

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

Criminal Appeal No. 140 of 2012

1. Vilas @ Pankaj s/o. Yadav Sable,
Age : 21 years,
Occupation : Laborer,
R/o. Indira Nagar, Ardhapur,
District : Nanded.
2. Yadav s/o. Mainaji Sable,
Age : 60 years,
Occupation : Laborer,
R/o. As above.
3. Masnaji s/o. Yadav Sable,
Age : 23 years,
Occupation : Laborer,
R/o. As above.
4. Sau. Shantabai w/o. Yadav Sable,
Age : 48 years,
Occupation : Household,
R/o. As above.

.. Appellants
(Original accused
nos.1 to 4)

versus

The State of Maharashtra,
Through Police Station, Ardhapur,
District : Nanded.

.. Respondent.

.....

Mr. Gajanan G. Kadam, Advocate, for the appellants.

*Mrs. P.J. Bharad, Additional Public Prosecutor, for
the respondent - State.*

.....

**CORAM : S.S. SHINDE &
A.M. BADAR, JJ.**

**Date of reserving the
judgment : 4th February 2015.**

**Date of pronouncing the
judgment : 11th February 2015.**

JUDGMENT (Per A.M. Badar, J.) :

1. This appeal by convicted accused is directed against the judgment and order dated 23-2-2012, passed by the learned IVth Additional Sessions Judge, Nanded, in Sessions Case No. 131/2011, thereby convicting appellants / accused of the offences punishable under Sections 498-A and 302, read with Section 34 of the Indian Penal Code, 1860 (IPC for the sake of brevity) and directing them to suffer life imprisonment and to pay fine of Rs. 5,000/-, each, in default, to suffer further rigorous imprisonment for one month, for the offence punishable under Section 302, read with Section 34 of IPC. For the offence punishable under Section 498-A read with Section 34 of IPC, appellants / accused were sentenced to suffer rigorous imprisonment for 3 years and to pay fine of Rs. 5,000/-, each, and in default, to suffer further rigorous imprisonment for one month, each.

2. The facts projected from Police report leading to the prosecution of appellants - accused are thus :-

- a) Appellant - accused no.1 Vilas @ Pankaj s/o. Yadav Sable was husband of Ashwini (since deceased). Their marriage was

solemnized on 20-6-2010. Appellant - accused no.2 Yadav s/o. Mainaji Sable is father, Appellant - accused no.3 Masnaji s/o. Yadav Sable is brother, whereas Appellant - accused no.4 Shantabai w/o. Yadav Sable is mother of Appellant - accused no.1. They used to reside jointly at Ardhapur. According to the prosecution case, accused persons treated Ashwini well for a period of one month after her marriage. Thereafter they started demanding Rs. 30,000/- and by coercing her to bring that amount from her parents, they were harassing Ashwini physically as well as mentally. Ashwini used to narrate her woes to her parents telephonically. Ultimately, on 19-9-2010, Ashiwini telephonically asked her father PW-2 Baburao s/o. Vitthalrao Baswante to take her to her parental house with a warning that, else she would not be seen alive. Hence, PW-2 Baburao sent his son PW-5 Sahebrao Baswante, to, Ardhapur, for fetching Ashwini. PW-5 Sahebrao reached Ardhapur at about 7.00 a.m. on 20-9-2010. On the way, he met accused no.2 Yadav, who told PW 5 Sahebrao that Ashiwini is in the house and he is going out. Then PW-5 Sahebrao went to the house of appellants / accused and found door of the house closed. Upon opening the door, he found his sister Ashwini in burnt condition. Ashwini then disclosed him that accused persons set her on fire. Thereafter, parents-in-law of Ashwini reached the spot. With their assistance, Ashwini was taken to Government Medical College and Hospital at Nanded for medical treatment. In the meanwhile, PW-5 Sahebrao informed the incident to his father PW-2 Baburao. Thereafter, PW-2 Baburao and his wife PW-6 Kantabai went to the hospital. According to the prosecution case, at hospital, Ashwini

