IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 111 OF 2014

1. Sunil S/o Bapurao Kadam
   Age : 28 years, Occ : Agriculture,

2. Sandip Bapurao Kadam
   Age ; 25 years, Occ : Student,

3. Bapurao Ganpatrao Kadam
   Age : 56 years, Occ : Agriculture

4. Shobhabai W/o Bapurao Kadam
   Age : 50 years, Occ : Household,

   All R/o Sirpur, Tq. Palam,
   Dist. Parbhani.

5. Savita Santukrao Deshmukh
   Age : 26 years, Occ : Nil,
   R/o Chimangaon now at Parbhani.

..APPELLANTS

-VERSUS-

The State of Maharashtra
Through Police Station Officer,
Police Station, Palam,
Tq. Palam, Dist. Parbhani

..RESPONDENT

...

Advocate for Appellants : Mr. Rajendra Deshmukh
Advocate for Respondent/State : Mr. B.L. Dhas

...

CORAM : S.S. SHINDE &
A.I.S. CHEEMA, JJ.

RESERVED ON : August 13, 2015
PRONOUNCED ON : September 21st,2015

JUDGMENT (PER S.S. SHINDE,J):-

This appeal is filed by the appellants-original accused, who are convicted for the offence punishable under Sections 498-A r/w 34, 302 r/w 34 of I.P. Code.

2. The brief facts of the prosecution case, are as under :-

(i) Marriage of Kanopatra (now deceased) was performed with accused no.1 on 11th May, 2006. The father of deceased Kanopatra was residing at village Takali Kumbhakarna, Tq. Parbhani. He was serving in Irrigation Department at Parbhani. After marriage, she resided with accused persons at village Sirpur, Tq. Palam. At the time of marriage, a dowry of Rs.2,00,000/- was given. Initially, the accused persons treated her properly. Thereafter, accused persons subjected deceased Kanopatra to cruelty for their

demand of Rs. 1,00,000/- for digging the well in their field. Accused no.3 Bapurao, the father of accused no.1 was in government employment. Accused no.5 Savita was residing with her husband at Parbhani. Deceased Kanopatra had informed her parents and relatives about physical and mental harassment from the accused persons for their demand of Rs. 1,00,000/-. Accordingly, father of deceased Kanopatra had given understanding to the accused persons.

(ii) Govind Deshmukh, father of deceased Kanopatra had brought her to village Takali Kumbhakarna, for Diwali festival of the year 2008. After about 10-15 days, Baban Deshmukh, the cousin brother of Govind reached her to the house of accused at Sirpur, Tq. Palam on 8th November, 2008. Accused nos. 1 and 2 had beaten deceased Kanopatra for not fulfilling the demand of Rs. 1,00,000/-. Accused no.5 Savita was also present at village Sirpur.

(iii) On 9th November, 2008 at about 8.00 a.m., while deceased Kanopatra was washing her face, the accused nos. 1 and 2 poured kerosene from two cans on her person. Accused no.5 Savita caught hold her and accused no.4 set her on fire by means of burning stick. Deceased Kanopatra, while burning came out of house. The neighbours and accused nos. 1 and 2 extinguished the fire. Initially, she was brought to sub-district hospital Gangakhed. Thereafter, she was shifted to Adhar hospital Nanded, for treatment.

(iv) Adhar hospital, Nanded, issued M.L.C., informing the admission of burn case to Shivaji Nagar Police Station, Nanded. Upon which, PSI Phule, visited the hospital and recorded statement of deceased Kanopatra in presence of the doctor. A requisition was also issued to the Special Judicial Magistrate Shri Zungare, for recording statement of deceased Kanopatra. He visited Adhar hospital, Nanded, and recorded statement of deceased Kanopatra. PSI Phule,

produced the statement of deceased Kanopatra at Police Station Shivaji Nagar, Nanded. On the basis of her statement, offence vide CR No. 0/2008 was registered, for the offences punishable under Sections 498-A, 307, 323, 504 and 506 of I.P. Code. The MLC issued by Adhar hospital, Nanded and the statement of deceased Kanopatra recorded by PSI Phule, were sent to police station, Palam, as alleged offences took place within its jurisdiction. Accordingly, offence vide C.R. No. 97/2008 for the above said alleged offences has been registered at Police Station Palam on 9th November, 2008 and API Kundankumar Waghmare conducted further investigation.

(v) API Kundankumar Waghmare, visited the house of accused at village Sirpur and conducted panchanama of place of incident. He had collected two plastic cans, burn pieces of saree and blouse, which deceased Kanopatra was wearing. He also collected earth mixed with kerosene and normal earth from the

place of incident. He arrested accused nos. 3 and 4 on 10th November, 2008. He arrested the accused no.1 on 11th November, 2008 and accused nos. 2 and 5 on 14th December, 2008. He sent the muddemal articles to C.A. Aurangabad, for chemical analysis.

(vi) While undergoing treatment, deceased Kanopatra succumbed to the burn injuries on 29th November, 2008. Accordingly, Apollo Burns hospital issued MLC to Vazirabad Police Station, Nanded, on which the police effected inquest panchanama. Dead body was sent for postmortem and after the postmortem, dead body was handed over to the relatives. Accordingly, the offence punishable under section 307 of I.P. Code was converted to the offence punishable under section 302 of I.P. Code. After recording the statements of material witnesses and collecting sufficient evidence against the accused persons, charge sheet was filed in the Court of Judicial Magistrate, First Class, Palam.

(vii) The offence punishable under section 302 of I.P. code is exclusively triable by the Court of Sessions, therefore, by an order dated 19th September, 2009, the Judicial Magistrate, First Class, Palam, committed the case under section 209 of Code of Criminal Procedure to the Court of Additional Sessions Judge, Gangakhed.

(viii) On appearance of the accused nos. 1 to 5 before the Additional Sessions Judge, Gangakhed, the said Court framed charge against them for the offence punishable under Sections 302, 498-A, 323, 504 and 506 read with 34 of I.P. Code. The accused pleaded not guilty. Accordingly, their plea has been recorded.

(ix) The defence of the accused, which appears from the manner in which the prosecution witnesses has been cross examined and their statements under section 313 of Cr.P.C., is denial and false implication. As per the defence, at the time of incident the accused

no.3 was serving at Jintur district Parhani. The accused no.4 was residing with her husband accused no.3. The accused no.2 was taking education at Parbhani, and accused no.5 was residing at Parbhani, with her husband and in laws. There was no demand on the part of the accused persons. Deceased Kanopatra sustained burn injuries, as her saree caught fire on samovar (a large vessel for heating water), while heating the water. The accused no.1 with the help of neighbours had admitted her at Adhar hospital, Nanded. It is further defence of the accused that, the relatives of deceased Kanopatra, in collusion with the police officer and the Special Judicial Magistrate, manipulated the dying declaration of deceased Kanopatra.

3. The trial Court, after recording the evidence and hearing the parties, convicted the appellants for the offence punishable under section 498-A read with 34 of I.P. Code and sentenced to suffer rigorous

imprisonment for 3 years and to pay fine of Rs.2,000/- each, in default, to suffer rigorous imprisonment for three months. The original accused nos. 1, 2, 4 and 5 are also convicted for the offence punishable under section 302 read with 34 of I.P. Code and sentenced to suffer imprisonment for life and to pay fine of Rs.5000/- each, in default, to suffer rigorous imprisonment for six months. The trial Court directed that, out of fine amount, Rs. 20,000/- be paid to the PW-1 Govind Deshmukh, as compensation under Section 357(1) of Code of Criminal Procedure.

