declaration at Exhibit – 73 recorded by the Executive Magistrate, Latur. The said dying declaration was recorded in between 5.45 to 6.00 a.m. It appears that, in order to ascertain consciousness of Kalpana to give dying declaration, certain questions have been asked by the Executive Magistrate to her. The Executive Magistrate did ask name, age, place of residence, when Kalpana got married and also the name of the husband, business/profession of the husband, further how many children and when the incident had taken place and why she is brought to the hospital. All these questions have been properly answered by Kalpana. She stated her full name, age, place of residence, when marriage had taken place and before how many years and also the name of husband, his profession, how many children are there and when the incident had taken place, and why she is brought in the hospital. Therefore, it appears that, the Executive Magistrate has independently ascertained that Kalpana was in fit condition of mind to give dying declaration.

In her dying declaration, Kalpana stated that,

when the question was asked by the Executive Magistrate to her as to how the incident had happened, she replied that, on 22.12.2010 at 10 p.m. her husband asked her to bring Rs. 40,000/- for his business from her parents and he ill-treated her. Mother-in-law Sakhubai Ghogare, father-in-law Babu Ghogare, sister-in-law Sunita Ghogare, all resident of Tungi, Tq. Ausa collectively assaulted her. Her husband poured kerosene on her person and set her ablaze with an intention to kill her. Nobody tried to extinguish her. The husband, mother-in-law, father-in-law and sister-in-law are responsible for the said incident. Since she has not brought the amount, as demanded, she was set on fire. In reply to question no.11 that, whether any quarrel had taken place earlier, it was told that, quarrel had taken place with husband, father-in-law, mother-in-law and sister-in-law. She further stated that, all these accused were present at the time of incident. She identified all the accused. She gave description of the accused. She further stated that, husband brought her to the hospital. She further stated that, her mother, father, brother and cousin came to meet her in the hospital. While replying to the query as to whether they have stated anything to her, she replied nothing. She replied

to the questions 18 and 19 that, she studied upto 12th standard and she can sign. She further stated that, the husband, father-in-law, mother-in-law and sister-in-law are responsible for the incident and appropriate action may be taken against them.

16. Narayan Bhujangrao Ranzunzare was examined as PW-4, who recorded Dying Declaration at Exhibit – 57. In his examination-in-chief he stated that, since last two years he was attached to Gandhi Chowk Police Station. He was on duty at Civil Hospital Chowki, Latur on 22.12.2010 from 9.00 a.m. till 10.00 a.m. on next day i.e. 23.12.2010. On 23.12.2010 at about 3.30 a.m. a lady named Kalpana Parmeshwar Ghogare, who sustained 100% burn injuries was admitted to Civil Hospital, Latur. The PSO of AUSA Police Station instructed him on phone to record dying declaration of Kalpana Parmeshwar Ghogare. He recorded dying declaration of Kalpana Parmeshwar Ghogare in between 5.00 to 5.30 a.m.in presence of Dr. Avinash Kawale. At about 4.30 a.m. He gave letter to the Executive Magistrate to record dying declaration of Kalpana. He identified the office copy of said letter and his signatures on

it. He further stated that, the said office copy bears acknowledgment from the Executive Magistrate, Shri Jogdand. He identified his signature. Thereafter, he gave letter to Dr.Avinash Kawale to certify the mental condition of patient Kalpana. Dr.Kawale certified that patient was in fit state of condition to make valid statement. The said endorsement was made by Dr. Kawale in his handwriting in his presence, which bears the signature of Dr.Kawale. The said endorsement is at Exh.56. He recorded the statement of Kalpana in between 5.00 a.m. to 5.30 a.m. as per her say. Kalpana stated before him that she was asked by accused No.1 to bring Rs.40,000/- for his business from her parents. She also stated before him that accused Nos.2 to 4 held her, and accused No.1 Parmeshwar poured kerosene on her person and set her ablaze. He scribed said declaration as per her say, and got affixed impression of toe of left leg of Kalpana to the Dying declaration. He recorded her statement as per her narration and Kalpana stated that, the contents of the dying declaration are as per her narration. He further deposed that, he drew inquest panchanama at Exhibit – 45.

17. In his cross-examination nothing useful to the

defence has been brought on record so as to discard his version in examination-in-chief. On the contrary, suggestion given by the defence that, he is deposing falsely that Kalpana stated before him that, accused no.1 asked her to bring Rs. 40,000/- from her parents for his business, has been denied by him.