made oral dying declaration to her mother PW-6 Kantabai, implicating appellants - accused in the crime in question. At hospital, statement of Ashwini came to be recorded by Nagorao Auliwad, Head Constable. In the course of her medical treatment, Ashwini succumbed to burn injuries at about 4:30 p.m. of 20-9-2010 itself. Her father PW-2 Baburao then lodged first information report at about 11.05 p.m. on 20-9-2010. On the basis of this report, Crime No. 160/2010 for offences punishable under Sections 498A, 302, read with Section 34 of Indian Penal Code, came to be registered with Police Station, Ardhapur, District Nanded, and wheels of investigation were set in motion.

b) During the course of investigation, the Investigating Officer visited the spot of the incident and seized burnt pieces of saree, match-stick as well as earth mixed with blood while preparing spot Panchanama. After taking inquest notes the dead body was sent for autopsy. Appellants - accused came to be arrested. Statements of witnesses came to be recorded. On the basis of voluntary disclosure statement of accused - appellant no.2 Yadav, a bottle of kerosene came to be seized from his house. Seized articles were sent for chemical analysis and on completion of routine investigation, accused were charge-sheeted for the offences punishable under Sections 498A, 302, read with Section 34 of Indian Penal Code.

3. Appellants - accused pleaded not guilty to the charge for the offences punishable under Sections 498A, 302, read with Section 34 of

Indian Penal Code and claimed trial. In order to bring home the guilt to the appellants - accused, the prosecution has examined inasmuch as nine witnesses. Defence of the appellants - accused was that of total denial. According to them, Ashwini died because of accidental burns. The defence has examined DW-1 Dr. Sayali s/o. Suryakant Narwade, Resident Doctor of Govt. Medical College, and Nagorao s/o. Laxman Auliwad, Police Head Constable, as DW-1 and DW-2, respectively, and placed reliance on dying declaration (Exhibit-52) of Ashwini recorded at Government Hospital, Nanded.

4. Upon hearing both sides, by the impugned judgment and order dated 23-2-2012, the learned IVth Additional Sessions Judge came to the conclusion that the prosecution has proved that appellant - accused have committed offence punishable under Section 302, read with Section 34 of IPC by setting Ashwini w/o. Vilas @ Pankaj Sable ablazed after pouring kerosene on her person and thereby committing her murder. The learned trial court also came to the conclusion that appellant - accused in furtherance of their common intention, had subjected deceased Ashwini to cruelty.

5. We heard the learned Counsel appearing for the appellants - accused. He vehemently argued that entire evidence adduced by the prosecution is inconsistent. According to the submissions of the learned Counsel for appellants, evidence of PW-5 Sahebrao s/o. Baburao Baswante, brother of deceased Ashwini, who reached the spot immediately after the incident, is totally contradictory to the evidence of PW-4 Vishwambhar s/o. Digambar Pardhe - husband of sister of deceased

Ashwini, who had been to the house of Ashwini, a day prior to the incident and also met her at the hospital after the incident. The learned Counsel for the appellants further argued that though the FIR is lodged on the basis of disclosure by PW-6 Kantabai, mother of the deceased, to informant PW-2 Baburao - father of the deceased in respect of the oral dying declaration; evidence of PW-6 Kantabai shows that she never heard any statement of deceased Ashabai. Thus, according to the learned Counsel for appellants, the impugned judgment and order, convicting appellants cannot be sustained.

6. The learned Counsel for appellants relied on judgment of Madhya Pradesh High Court, in the case of **Ramsingh @ Jalia Vs. State of M.P.**, reported in **1996 (2) Crimes 275**; judgment of Hon'ble Apex Court, in the case of **State of Uttar Pradesh Vs. Bhagwant and others**, reported in **2003 AIR (SC) 2293**, and judgment of Andhra Pradesh High Court in the case of **Chowdam Bhikshapathi and others Vs. State of A.P.**, reported in **2005(2) Crimes 257**, for supporting his contention that when the entire story of the prosecution is doubtful and the prosecution has not adduced clear, cogent and reliable evidence, accused deserves acquittal.