4. The learned counsel appearing for the appellants submitted that, so far alleged demand of Rs. 1,00,000/- is concerned, there are vague allegations. There are no specific averments regarding illtreatment on the part of any particular accused and evidence is also lacking on that line. Accused nos. 2 to 5 are residing at different places. Accused no.2 was residing at Parbhani at the relevant time for education

purpose. Accused nos. 3 and 4 are residing at different places, whereas accused no.5, who is married daughter was residing at the relevant time in her matrimonial house at Chimangaon. It is submitted that, there are no definite findings recorded by the trial Court that, there was harassment to Kanopatra (deceased) by the accused. The trial Court has not properly considered the dying declarations at Exhibit – 65 and Exhibit – 80. There are material improvement in the subsequent dying declaration, and therefore, benefit of doubt ought to have been given to the appellants. There are omissions in respect of visit of Kanopatra (deceased) at the time of her first Diwali to the house of her parents. The investigation is totally doubtful on the ground in respect of admission or referral of patient from government hospital Gangakhed to `Adhar' Hospital Nanded. It is submitted that, in dying declaration recorded by PW-11 PSI Phule Exhibit-64, Kanopatra (deceased) has categorically stated that, her father-in-law had been to Pandharpur for pilgrimage, whereas in

dying declaration at Exhibit – 80 recorded by the Special Judicial Magistrate PW-13, she improves statement stating some overt act by father-in-law. It is therefore, stated that, in absence of the father-in-law, accusation of overt act is only with a view to rope total family in the offence.

It is submitted that, no findings are recorded on the aspect that, cruelty and harassment was soon before the death of Kanopatra (deceased). It is submitted that, the relatives of Kanopatra (deceased) were present at the time of visit of PW-11 PSI Phule, and therefore, there is every possibility of tutoring Kanopatra (deceased) by her relatives. It is submitted that, the trial Court in para 61 of the judgment observed that, nothing is before the Court to conclude when he returned to Shirpur from his pilgrimage. Therefore, there is reasonable doubt about the presence of accused no.3 on the day of incident. The learned counsel further submits that, evidence of the

prosecution witnesses suffers from improvements, omissions and contradictions, and therefore, the same is not believable. It is submitted that, when the benefit of doubt is given to accused no.3, other accused ought to have been given benefit of doubt.

In order to demonstrate that, there are inconsistency in two dying declarations, the learned counsel appearing for the appellants made following submissions:-

a) 1st dying declaration recorded by PW-11, PI Phule on 09.11.2008 at Exhibit-64 wherein the recording of the said dying declaration has commenced at 03.20 p.m.

b) That there is an endorsement on the left hand side it reveals that there is even the stamp of Dr. Sanjay Kadam on left side of the dying declaration and the stamp of the said Doctor also comes on the part and overwriting on the part of dying declaration, to demonstrate the fact and submission of the

appellant that the said endorsement is put after completion of recording of dying declaration. Thus, it becomes doubtful as to whether the deceased / declarant was in a conscious state to give statement.

c) That there is no endorsement of the Doctor at the end of the said dying declaration, as to whether the patient / declarant / deceased was conscious during the recording of the dying declaration.

d) That it is not mentioned as to at what time the recording of the 1st dying declaration was completed and concluded, which creates doubt as to whether it was from the mouth of the declarant or not and raises a shadow of doubt on the entire prosecution case.

e) That on the said dying declaration it is mentioned that Station Diary No.40 at 15.30, part-5, C.R.No.0/2008 under Section 498-A, 307, 323, 504, 506, 34 of IPC, and whereas the Station Diary Entry No.40 is made at 15.30 on the basis of the 1st dying declaration would reveal that the recording of the said dying declaration was started at 03:20 p.m. That in

the absence of timing of conclusion and the station diary entry immediately within 10 mins itself creates doubt on the entire prosecution case. Further, it has come in the evidence of PW-11 that the said dying declaration was written / recorded by writer, which creates doubt about the recording of the said dying declaration by PW-11 and benefit of doubt lies in favour of the appellants.

f) That the said dying declaration bears the signature of the declarant / deceased, when it reveals from record, inquest panchanama and the impugned order dated 10.02.2014 passed by the learned Additional Sessions Judge, Gangakhed in S.T.No. 21/2009 that, at para no.36, the Judge observes that the hands of the deceased were burnt and admittedly the deceased / declarant had sustained 72% burn injuries.

g) That the declarant states that father-in-law, Appellant No.3, Mr. Bapurao Ganpatrao Kadam had gone to Pandharpur.

h) That material witness Sarubai, whose statement under Section 161 of the Code of Criminal Procedure, 1973 was recorded and the said statement is reflected in charge-sheet and who was the prime and star witness of the prosecution was not examined by the prosecution. That it is stated by deceased that, the said Sarubai told her not to change her clothes of kerosene till her father comes.

i) That in 1st dying declaration the declarant states that, her husband, brother-in-law, villagers like Sutar Raju, Bapurao Deshmukh, Nagu Bhau, Motiram had all extinguished fire and brought her to Hospital in an Autorikshaw.

j) That none of the above independent witnesses have been examined by the prosecution when their statements were recorded and finds place in charge-sheet.

k) That in 1st dying declaration the declarant states that by using a match-stick she was set on fire and whereas, in 2nd dying declaration she states that,

(Vatanatil Jalati Parat) farlace for heating hot water was thrown on her person to set her on fire. That the 2nd dying declaration are recorded on the very same day, in the presence of her parents and relatives. Thus, in the above mentioned background, it is material discrepancy and inconsistency in the 2nd dying declaration in material particulars.

l) That in 2nd dying declaration, father-in-law is introduced whereas, in 1st dying declaration it is mentioned that he was at Pandharpur being the month of Shrawan.

m) That the declarant was taken to Civil Hospital, Gangakhed and first aid was given. That the said Doctor from Civil Hospital, Gangakhed is not examined by the prosecution and further, no evidence about medical record / history pertaining to the treatment advanced at Civil Hospital, Gangakhed brought on record by the prosecution.

n) Further, she states that whatever transpired pertaining alleged conflict and confrontation on 8th

November, 2008 was listened by neighbors. But, not even a single neighbor examined by the prosecution, who would had been independent witness.

The learned counsel appearing for the appellants, in support of his contention that, when there are inconsistency in the dying declarations, then the benefit of doubt should be given to the accused, pressed into service the following expositions of the Bombay High Court and also the Supreme Court in the case of *State of Maharashtra Vs. Uttam Karbhari Dhage & another*[1], *Sunil Kashinath Raimale Vs. State of Maharashtra*[2], *Abdul Riyaz Abdul Bashir Vs. State of Maharashtra*[3], *Burakhbee Vs. State of Maharashtra*[4], *Thurukanni Pompiah & anr. Vs. State of Mysore*[5], *Dada Machindra Chaudhar & Ors. Vs. State of Maharashtra*[6], *Shivkumar Maruti Umardand Vs. State of Maharashtra*[7],

1 1997 Cri.L.J.2513
2 2006 Cri.L.J.589
3 2012 Cri.L.J.3277
4 2006 Cri.L.J.3128
5 1965 (2) Cri.L.J. 31 (Vol.71, C.N.6)
6 1999 Bom.C.R. (Cri.) 601
7 2009 Cri.L.J. 2549

Shakuntalabai Khairuprasad Joshi and Anr. Vs. State of Maharashtra[8], *Shaikh Bakshu & Ors. Vs. State of Maharashtra*[9], *Mohan Lal & Ors. Vs. State of Haryana*[10], *Dandu Lakshmi Reddy Vs. State of A.P.*[11], *The State of Maharashtra Vs. Raghunath Ramchandra Sable in Criminal Appeal No.154 of 1996 decided on 29th June, 2015*, *Anusaya Atmaram Kasbe Vs. The State of Maharashtra* in Criminal Appeal No.1536 of 2011 decided on 13th October, 2014, Dhanraj Jairam Patil Vs. The State of Maharashtra in Criminal Appeal No.589 of 2009 decided on 23rd February, 2011, Tukaram Dashrath Padhen & Ors. Vs. State of Maharashtra[12], Vilas Vikramsingh Deshmukh & Ors. Vs. The State of Maharashtra[13] and Kushal Rao Vs. State of Bombay[14]. Therefore, the learned counsel appearing for the appellants submits that, the appeal may be allowed.