Upon perusal of the copy of the original dying declaration, it appears that, there is endorsement of the Medical Officer and also same is signed by the Executive Magistrate. There is also impression of toe of left leg of Kalpana.

18. Executive Magistrate, Latur is examined as PW-6. In his examination-in-chief, he stated that, since 7th August, 2009 he was working as Naib Tahsildar at Latur, The powers of Executive Magistrate are conferred upon him. He further stated that, on 23.12.2010 a Police Constable came to his residence at about 4.15 a.m. from Civil Hospital, Latur. He reported him that a lady named Kalpana Parmeshwar Ghogare has been admitted to Civil hospital with 98% burns, and her dying declaration is to be

recorded urgently. He handed over him requisition letter Exh.55, which bears his signature. He further stated that, he reached Civil Hospital, Latur at about 5.15 a.m. and went to Burns Ward. He introduced himself to Dr.Kawale, who was on duty at that time in burns ward. He has also shown him letter Exh.55 and told him that, he has to record dying declaration of Kalpana Parmeshwar Ghogare. The doctor accompanied him to the patient Kalpana and examined her and made endorsement that she is in fit position to make statement, at the top of Exh.73. Therefore, he introduced himself to the patient and recorded her statement as per her say. After preliminary inquiry, she told him that, on 22.12.2010 in the night at about 10.00 p.m. she had quarrel with her husband Parmeshwar. Her husband was asking her to bring Rs.40,000/- from her maternal house for the business. This witness further stated that, she further told that accused No.1 to 4 beat her as she has not brought Rs.40,000/- from her maternal home. She further told that husband Parmeshwar took kerosene can from the room, poured kerosene on her person, and set her ablaze. Accused Nos.2 to 4 remained spectators. She also told that this incident took place only

on account of non fulfillment of demand of amount of Rs.40,000/-. He identified Exh 73 i.e., the D.D. recorded by him on 23.12.2010. He also identified his signature as well as signatures of Dr. Kawale on dying declaration. He also took impression of toe of left leg of Kalpana on the said statement. He further stated that, the statement was read over to Kalpana and she stated that, the same is recorded as per her narration. Thereafter, this witness has put his signature after obtaining her impression of toe of left leg. The doctor again examined her and made endorsement below the statement. The said dying declaration is at Exh. 73. He sealed the said dying declaration in a packet and handed over it to the police.

19. In his cross-examination nothing useful to the rescue of defence has been brought on record. On the contrary, suggestion given by defence to him that, he is deposing falsely that, Kalpana deposed before him that, accused no.1 put kerosene on her person and set her ablaze and other accused remained mute spectators, has been denied by him. It appears from his evidence that, he introduced himself to the patient and made preliminary

enquiry to her so as to ascertain her mental fitness to give dying declaration.

20. Dr. Avinash Shahajirao Kawale was examined as PW-7. His evidence is at Exhibit – 74. In his examination-in-chief, he has stated that, since one and half years, he was working as Medical Officer at Civil Hospital, Latur. He stated that, on 22.12.2010 he was assigned duty in the night in between 22.12.2010 and 23.12.2010 in Surgical Ward. A patient named Kalpana Parmeshwar Ghogare was admitted in burns ward. He was in the burns ward from 4 a.m. of 23.12.2010. At about 5 a.m. Police Head Constable Ranzunzare approached him, and told him that he has to record statement of patient Kalpana Parmeshwar Ghogare. He examined the patient Kalpana. He certified that patient is conscious oriented and is in a position to make statement. Accordingly, he made endorsement at the margin of the paper. He identified the handwriting on the said document on which endorsement was made and stated that the contents of the same are true. The endorsement is at Exh.56. He was present throughout the recording of the statement of Kalpana Ghogare. After recording the

statement, he made endorsement that during the course of recording of statement the patient was fully conscious and oriented, and signed the endorsement. He made the endorsement after examining the patient. He identified the signature and stated that, the contents are true. The same is at Exh.59. He further stated that, on going through the record, it seems that the Exh.59 is in respect of registration and the present witness signed only endorsement i.e. Exh.56.