7. The learned Counsel for the appellants further argues that, upon admission of deceased Ashwini to the Government Hospital at Nanded, her dying declaration came to be recorded by the Police Head Constable which demonstrate sustaining burn injuries accidentally and, therefore, in the case resting upon circumstantial evidence, appellants deserve acquittal. He placed reliance on judgment of this Court, in the matter of **Bhagirath Bhaurao Kanade Vs. State of Maharashtra**, reported

in **1997 Bom.C.R. (Cri.) 168**, and judgment of Hon'ble Apex Court, in the case of **Roop Singh @ Rupa Vs. State of Punjab**, reported in **2008(9) Scale 432**, to buttress this contention.

8. Per contra, according to the learned Additional Public Prosecutor, oral dying declarations made by deceased Ashwini to her brother, as well as brother-in-law, are consistent and trustworthy and, therefore, the prosecution has proved the charge for offence punishable under Section 302, read with Section 34, of the IPC. The learned Additional Public Prosecutor further submitted that, evidence of father, mother, brother, as well as brother-in-law of deceased Ashwini, is sufficient to demonstrate that she was coerced by accused persons by demand of Rs. 30,000/- for centering work and on account of this demand, she was subjected to cruelty by them. The learned Additional Public Prosecutor submitted that as the impugned judgment and order convicting appellants - accused is based on evidence on record, same needs no interference by this court.

9. With the assistance of the learned Counsel appearing for the parties, we have carefully perused record & proceedings, including deposition of witnesses and the documentary evidence placed on record. According to the prosecution case, appellants - accused, along juvenile in conflict with law, Ms. Kunta d/o. Yadav Sable, a minor girl aged about 11 years, in furtherance of their common intention, committed murder of Ashwini on 20-9-2010, at their residential house at Ardhapur by dowsing her with kerosene and then setting her ablazed. The prosecution case projected from Police report further demonstrate that all accused along

with juvenile in conflict with law, Ms. Kunta d/o. Yadav Sable, in furtherance of their common intention, subjected Ashwini w/o. Vilas @ Pankaj Sable to cruelty by coercing her to bring an amount of Rs. 30,000/- from her parents and by harassing her on account of this demand.

10. It is not in dispute, that Ashwini was married with Appellant - accused no.1 Vilas @ Pankaj s/o. Yadav Sable on 20-6-2010. It is not in dispute, that Ashwini sustained burn injuries at the residential house of accused - appellants at Ardhapur, District : Nanded, on 20-9-2010, and she succumbed to those burn injuries at about 4.30 p.m. on the same day.

11. In order to bring home the guilt to appellants - accused, prosecution is heavily relying on evidence of oral dying declaration made by deceased Ashwini to her brother PW-5 Sahebrao and husband of her sister, namely, PW-4 Vishwambhar s/o. Digambar Pardhe. According to informant - father PW 2 Baburao, deceased Ashwini had also made oral dying declaration to her mother PW-6 Kantabai. Reliance is also placed on discovery of bottle containing kerosene oil at the instance of Appellant - accused no.2 Yadav. To dislodge the accusation against them, appellants - accused are pressing in service, officially recorded dying declaration of deceased Ashwini at Government Hospital, Nanded, by DW-2 Nagorao s/o. Laxman Auliwad, Police Head Constable, after getting Ashwini medically examined by DW-1 Dr. Sayali Narwade, Residential Doctor of the said hospital.

12. Before proceeding to examine whether evidence adduced on record is sufficient to justify conviction for grave offences punishable

under Section 302, 498A, read with Section 34 of IPC, let us examine how the learned trial court dealt with the matter. Perusal of the impugned judgment and order do show that the learned trial court has not framed the point, as to whether deceased Ashwini died homicidal death. In respect of offence punishable under Section 302 of IPC, the learned trial court has framed the point, as to whether the prosecution proves that on 20-9-2010, at about 6.30 a.m., at their residential house at Ardhapur, acting in furtherance of their common intention, accused persons intentionally and knowingly poured kerosene on person of Ashwini and set her on fire causing her death and thereby committed her murder. After elaborately noting the submissions made by the learned Counsel appearing for both the parties, the learned trial court proceeded to give reasons for answering this point.