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8 2011 Cri.L.J. 1819
9 2007 AIR SCW 4120
10 AIR 2007 SC (Supp.) 1139
11 AIR 1999 SC 3255
12 2012 All MR (Cri.) 2754
13 2013 All MR (Cri.) 3145
14 AIR 1958 SC 22 (1)

5. On the other hand, the learned Additional Public Prosecutor appearing for the Respondent/State invited our attention to the contents of the dying declaration at Exhibit – 65 and Exhibit -80 and submits that, both dying declarations are consistent with each other and there are no material contradictions, and therefore, the trial Court has rightly believed the dying declarations and convicted the appellants. It is further submitted that, the evidence of PW-1 and PW-2 and other relatives of the deceased unequivocally indicates about the illegal demand and alleged illtreatment and harassment at the hands of the accused, and therefore, the accused are rightly convicted by the trial Court under Sections 498-A and 302 r/w 34 of the I.P. Code. It is submitted that, apart from two dying declarations, there is oral dying declaration given by Kanopatra (deceased) with PW-1 and PW-2. Therefore, he submits that, the appeal may be dismissed.

6. We have heard the learned counsel appearing for the appellants and the learned Additional Public Prosecutor appearing for the Respondent/State at length. With their able assistance, we have perused the entire notes of evidence as to re-appreciate the evidence.

7. The prosecution examined father of deceased as PW-1. In his deposition before the Court, he stated that, the marriage of Kanopatra (deceased) was performed with accused no.1 Sunil on 11th May, 2006 at village Takali Kumbhakarna. Rs. 2,00,000/- was given as dowry. After marriage, his daughter went to reside at village Shirpur, Tq. Palam along with husband and his family members. For period of six months, she was treated well. He further stated that, thereafter accused started harassing his daughter. They used to say deceased that, at the time of marriage, pendol was not properly erected, her father is beggar and dowry was paid less and deceived them and on

that count they used to illtreat her. Husband of deceased used to beat her at the instance of other accused. After first Diwali festival, she was brought to their house and at that time, she told PW-1 and his family members about the illtreatment and harassment by the appellants. After convincing her, they sent her back to Shirpur and thereafter all the accused said whatever had happened should be forgotten and PW-1 should give Rs.1,00,000/- for digging well in their field. PW-1 went to Shirpur after one month and he said accused that, he performed marriage of his daughter by taking loan and he was not having money and thereafter he came back. Thereafter, he brought his daughter to Takli Kumbhakarna for her delivery. She begotten a daughter. Kanopatra (deceased) told that, accused used to beat and illtreat her so she apprehends. When, Kanopatra (deceased) was reached to her in-laws house, her brother-in-law accused Sandeep bet her by throwing Radio. Accused Sandeep abused and bet her saying “Tumchi Khandan Awara

Aahe, Tumhi Halkat Lok Aahet, Tumhi Pratistith Lok Nahi.". Mother-in-law and sister-in-law were used to insult deceased and at their instance, husband of deceased used to beat her. He used to visit house of deceased after intervals of one month, therefore, he came to know about illtreatment and harassment by the appellants to the deceased. He brought his daughter for Diwali of the year 2007. She stated that, her husband used to beat her and used to give threat to kill her, and therefore, she told him not to sent her back to matrimonial house. However, after convincing her they sent her to matrimonial house. It is also stated that, in the year 2008, he invited father-in-law, brother-in-law and husband of her daughter for Kandori. Husband and father-in-law of accused Savita had also come for Kandori. At that time, accused no.1 asked him about money and he told that, he would pay Rs. 50,000/- after selling cotton in this year and in next year he would pay remaining amount of Rs. 50,000/- and thereafter, the appellants left the

house of PW-1. Her daughter was brought for festival of Diwali in the year 2008 at Takli Kumbhakarna. After 10 to 15 days, they sent her back with Baban Deshmukh, who is cousin brother of Kanopatra. In the night, accused no.1 bet deceased. On 09.11.2008, PW-1 received mobile call from Pralhad Kishanrao Deshmukh that, his daughter is burnt and asked to come to Takli Kumbhakarna. They went to Takli Kumbharkna, along with nephew Ashok Deshmkh and his other relatives. Thereafter, they went to Gangakhed and there it was informed that, Kanopatra (deceased) is admitted in Adhar Hospital at Nanded. They reached at Adhar Hospital, Nanded but Police did not allow them to enter in the hospital. After about half hours, they were called in a room where her daughter was admitted. They saw her both hands, legs, back were burned. After about half hour, her daughter told that, her husband had beaten her in night. In the morning when she awoke, her husband and brother-in-law poured kerosene from two Cans on her person, sister-in-law caught hold her

hands and mother-in-law threw a burning match-stick. At that time, father-in-law had gone to Pandharpur. She stated that, there was attempt to kill her.

8. PW-1 was cross-examined at length by the Advocate for the accused. In his cross-examination, he admitted that, when he made enquiry before marriage, at the relevant time father-in-law of the deceased was serving at Zilla Parishad, Parbhani and thereafter he served at Jintur. At that time, the accused were having 18 acres of land. There was one well and work of other well was going on. For two times, he visited their land. One land was shown to him. He denied that, he was having knowledge that, there were two wells in the field of accused. He further stated that, father-in-law of deceased is pious person (Malkari). He admitted that, marriage of accused no.5 Savita is performed prior to marriage of his daughter. Savita resides at Parbhani. Her husband Santuk is originally resident of Chimangaon, Tq. Sailu. Father of Santuk Deshmukh is

serving at P.D.C.C. Bank at Parbhani. Xerox center of husband of Savita is near his office and her residence is behind his office. Since last 7 to 8 years, there is xerox center near his office. He know husband of accused No.5 – Savita since marriage of his daughter. He visited their house once along with his wife and daughter. After birth of Vaishnavi daughter of Kanopatra, he had been to house of accused No.5. He did not know for what purpose, deceased had come to house of accused no.5. He further stated that, since 11th May, 2006 to 8th November, 2010, he did not lodge any complaint against the accused. He admitted that, within half and hour, it is possible to reach to Nanded from Basmath and his brothers and accused reached Nanded at about 10 to 10.30 a.m. It appears that, suggestion was given to PW-1 that, when they all reached to Nanded, his daughter told that, her Sari caught fire in the morning when she was alighting furnace for hot water. He further stated that, accused no.1 had deposited Rs.15,000/- in the private hospital soon she was

admitted. Since the time of incident till 19th November, 2008, he did not lodge any complaint either to Palam or Nanded Police Station. He further stated that, accused no.5 was residing with her husband at Parbhani. However, he denied suggestion that, on the day of incident, she was at Parbhani. He further stated that, since 9th November, 2008 upto 29th November, 2008, Kanopatra was alive. During that period, he did not go to the house of the accused and did not ascertain the place of incident and when and where incident occurred. Suggestion was given to him that, since it was accidental death, therefore, he did not ascertain about the incident, is denied by him. On 19th November, 2008, his statement was recorded by the Police from Palam Police Station. He denied that, he stated before the Police that, when Kanopatra was brought to the house, she disclosed about illtreatment and after convincing her, she was sent back to the house of the accused. He further stated that, he did not tell the Police that, after every month, he used to visit

house of accused and deceased used to tell about illtreatment. He did not tell that, deceased disclosed that her husband used to beat her and give threats to kill Kanopatra so she apprehends danger to her life and told not to send her back to in-laws house. He denied the suggestion that, Kanopatra never told him about the incident of illtreatment and harassment.