This witness stated that, at about 5.45 a.m. Tahsildar approached him. He also told him that he has to record statement of Kalpana Parmeshwar Ghogare. He examined the patient and signed the endorsement at the top of Exh.73. He identified his signature and stated that, the contents are true. It is at Exh.75. He further stated that, the Tahsildar recorded the statement of Kalpana Ghogare in his presence. After recording the statement, at about 6 a.m. he again examined Kalpana Ghogare, the patient was oriented and conscious as well as in a position to make the statement. He signed the endorsement below the Dying declaration.

21. It is true that, in his cross examination PW-7

stated that, superficial deep burns are painful and in superficial burns the skin peels off after becoming black. Due to pain killer and sedatives, patient become drowsy. At 4.00 a.m. on 23.12.2010 30 mg. fortwin in divided doses of sedative was administered to the patient, which controls brain functions. Though aforestated version is appearing in the cross examination of PW-7, he denied the suggestion that, he is deposing falsely that, he made endorsement in the margin that patient is conscious, oriented and is in a position to make statement. On the contrary in his cross examination he has reiterated his statement in examination in chief that, Kalpana was conscious, oriented and in a position to give statement. Therefore, suggestion given to this witness that, Kalpana was not in position to give statement on 23.12.2010 due to 100% burns and administration of sedatives, has been denied by this witness. He has denied that, the endorsement made on both dying declarations are made by him in his Chamber. Therefore, both dying declarations have been proved by the prosecution through PW-4, PW-6 and PW-7. Upon perusal of both the dying declarations, they appear to be in conformity with the procedure. The contention of the

learned counsel appearing for the appellant that, the time of recording dying declaration is overlapping cannot be accepted upon perusal of the dying declarations at Exhibit – 57 and Exhibit – 73. On Exhibit – 57 time of recording dying declaration by Police Officer is between 5 to 5.30 a.m. and on Exhibit – 73 time of recording dying declaration by Executive Magistrate is in between 5.45 a.m. to 6 a.m. Therefore, there is no question of overlapping of timing of recording dying declarations.

The learned counsel appearing for the appellant has placed reliance in the case of **Chacko (supra)** to contend that, if there are 80% superficial burns in that case, it is not possible for patient to give dying declaration. If the facts in the case of Chacko are minutely perused, it appears that, in the facts of that case, there was only dying declaration and on that basis conviction was given by the trial Court, which was confirmed by the High Court. In the facts of that case, Supreme Court held that, since the deceased was 78 years with 80% burns and Medical certificate appeared to have been given after recording dying declaration, not reflecting in inquest report as to who

caused murder, and therefore, the benefit of doubt was given to the accused therein. As it appears that, conviction was based on said dying declaration alone and there was no other evidence on record to sustain the conviction. In the case of **Surinder Kumar (supra)**, the Supreme Court was considered the appeal against acquittal. In that case also the basis of conviction was sole dying declaration. There were infirmities and contradictions as to the occurrence, failure on the part of the Executive Magistrate in obtaining certificate as to whether Kamlesh Rani had made a voluntary statement and not attested by any doctor and also his statement which is contradictory to that of the deceased Kamlesh Rani and of the fact that, at the relevant time, she was under the influence of fortwin and pethidine injections and was not supposed to be having normal alertness, as rightly observed by the trial Court in the facts of that case. Therefore, the Supreme Court confirmed the order of acquittal by the trial Court.

22. In the present case, dying declaration at Exhibit – 57 and Exhibit – 73 have been convincingly proved by the prosecution through PW-4, PW-6, PW-7. Apart from two

dying declarations, there was oral dying declaration given to PW-2. In the facts of the present case, the prosecution has led sufficient and satisfactory evidence to prove the motive. PW-3 who was working as the President of Tantamukti Samittee was examined. Therefore, in the facts of the present case, the dying declarations have been proved by the prosecution by leading satisfactory evidence. Apart from said dying declarations, the other attending/surrounding circumstances, coupled with dying declarations establishes the guilt of the accused no.1. While considering the case based upon dying declarations, the Supreme Court in the case of **Khushal Rao V/s State of Maharashtra**³ in paras 16 and 17 held thus :-

“16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) 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

3.AIR 1958 SC 22

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 reliability 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.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the, death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the -necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case.”

23. The Constitution Bench of the Supreme Court in the case of **Laxman V/s State of Maharashtra**⁴ in para nos. 3 and 5 held thus :-

“3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is

4. 2002 Cri.L.J. 4095

silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs 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 is 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 proved 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.