9. Ashok Jagnnathrao Deshmukh was examined as PW-2. In his deposition, he stated that, Kanopatra was her cousin sister. So far allegations of harassment and illtreatment are concerned, in his examination-in-chief, he has made similar allegations like PW-1. Sum and substance of his allegations is that, all accused used to illtreat and subject Kanopatra to mental and physical harassment. They used to illtreat her for the reasons that, no proper arrangement was done at the time of marriage. Dowry was paid less. They used to say that, relatives of deceased were not of standard status as like accused. Accused used to tell

deceased that, her relatives of Takli are beggars. There was demand of Rs. 1 Lakh. He has also stated that, Kanopatra told them about the incident happened on 09.11.2011.

10. During his cross-examination, he admitted that, Bapurao Kadam, father of accused no.1 was serving at Jintur at the time of incident and he was serving at Parbhani at the time of marriage. He did not know whether accused Sandip was taking education of D.Ed. course in the year 2008. Accused no.5 Savita resides at Parbhani. He further stated that, he did not know the place of residence of her in-laws.

11. Meera Govindrao Deshmukh, mother of Kanopatra was examined as PW-3. In her examination-in-chief, more or less similar allegations of illtreatment and harassment are stated by her like PW-1 and PW-2. She also stated that, Kanopatra narrated the incident dated 09.11.2011. However, during her cross-

examination, she admitted that, none of them lodged the police complaint for harassment and illtreatment earlier. She further admitted that, their statement was recorded after 10 days by the Police. So far Savita is concerned, she stated that, Savita had son of about 4 years. She used to reside at Parbhani.

12. One Baban Ganeshrao Deshmukh was examined as PW-4. In his examination-in-chief, he stated that, deceased Kanopatra was his nice. He has also stated that, Kanopatra used to tell about illtreatment and harassment at the hands of the accused, as stated by PW-1 to PW-3. One day before the day of incident, he went along with Kanopatra to her in-laws house. He went their on 8th date and after leaving Kanopatra to matrimonial house, he left the said house on the same day and on the next day morning at 9 a.m., he came to know about the alleged incident of burning Kanopatra. He also admits in his cross-examination that, earlier no complaint was

lodged about illtreatment or harassment. He stated that, he did not tell before the Police that, deceased told to her father that her in laws were demanding money and her father told them that, he was not having money as he had performed marriage of her daughter. He did not tell to police that, on next day at 9.00 a.m. in morning, he came to know that, Kanopatra was set on fire and that, her parents had been to Basmath. It appears that, the portion mark `A' from the police statement was read over to him and he stated that, he cannot assign any reason as to why the police have written the said portion in his police statement.

13. The evidence of PW-1 to PW-4 is to the effect that, Kanopatra whenever visited the house of her parents or when somebody from her parental house went to her house, told about illtreatment and harassment caused to her at the hands of accused persons. However, all the witnesses have stated that, prior to date of incident, no single complaint is filed

about the illtreatment or harassment to Kanopatra. PW-1 to PW-4 all have stated that, Savita i.e. sister of husband Sunil Kadam is already married and residing at Parbhani and have four years child. It appears that, the Police have recorded their statements almost after 10 days from the date of incident. It also appears from the evidence of PW-1 that, he never made attempt to lodge the complaint at the earlier stage though the alleged incident had taken place on 09.11.2008. It is only when recording of the statements by the police, they have disclosed about the illtreatment, harassment and manner in which the incident had taken place as narrated by Kanopatra. It has also come on record through the evidence of PW-1 that, family of the accused persons possesses 18 acres of land and already there is one well situated in the agricultural land. PW-1 has categorically stated that, his statement was recorded by police at the hospital at Nanded on 19.11.2008. Police of Palam recorded his statement on the said date. The prosecution has not placed on record

any reasons for not recording the statement of PW-1 to PW-4 and other relatives till 19.11.2008 though alleged incident had taken place on 09.11.2008.

14. There are two officially recorded written dying declarations of Kanopatra. The statement at Exhibit-64 is recorded on 09.11.2008 at about 11.15 p.m. Upon careful perusal of the said statement, it appears that, there is endorsement of medical officer that, patient is in a conscious state to give the statement. The said statement was recorded by P.S.I. Police Station, Shivajinagar, Nanded. It appears that, crime was registered on the basis of the said statement. It further appears that, so far alleged incident is concerned, there is Station Diary entry at Sr. No.40 at 15.30 hours and offence was registered under Sections 498A, 307, 323, 504, 506, 34 of the I.P. Code against the accused. It further appears that, subsequently when Kanopatra was died, Section 302 of I.P. Code was added by the Investigating Officer.

15. Upon careful perusal of the dying declaration, it appears that, the marriage of Kanopatra was performed with Sunil Bapurao Kadam accused no.1 on 11th May, 2006. According to her version, the amount of Rs. 2 Lakh was given as a dowry as per customs. She begotten one daughter Vaishnavi from their wedlock, whose age was one year at the relevant time. She was carrying pregnancy of three months on the date of incident. Her father Govindrao Vishwanathrao Deshmukh was serving in Irrigation Department at Parbhani. She alleged that, since the date of marriage, accused persons started demanding Rs. 1 Lakh so as to dig well in their land and on that count they used to mentally and physically illtreat and harass her. Whenever, she used to visit house of her parents, she used to tell them about the illtreatment and harassment at the hands of the accused persons. She has specifically stated that, before Dipawali, husband Sunil and brother-in-law Sandeep abused her and assaulted her. Thereafter, she went to the house of

her parents at Takali Kumbhakarna.

16. She further stated that, on 08.11.2008, her cousin uncle Babanrao Ganeshrao Deshmukh accompanied her to come to Shirpur. He left her in her matrimonial house at about 6 p.m. At the relevant time, mother-in-law Shobha, sister-in-law Savita were present in the house. Father-in-law Bapurao went to Pandharpur for *Darshan*. Husband Sunil was not present at that time and he had gone to agricultural field. Brother-in-law Sandip was in the village. In the evening at about 7 p.m., husband Sunil came in the house and asked Kanopatra that, why her father has not come to accompany with her to matrimonial house. How the maternal uncle came and whether, she has brought Rs. 1 Lakh for digging well. Sunil started assaulting her. At about 10 p.m., brother-in-law Sandeep came to the house and started abusing her. He asked her to vacate the house along with child. Neighbours were knowing about the quarrel which has

been taken place.

17. So far actual incident is concerned, she stated that, on 09.11.2008, Sunday, at about 7 a.m., she woke up from the sleep, and came to ground floor from the first floor of the house. Nobody from the matrimonial side was talking to her. After some time, husband and brother-in-law started abusing her in filthy language. Husband stated that, he will kill her by pouring kerosene and brother-in-law was instigating her husband to pour kerosene on her. Husband as well as brother-in-law poured kerosene from two different white Cans on her person. At that time, wife of Ganya, Sarubai came there. Husband and brother-in-law went outside. Sarubai mentioned that, sari of Kanopatra was smelling kerosene. Then Kanopatra told her that, said kerosene is poured by the husband and brother-in-law. Sarubai said, do not change her sari till her father arrives. Again husband and brother-in-law came in house and asked the sister-in-law Savita and mother-

in-law Shobha to set her ablaze by enlightening match-stick. Sister-in-law Savita caught hold her and mother-in-law Shobha set her on fire by enlightening the match-stick. She started crying and ran away. At that time, husband, brother-in-law and other persons from village namely Raju, Bapurao Deshmukh, Nagubhau and Motiram came and tried to extinguish the fire. In that, her entire back portion, both hands, portion below waist have been burnt and she was admitted initially in Government hospital, Gangakhed and thereafter she was taken to Adhar hospital, Nanded for further treatment. She was in Burn Ward B-1 wherein she was being treated. The said incident had happened at 8 a.m. in the matrimonial house and her husband, brother-in-law, mother-in-law and sister-in-law have abused her by saying that, as to why Rs. 1 Lakh have not been brought from the parents for digging well, and as to why father of Kanopatra did not come for dropping her. Husband, brother-in-law have poured kerosene on her person, sister-in-law caught hold her,

mother-in-law set her on fire by enlightening matchstick and tried to kill her. The official translation of Dying declaration at Exhibit – 64 dated 09.11.2008 is as under :-

EXH.64 ***Adhar Hospital Nanded***
S.T.21/09 ***Date : 09-11-2008.***
Art."B"

STATEMENT

I, Sow.Kanhopatra W/o Sunilrao Kadam, age:24 years, Occup. household, r/o Shirpur, Taluka Palam, Police Station Palam, Dist.Parbhani on asking personally give this statement in writing that I am resident of aforesaid place. My marriage has been solemnized with Sunil Bapurao Kadam at my matrimonial home at village Takli Kumbhkarn on dated 11-05-2006 by giving rupees two lakh as dowry according to the custom. I have a daughter namely Vaishnavi who is one year old. Presently I am conceiving three months' pregnancy. My father Govindrao Vishwanathrao Deshmukh is serving in Irrigation Department at Parbhani.

Since my marriage, my in-laws i.e. (1) Bapurao Ganpatrao Kadam - father-in-law, (2) Shobhabai W/o Bapurao Kadam - mother-in-law (3) Sunil Bapurao Kadam - husband, (4) Sandeep Bapurao Kadam - brother-in-law, (5)

Savita W/o Santukrao sister-in-law have started torturing mentally and physically by saying to bring Rs. one lac from my parents for digging a well in their field. Whenever I use to come to my maternal home, I use to say it to my parents. On the eve of last Diwali festival my husband Sunil and brother-in-law Sandeep had abused and assaulted me for the above reason. When Diwali festival about to 8 days away my father Govindrao Vishwanathrao Deshmukh came to my matrimonial home at Shirpur and he took me to my maternal home at Takli Kumbhkarn. And my uncle named Babanrao Ganeshrao Deshmukh has left me yesterday on 08-11-2008 at Shirpur at my matrimonial home at 06.00 p.m. approximately and went away. At that time my mother-in-law Shobha and my sister-in-law Savita were present. Father-in-law - Bapurao had gone to Pandharpur for darshana. Husband Sunil had gone to field and brother-in-law Sandeep was in village. At about 7.00 p.m. husband Sunil came to home and told me that my father ought to have come to leave you here. As to how your uncle came ? By asking "Did you bring one lakh rupees for digging a well in the field and started abusing and assaulting. "At about 10.00 p.m. brother-in-law Sandeep came and he too abused and told me not to sleep in the house and told to go out. Therefore, I, taking my little baby went on the first floor of the house but I could not get sleep. However, the incident taken place at night and the assault received by me came into the knowledge of our neighbors.

Today on Sunday dated 09-11-2008 I woke up at 7.00 a.m., step down from the first floor, nobody from my in-laws were talking with me. After sometime, my husband Sunil and brother-in-law came there and started abusing. Husband told me that I would be burnt alive by pouring kerosene and I would be killed. Brother-in-law was also saying him to pour kerosene on my person. They both took kerosene from the white plastic can and poured it on my person. In the meanwhile wife of Ganya - Sarubai came there, then husband and brother-in-law went away. She asked me saying that there is a smell of kerosene coming from my saree. I told her that it was poured by my husband and brother-in-law. She told me not to change my saree till my father come and thereafter she went away. Thereafter again husband and brother-in-law came in the house and they asked Savita - sister-in-law and Shobha mother-in-law to set the fire stick on me. Thereupon sister-in-law Savita caught me and mother-in-law Shobha set me on fire. I was crying and running. At that time, husband, brother-in-law and persons of village viz. carpenter Raju, Bapurao Deshmukh, Nagubhau, Motiram came there and tried to extinguish the fire. Wherein my entire back, both hands and complete portion below my waist have been burnt. They took me initially to the Govt. Hospital, Gargakhed and thereafter for further treatment admitted me at Adhar Hospital which is located in the Shivaji Nagar area at Nanded. My

treatment is going on there in the Burn Ward B/1. Said incident has taken place approximately at 08-00 a.m. in the house at Shirpur.

Therefore today on dated 09-11-2008 at about 08-00 a.m. in the house at Shirpur my husband Sunil Bapurao Kadam, (2) brother-in-law Sandeep Bapurao Kadam, (3) mother-in-law Shobhabai W/o Bapurao Kadam, (4) sister-in-law Savita W/o Santukrao all these persons have abused by saying that as to why rupees one lakh for digging a well have not brought from your parents, and as to why your father did not come with you for dropping me. Husband Sunil Bapurao Kadam, brother-in-law Sandeep Bapurao Kadam both have poured kerosene on my person, sister-in-law Savita W/o Santukrao caught me, mother-in-law Shobhabai W/o Bapurao Kadam burnt fire stick at me and set me on fire and tried to kill me alive.

My aforesaid statement is written as per my narration, read over to me which is true and correct

Before me.
Sd/-
Police Sub Inspector,
Police Station, Shivaji Nagar,
Nanded.

Sd/-
Kanhopatra

Date : 09-11-2008

Police Station Entry No.40, time : 1530 recorded.
Part 5, C.R. No.0/08 U/Sec. 498-A, 307, 323, 504, 506, 34 IPC have been registered and since the incident took place in the jurisdiction of Police Station Palam, it was referred to that Police Station.

Sd/-
(B.J.Phule)
Police Sub Inspector,
Police Station Shivaji Nagar,Nanded.

18. The second Dying declaration was recorded on 09.11.2008 by the Special Judicial Magistrate, Nanded. In this dying declaration, role is assigned even to the father-in-law. The specific allegations have been made against him. However, in earlier dying declaration at Exhibit-64, she stated that, father-in-law had gone to Pandharpur for *Darshan.*

So far incident dated 08.11.2008 is concerned, when Kanopatra reached to matrimonial house on said date, she stated that, her uncle went to their farm to meet her husband and told him that, he has brought Kanopatra, and went away. It is further

stated that, in the evening, when her husband returned, he started beating her inhumanly saying why she had returned and that, she should go away. He held her hair and started hitting her head on the wall. When she replied that, child is having fever, husband said that, he is nothing to do with child. He does not care if the child dies. She further stated that, after some time, her father-in-law, mother-in-law, brother-in-law and sister-in-law returned home. Her father-in-law Bapurao said to her husband that, as to why he take her inside the home and other accused started saying the same thing to her husband. That time, father-in-law, brother-in-law, mother-in-law and sister-in-law said that, they will do away with her and will come out of jail by bribing. By saying this, they started beating her and throughout night her father-in-law, mother-in-law and sister-in-law were whispering and troubling her. This is what Kanopatra has stated about the incident of ill-treatment and harassment to her on 08.11.2008 in dying declaration recorded at Exhibit-80.

However, when the dying declaration at Exhibit-64 was recorded, she attributed role to only husband and brother-in-law. It is stated that, the husband asked her why her father was not accompanied with her to leave her to matrimonial home and asked her to leave the house. He asked her, whether she has brought one lakh rupees, for digging a well in the field, and started abusing and assaulting. Thereafter, brother-in-law came at 10 p.m. and abused her. Therefore, even about the allegations, which relates to alleged incident dated 08.11.2008 during the evening/night is concerned, there is substantial variance in her version/in two dying declarations.