5. The court also in the aforesaid case relied upon the decision of this court in ***Harjeet Kaur v. State of Punjab : 1999 (6) SCC 545*** case wherein the magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this court in ***Paparambaka Rosamma and Ors. v. State of Andhra Pradesh 1999 (7) SCC 695*** to the effect that "...in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind where-after he recorded the dying declaration. Therefore, the judgment of this court in ***Paparambaka Rosamma and Ors. v. State of Andhra Pradesh 1999 (7) SCC 695*** must be held to be not correctly decided and we affirm the law laid down by this court in ***Koli Chunilal Savji and Anr. v. State of Gujarat, 1999 (6) SCC 545*** case."

24. If the evidence brought on record by the prosecution is considered in the light of paras 16 and 17 in the case of Kushal Rao (Supra), the dying declarations are trustworthy and inspired confidence in the prosecution theory and also there is corroboration to the version in the said dying declarations. Not only that, the Police Officer

recorded dying declaration at Exhibit – 57, but the Executive Magistrate has also recorded the dying declaration at Exhibit- 73, which would stand on higher footing than the dying declaration which depends upon oral testimony, which may suffer from all the human memory and human character. If the over all evidence is considered, the prosecution has proved beyond reasonable doubt both the dying declarations with attending circumstances.

25. In the case of **Laxman (supra)**, the Supreme Court held that, the dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. Therefore, the contention of the learned counsel appearing for the appellant that, no impression of toe of left leg of Kalpana would have been taken on the dying declaration loses its importance. As already observed, there is oral dying declaration with PW-2 by Kalpana. Apart from that, on both dying declarations, there is endorsement by the Medical Officer that, Kalpana was conscious and oriented to give statement.

26. Incident had taken place at 10 p.m. in the matrimonial house. Presence of accused no.1 has been convincingly established by the prosecution. It does not appear from the defence taken by the accused no.1 that, there is any suggestion of commission of suicide by Kalpana. Since incident had occurred at 10 p.m. in the house of accused i.e. matrimonial house, he was expected to offer some explanation under which circumstances Kalpana died. However, silence of accused no.1 speaks volumes regarding the same. There is no attempt on the part of the accused no.1 of his extinguishing the fire, and that fact also further strengthen the case of the prosecution.

27. The learned counsel appearing for the appellant argued that, since accused nos. 2 to 4 are acquitted, there cannot be conviction of accused no.1 on the basis of the dying declarations. According to the learned counsel appearing for the appellant, even role attributed to the accused nos. 2 to 4 is similar like accused no.1, and if they are acquitted, the benefit of doubt also deserves to be extended to appellant as well. In this regard, it appears from

the evidence brought on record by the prosecution that, accused no.1 was separately residing since one year back from other accused. Their houses were 500 meters away from the place of residence of accused no.1. Therefore, the trial Court considering the said aspects have granted benefit of doubt to the accused nos. 2 to 4. However, so far as accused no.1 is concerned, the prosecution through PW-2 and PW-3 have convincingly established that, there was harassment and illtreatment at the hands of the accused no.1 by demanding the money for purchasing the vehicle and for business purpose, inspite of the fact that, an amount of Rs. 4.5 thousand and Luna was given to accused no.1 by father of deceased Kalpana.

28. Upon reading the evidence of PW-2 and PW-3 led by the prosecution in the light of the contents of two dying declarations, there is no manner of doubt that, prosecution has proved the accusation beyond reasonable doubt, that, there was illtreatment and harassment to Kalpana with a view to force her to meet unlawful demand by the accused no.1 and on account of failure of Kalpana to bring Rs. 40,000/-, as demanded by accused no.1, on

22.12.2010 at 10 p.m., accused no.1 poured kerosene and set her ablaze.

29. It is true that, the Trial Court acquitted all the accused for the offence punishable under section 498A of I.P. Code, nevertheless so far accused no.1 is concerned, the prosecution through PW-2 and PW-3 has convincingly proved motive for commission of offence. Therefore, if the evidence on record is considered in its entirety, in our considered view, the findings of guilt of accused no.1 Parmeshwar S/o Baburao Ghogre recorded by the trial Court appear to be in consonance with the evidence on record. Therefore, we confirm the findings recorded by the Trial Court and uphold the conviction of accused no.1. As such there is no merit in this Appeal, the Appeal stands dismissed.

Sd/-

[N.W.SAMBRE, J.]

Sd/-

[S.S. SHINDE, J.]

sga/-