19. So far actual incident on 09.11.2008 is concerned, in dying declaration recorded at Exhibit-64, she has not attributed the role to father-in-law and she stated that, on that day, father-in-law went to Pandharpur for *Dharshan*. As alleged in the said dying declaration, the husband said that, she will be burnt

by pouring kerosene and husband and brother-in-law poured kerosene on her person from two separate white plastic Cans and meanwhile, one Sarubai came there and then Kanopatra had conversation with her, and then Sarubai left and thereafter again husband and brother-in-law came in the house and asked Savita - sister-in-law and Shobha mother-in-law to set her on fire. Thereafter, sister-in-law Savita caught hold her and mother-in-law Shobha set her on fire. However, in dying declaration at Exhibit-80, she stated that, she got up on 09.11.2008 in the morning and sat down with child. No family member was talking to her. She stated that, her father-in-law asked husband and brother-in-law to caught hold her and get her inside. Father-in-law held her hand, brother-in-law and husband poured kerosene on her person from two plastic cans and out of fear of people suspecting father-in-law, husband and brother-in-law went outside the house. She started going outside the house to save herself, but at that time, her sister-in-law caught her

tightly and mother-in-law took out a burning stick from the kiln and put it on her. Her whole body was on fire. Then she went outside the house. Thereafter, people rushed to the house and tried to extinguish the fire on her body. Thereafter, husband, brother-in-law and the neighbours took her to Gangakhed Government Hospital by a goods tempo/auto and admitted there. Thereafter she was shifted to hospital at Nanded for treatment. The official translation of dying declaration at Exhibit-80 dated 09.11.2008 is as under:-

Exh.80

Dying declaration of Sou.Kanhopatra W/o Sunil Kadam, age:24 years, R/o Shirpur, Taluka Gangakhed, District Parbhani admitted in Aadhar Hospital, Nanded referred by H.C. Madrewar, B/N. 538, P.S.Shivaji Nagar, Nanded in M.L.C. No.22/SSK/08 dated 09-11-2008.

==========

<u>Dying Declaration</u>.

Identification is given by Dr.Sanjay Kadam that patient is ready to deliver Dying Declaration.
D.D. started on 09-11-2008 @ 16=30 p.m.

Patient is conscious and mentally fit to give statement.

Sd/-
09-11-08 at 4.30 p.m.

Q.1 : Do you know that I am a Magistrate ?

Ans : Yes.

Q.2 : What is your name ? Age ? Where are you from ?

Ans : Sou.Kanhopatra Sunil Kadam, age:24 resident of Shirpur, Tal.Gangakhed, Dist.Parbhani.

Q.3 : When and where did the incident took place ?

Ans : The incident taken place on 09-11-2008 approximately in the morning between 8.00 to 8.30 at Shirpur at my residence.

Q.4 : How did the incident take place ? You may tell whatever you want to say regarding the incident ?

Ans : From the time of my marriage I was harassed by my in-laws. I had always been beaten by my husband and his brother. At the time of last Diwali my father and my maternal uncle came to take me to my maternal home. My father-in-law, my husband and my brother-in-law quarrelled with my father. I told my father that I could understand that my husband could beat me or abuse me sometimes but as to why my brother-in-law beats me and abuses me. That time my father-in-law replied that they have one time returned from jail. We are not afraid of going to jail again. What will you do if, we get your daughter killed from a contract killer. My father took retreat, requested them and brought me and my child to my maternal home. After Diwali, I told my father that I am afraid of my in-laws. There is a threat to my life. That

time consoling me and asking me not to worry and telling that they will not do anything I was sent with my uncle, Babanrao to my home at Shirpur yesterday on date 08-11-2008. My uncle went to our farm, met my husband, told him that he has brought Kanhopatra and went away. In the evening when my husband returned, he started beating me inhumanly saying why I have returned and that I should go away. He held my hair and started beating against the wall. He started saying that I should go away from the house. I said I will not go I told him that my child is having fever. My husband said what do I have to do with it. I do not care if the child dies go outside the house and do not come in. I went on the upper floor and sat there with the child. After some time my father-in-law, mother-in-law, brother-in-law, sister-in-law returned home. My father-in-law Bapurao said to my husband as to why did he take me inside the home. Brother-in-law Sandip, mother-in-law Sau.Shobha and sister-in-law Savita Santosh all of the above started saying the same thing to my husband. That time my husband said what happen if I have taken her inside, it is in our hands to do away with her. That time my father-in-law, brother-in-law, mother-in-law and sister-in-law said that we will do away with her and will come out of jail by bribing. By saying this they started beating me. After continuous beating they went on to one side. I took my child and laid down with my child. All the night my mother-in-law, father-in-law, brother-in-law, sister-in-law were whispering I was scared of them and could not sleep all the night. I got up at 7-00 in the morning and sat

down with the child after washing my face / brushing. No one was taking to me. My father-in-law said to my husband and brother-in-law, clutch her and get her inside. Father-in-law held my hand, brother-in-law and husband poured all the kerosene on me from two plastic cans and for the fear of people suspecting father-in-law, husband and brother-in-law went and stood outside the house. I started going outside the house to save myself. But at that time my sister-in-law caught me tightly and mother-in-law took out a burning stick from the kiln and put it on me. My whole body was on fire. Apprehending danger to them, and that they also could catch fire mother-in-law and sister-in-law ran outside. People came running and tried to extinguish the fire on my body. My husband, brother-in-law and the neighbors took me to the Gangakhed Govt. hospital by a goods tempo / auto and admitted there. From there they took me to this hospital in Nanded and admitted me there and started the treatment.

Q.5 *Do you want to tell anything else ?*

Ans *My father-in-law, husband, brother-in-law, mother-in-law, sister- in-law have set me on fire by the motive of burning me alive.That is why they should be given maximum punishment. So that no one should do such type of injustice. This is what I have to say. My abovesaid statement has been noted as told by me. It has been read over to me. It is true and correct.*

Sd/-

(Mrs.Kanhopatra Sunil Kadam)

R/o Shirpur, Tal.Gangakhed.

D/D is recorded as per say of patient. It is read over to her. She admitted that contents of D.D. are true and correct. I believe that D.D. is given voluntarily, it is true and correct on 09-11-2008 @ 17=40 P.M.

Sd/-
P.N.Zhunjare,
Spl.Judicial Magistrate
Nanded.

20. As already discussed, upon perusal of the contents of both the dying declarations, there is inconsistency and also variance. In the second dying declaration, father-in-law is introduced, whereas in the first dying declaration, it was mentioned that, he was at Pandharpur being the month of Shrawan for *Darshan*.

21. The prosecution examined Dr.Avinash Digamber Puri, the medical Officer, Government Medical College, Nanded. During his cross-examination, he stated that, no cause of burning is mentioned in the inquest. He has not mentioned age of injuries in memorandum of P.M. He did not call details about when patient was admitted and for how much

period she was indoor patient in the Apollo hospital. As per his report, there were no injuries on the head, neck and face and only 2% injuries were on chest and abdomen. Lower extremities and back were having more percentage of burn injuries. He has given specific admission that, if a woman from rural area burnt while setting fire to furnace used for hitting water, such type of injuries are possible, due to accidental burn. If two persons caught hold a lady, poured kerosene on her person and set fire, 100% injuries may or may not be possible. He has given specific admission in his cross-examination that, he could not differentiate the burn as homicidal, suicidal or accidental. It may or may not be possible that, head, neck, face of a lady remained unburnt, if she is caught hold of two or more persons and set on fire by pouring kerosene on her persons. Direction of flame of burning of a person, is usually to upper side.

22. Therefore, upon careful perusal of the cross-

examination of PW-5, it is abundantly clear that, he could not differentiate the burn as homicidal, suicidal or accidental. Further he opined that, if deceased was caught hold by two or more persons and set on fire by pouring kerosene on her person, the direction of flame of burning of a person is usually to upper side. However, in the present case, it is abundantly clear that, as per report of PW-5, there was no injuries on head, neck and face and only 2% injuries were on chest and abdomen. Therefore, the allegation that, brother-in-law and husband poured kerosene from different Cans and then she was set on fire appears to be improbable, in the sense that, if two cans of kerosene is poured on the body and if person is set on fire, certainly there would be injuries on neck, head, face and also on chest and abdomen due to flame of burning of a person, is usually to upper side.

23. PW-5, further stated in the cross-examination that, all burnt patients are treated by

Surgeon. He further stated that, he did not call any opinion from Surgeon, in order to ascertain age of injury. He feel that, it is not necessary to call opinion from the Surgeon. He further stated that, he did not know whether it is necessary to mention the age of injuries in P.M. report as per directions of medical Board.

24. So far opinion expressed by PW-5 that, he cannot differentiate the burn as homicidal, suicidal or accidental, the Bombay High Court while considering the prosecution case based upon dying declaration, in the case of ***Shakuntalabai (supra)*** held that, the burn injuries received by the deceased could be accidental, suicidal or homicidal, the prosecution is required to establish homicidal death by bringing positive evidence on record. Therefore, in the present case also, it was necessary for the prosecution to bring on record the positive evidence so as to establish the homicidal death. As already discussed about the dying declaration at

Exhibit-64, Kanopatra stated that, father-in-law went to Parbhani. It means he was not present on the date of incident in the house. However, in dying declaration Exhibit-80, she attributed specific role to father in law. The Bombay High Court in the case of **State of Maharashtra V/s Uttam Karbhari Dhage (supra)** in para no.14 held thus :-

> "14. We would like to emphasize that, where an integral part of the dying declaration is false, the residual part cannot be accepted, on the principle that, falsus uno falsus omnibus is not a rule applicable to our country. The rationale behind this is that, unlike ocular evidence, a dying declaration cannot be tested on the anvil of cross-examination. Once the Court is convinced that, an integral part of the dying declaration is false inasmuch as, an accused person has been falsely named therein, the principle that, truth sits on the lips of the dying man on which is founded the rationale of accepting a dying declaration cannot be pressed into service for salvaging the residual portion of the dying declaration. In other words, the same dying declaration cannot be accepted against a co-accused. We are fortified in our view by the observations contained in para 9 of the judgment of the Apex Court reported in AIR 1965 SC 939 (1965(2) Cri. LJ 31): Thurukanni Pompiah V/s Stat of Mysore, which read thus :
>
> > "..... If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration ....."

25. In the case of **Dada Machindra (supra),** it is held that, in case based upon the dying declarations i.e. the dying declarations recorded by the Executive Magistrate and by Police Officer, discrepancies and variations found in both dying declarations regarding number of persons pouring kerosene and the number of persons setting deceased on fire, the evidence showing deceased might have been tutored or her faculties were impaired and conviction of accused on the basis of the said dying declarations, is not proper. The Supreme Court in the case of **Mohan Lal (supra)** in para 9 has laid down law in respect of appreciation of evidence when the prosecution case is based on dying declaration. The para 9 of the said judgment is as under :-

> "9. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on his death-bed, being exceedingly solemn, serene and grave, is the reason in law to accept the veracity of his statement. It is for this reasont hat the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of

justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence."

In the said case, the Supreme Court has in para 11 further held thus :-

"11. In the instant case, it is to be noted that the evidence of PW-3 and doctor clearly show that before the dying declaration was recorded the relatives of the deceased including PWs-7 and 8 were present with her and were subsequently asked to leave the room where the dying declaration was recorded. Though much was made of the dowry demand by the courts below there is only a vague reference to it in the dying declaration. The statement of PWs 7 and 8 that they had told the Investigating officer about the dowry demand is not correct. They had not said so before the Investigating Officer. It is also significant that prior to the death, neither the deceased nor her parents had complained to the police or told anyone else about any alleged dowry demand. In the circumstances, the dying declaration itself was clearly the result of tutoring and was not a free and voluntary one. The courts below ere therefore not justified in placing reliance on the same. Additionally, there was only a vague reference of dowry demand to the police which in any event has not been established and also was not told during investigation. Once the dying declaration is excluded, there is nothing to implicate the accused-appellants with the death."

26. In the present case, though the evidence of PW-1 to PW-4 suggest that, they went to see Kanopatra in the hospital at Nanded and they were not allowed to

enter in the hospital upto 5 p.m., but it has come in the evidence of Investigating Officer Babu Jyotibarao Phule, PW-11 that, when he went towards the patient, her parents and other relatives were present. PW-11 has recorded the dying declaration of Kanopatra at Exhibit-64. Therefore, the said dying declaration may be result of tutoring. The Bombay High Court in the case of **Sunil Raimale (supra)** as already observed in para 11 that, in case of presence of relatives, possibility of tutoring cannot be ruled out and in that case, the dying declaration cannot be free from doubt. In the facts of the present case, as stated by PW-1, PW-4 and PW-10 in their statements, there was demand of Rs. 1 Lakh from the accused persons after 5-6 months from the marriage. However, they did not lodge any complaint about illtreatment and harassment. Even their statements are recorded by the police after 10 days from the date of incident. It has come on record from the evidence of PW-1 that, he did not go to complain but police on their own recorded their

statements. On the day of incident, out of wedlock of Sunil and Kanopatra one child was begotten and Kanopatra was carrying pregnancy of 3-4 months. PW-1 to PW-4 and PW-10, in their evidence stated about illtreatment and harassment on account of not erecting good pendol in the marriage. However, those allegations deserve no consideration, since no attempt was made by the prosecution witnesses to lodge any complaint, and therefore, such belated attempt to make such allegations has no substance. So far demand of Rs. 1 Lakh is concerned, it has come in the evidence of PW-1 that, family of the accused owns 18 acres of land and already there is one well. According to defence, there are already two wells. It has come on record that, PW-3 was serving in Zilla Parishad, Parbhani and thereafter he served at Jintur. It further appears from the evidence on record that, the land belongs to the accused to some extent is irrigated. Therefore, the demand of Rs. 1 Lakh is difficult to believe and accept. PW-1 to PW-4 have admitted in their evidence that,

accused no.5 Savita got married even before the marriage of Sunil and Kanopatra and she is staying at Parbhani. Therefore, it is difficult to fathom that, on the date of incident, as alleged by Kanopatra, Savita played active role i.e. caught holding her and then mother-in-law set her on fire. It has come on record that, Savita is having child and settled in Parbhani and her husband is having business of photo-copy Center at Parbhani.

27. The prosecution examined Dr. Sanjay Sahebrao Kadam, Medical Practitioner, who was working in Adhar Hospital at Shivaji Nagar, Nanded on 09.11.2008. He stated that, Kanopatra was admitted in the hospital from 09.11.2008 and thereafter she was referred to Civil Hospital, Parbhani on 21st November, 2008. Patient was 72% burnt. He has stated that, Police Officer and Special Judicial Magistrate have also came to him and asked him for giving opinion about condition of the patient for giving statement. During his cross-examination, he stated that, upper limbs of

Kanopatra was completely burnt. He did not receive any letter from police or Magistrate, having request to record statement of patient. Therefore, the learned counsel appearing for the appellants is justified in arguing that, when the upper limbs of Kanopatra were completely burnt, signing of both dying declaration by Kanopatra was not possible. The Bombay High Court in case of **Abdul Riyaz (supra)** in para 9, in the facts of that case held that, when the doctor has admitted in the cross-examination that, both hands were nearly completely burnt, the post mortem notes would show that all four limbs were extended and fingers were semi flexed, it cannot be believed that in such condition, the patient would be able to sign the document so assertively. The Supreme Court in the case of **Thurukanni Pompial (supra)** while considering the case of the prosecution based upon dying declaration in para 9 held thus :-

> "Under Clause (1) of Section 32 of the Indian Evidence Act, 1872, a statement made by a person who is dead, as to the cause of his death or as to any of the circumstances of the

transaction which resulted in his death is a relevant fact in cases in which the cause of that person's death comes into question, and such a statement is relevant whether the person who made it was or was not, at the time when it was made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. The dying declaration of Eranna is, therefore, relevant and material evidence in the case. A truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration. The law on this subject is stated by Sinha, J. in Khusal Rao v. State of Bombay, thus:

> "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."

28. The Bombay High Court in the case of **Shivkumar Umardand (supra)** held that, in case the prosecution case is dependent upon dying declaration and if the death of wife is due to burn injuries and two dying declarations implicating her husband were at variance on two crucial aspects i.e. the manner in which incident took place and location of incident, in first dying declaration wife mentioning that, husband extinguished fire, said credit given to husband was withdrawn in subsequent dying declaration, the husband also sustaining burn injuries in incident, in such situation the accused is entitled for benefit of doubt. In the present case also, as already observed, there is variance in two dying declarations recorded at Exhibit-64 and Exhibit-80.

29. PW-11 Babu S/o Jyotibarao Phule, Investigating officer in his cross examination stated that, he did not see the case papers of Kanopatra or number of ward where she was kept. He did not give

any letter to concerned medical officer showing that, he was directed to record statement of injured Kanopatra. He did not mention about the time when he commenced recording of statement. He did not make note on the statement that, he meet doctor, who examined the patient and stated about her fit condition for recording statement. The contents of the statement vide Exhibit-64 were written by his writer. He cannot tell the name of his writer. Patient was 70% burnt. He cannot tell which part of patient was burnt and which was not burnt. He did not feel it necessary to make inquiry about treatment or medicines given to the patient. When he went towards patient, her parents and other relatives were present. He cannot tell whether both the hands of the patient were burnt. Therefore, aforementioned admission given by the Investigating officer in the cross-examination is dent to the prosecution case, inasmuch as he stated that, when he went to patient her relatives were present and also he did not give letter to doctor for examining the

patient. He does not remember even whether both the hands of Kanopatra were burnt or not. He did not remember the name of the writer.

30. It appears that, PW-12 Balasaheb Vithalrao Dudhate, witness to the spot panchanama stated that, his signatures were taken on blank papers on 10.11.2008. Therefore, his evidence is of no assistance to the prosecution case. It appears that, Kundlik S/o Nagorao Zunzare was examined as PW-13, who recorded the dying declaration at Exhibit-80. Upon reading his evidence about the actual incident narrated by Kanopatra, she stated that, her father-in-law caught hold of her hands, her husband and brother-in-law poured kerosene from plastic cans on her person. Therefore, as already observed in dying declaration recorded at Exhibit-64, Kanopatra stated that, father-in-law went to Pandharpur on the date of incident. During his cross-examination, he stated that, he recorded the dying declaration of the deceased on

working day. He did not receive any intimation for recording dying declaration. He did not remember the phone number from which, he received the phone call for recording the statement of deceased. He further stated in cross-examination that, he has not made entry in the register at the reception counter in respect of his visit. An entry is taken at the reception in respect of the indoor patient O.P.D. Consultancy etc., and special visitors. He did not mention in the statement of the witness as to on which floor she was, when her statement was recorded. He does not maintain the register or diary for noting the date of statements of the witnesses recorded by him. He did not ask the doctor as to what treatment he had given to the patient. He did not mention in the statement that, the witness was able to talk. He did not noted the presence of the doctor in the statement. He did not seen the bed head ticket of the patient. He did not see history of the patient as per the bed head ticket. He did not noted on the bed head ticket of the patient in respect of recording her

statement. He delivered the statement of the witness with his forwarding letter at the office of C.J.M. Nanded on 9th July, 2009. On 9th July, 2009, the statement was with him. He did not mention that, he had retained the carbon copy and the original is sent to the C.J.M. However, he further admits that, the dying declaration is to be sealed immediately and is to be delivered to the C.J.M., however, the said dying declaration was with him for 7 to 8 months. Therefore, his evidence in cross-examination makes it clear that, the copy of the dying declaration Exhibit-80 was not sent to C.J.M. for 8 to 9 months.

31. The prosecution examined Kundankumar Bapurao Waghmare, who was working as Police Inspector in Special Security Department, Nanded as PW-16. He stated that, on 10th November, 2008, he visited the place of incident at village Shirpur, Tq. Palam and conducted panchanama. The place of incident is at the house of complainant Kanopatra at

village Shirpur. He arrested the accused by separate panchanama on 10th November, 2008. During the course of treatment, the complainant Kanopatra died accordingly the offence punishable under Section 302 of the I.P. Code was added. He has stated other details about sending articles to C.A. During his cross-examination, he stated that, the house number is not mentioned in the panchanama Exhibit-106. He did record the statement of the neighbours of the place of incident and they did not disclose about the illtreatment to deceased Kanopatra from the accused persons. He stated that, the place of incident is a house consisting of compound wall and court yard. The main road of the village is in front of the house. On the northern side of the court yard, towards left of the entrance, there is fire place for hitting water etc. It is adjacent to the bathroom. There is projection in the wall for keeping articles such as kerosene lamp etc. A kerosene lamp was kept in it. The kerosene lamp can be used for igniting the fire place. He stated that, on

10th November, 2008, he recorded the statement of witnesses at village Shirpur. He recorded the statements of Kailash Deshmukh, Raju Panchal, Nagnath Deshmukh, Subhashrao Deshmukh, Balasaheb Deshmukh and Moiram Bachate. None of the witnesses stated in respect of seizure of any articles from the place of incident or road in front of the house. From the statements of the above persons, he ascertained that, the incident took place at about 8 a.m. on 9th November, 2008. He also ascertained from the statements of the above witnesses that, at the time of incident, they were sitting near the temple on the road and some were in front of the house of deceased. They stated before him that, deceased Kanopatra came running on the road with burnt clothes on person and accused Sunil Kadam and Sandeep Kadam had extinguished the fire. None of the witnesses has disclosed about any quarrel in the house of the accused on the night prior to the incident. He stated that, he did not collect injury certificates of accused

nos. 1 and 2. He denied the suggestion that, he concealed the fact that, accused nos. 1 and 2 were on the road at the time of incident and they had extinguished the fire of the deceased, in which they sustained burnt injuries, therefore, he did not file the injury certificates of both the accused. He stated that, all the witnesses have stated that, marriage of Savita accused no.5 was performed with Santukrao Deshmukh of Chimangaon, Tq. Jintur and she was residing with her husband at Lokmanya Nagar, Parbhani since many years. None of the witness made statement to show that, on the day of incident accused no.5 Savita was at village Shirpur.

32. Upon reading the entire evidence of this witness, it appears that, though he recorded the statements of various persons in the said village, none of the witness is examined.

33. Therefore, taking into consideration the

entire evidence placed on record by the prosecution and upon re-appreciating the said evidence, it does not inspire confidence so as to sustain the conviction of the accused. It is true that, PW-1 to PW-4 and PW-10 stated that, Kanopatra orally told them about the manner in which the incident had taken place and role played by the accused persons. However, when the officially recorded two dying declarations at Exhibit-64 and Exhibit-80 does not inspire confidence and not believable for having material inconstancies and variance, and when the accused had no opportunity to cross-examine the declarant, both the dying declarations, therefore, deserve to be discarded.

34. In the light of discussion hereinabove, both the dying declarations at Exhibit-64 and Exhibit – 80 deserve to be disbelieved. The Supreme Court in the case of **Dandu Reddy (supra)** in para 16 held thus :-

> "16. Thus the High Court has sidelined such a noticeable discrepancy looming large as between the two

different statements made by the same person. When the sphere of scrutiny of dying declaration is a restricted area, the Court cannot afford to sideline such a material divergence relating to the very occasion of the crime. Either the context spoken to one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as to relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course."

35. In the light of discussion in the foregoing paragraph, the appellants deserve to be given benefit of doubt. Accordingly the following order :-

ORDER

Accordingly Criminal Appeal is allowed. The conviction and sentence of the appellants is hereby quashed and set aside and the appellants are acquitted of the offences with which they were charged and convicted. Fine, if any, paid by the appellants be refunded to them. Since the appellants are in jail, they be released forthwith, if not required in any other case.

Sd/- Sd/-

(**A.I.S. CHEEMA, J.**) (**S.S. SHINDE, J.**)

sga/-