13. Perusal of the impugned judgment shows that after briefly noting evidence of PW 5 Sahebrao, the learned trial court started evaluating the defence evidence. The learned trial court, upon evaluating the defence evidence, in para 31 of the impugned judgment, noted that the officially recorded dying declaration of deceased Ashwini at Exhibit 52 was an outcome of influence exerted by Appellant - accused nos.2 to 4 on deceased Ashwini while taking her to the hospital. Then the learned trial court dealt the aspect of recovery of bottle of kerosene at the instance of Appellant - accused no.2 and held that though Panch witness PW-3 Chandrakant Wadje turned hostile, the prosecution has duly proved memorandum Panchanama and discovery of bottle of kerosene at the instance of Appellant - accused no.2 through evidence of Investigation Officer PW-8 Syed Azam, PSI. In paragraph 34, the learned trial court

examined the spot Panchanama Exhibit 15 and recorded the finding that if really Ashwini sustained burns due to outburst of flame from the hearth, then walls of the hearth ought to have turned black so also the pot on the hearth. Upon perusal of the photographs annexed to the spot Panchanama, (which cannot be said to be duly proved for want of evidence for proving the same) the learned trial court presumed that after the incident of setting Ashwini on fire was over, with an intention to show that it was accidental death, the firewood stick is put in the hearth and then water pot is kept on that hearth. The learned trial court upon seeing the photographs, recorded a finding that the pot put on hearth is so big that it cannot be said to be kept for preparing tea. The learned trial court presumed, upon perusal of unproved photographs, that the hearth and the pot on the hearth have not turned black. On considering the recitals in the officially recorded dying declaration Exhibit 52 proved by the defence, the learned trial court further concluded that, as Appellant - accused no.2 Yadav / father-in-law of the deceased had gone to the grocery shop for bringing sugar and tea, deceased Ashwini should not have been in hurry to prepare tea in absence of sugar and tea. With this, the learned trial court concluded that the defence taken by accused, that the death of Ashwini is accidental, is not believable. This is reflected from para 35 of the impugned judgment rendered by the learned trial Court.

14. Thereafter, the learned trial court re-produced evidence of Autopsy Surgeon - PW-9 Dr. Maroti Digambarrao Dake, Assistant Professor at Government Medical College & Hospital, Nanded, and noted that the Autopsy Surgeon has deposed that on external examination, he noticed smell of kerosene from clothes on the dead body. After

undertaking this exercise, in para 38 of the impugned judgment, the learned trial court without examining the evidence adduced by the prosecution and without considering and appreciating oral dying declarations of deceased Ashwini as well as without giving any reasons thereto, directly gave a finding of guilt of accused persons for the offence punishable under Section 302, read with Section 34, of IPC, in following words :-

“ Again in my opinion, if the defence story is taken into consideration that Ashwini received burn injuries on account of outburst of flame, under such circumstances, her clothes had no reason to smell kerosene. This very fact goes to show that accused Nos.1 to 4 on 20-9-2010 early in the morning poured kerosene on the person of Ashwini from the rockel bottle which was recovered from the accused No.2 vide panchanama exhs. 35 and 36 by the I.O. (PW-8), and set her on fire. Thereby it is crystal clear that death of Ashwini is homicidal. As such, it is neither suicidal nor accidental. Therefore, the authorities cited by the learned Advocate for the accused (1) 1993 CRI. I.j. 2609 (S.C.) State of Karnataka V/s. Bheemappa and others, (2) 2003 SAR (Criminal) 525 (SC) State of U.P. V/s. Bhagwant and others and (3) 1996(2) CRIMES 275 (Madhya Pradesh H.C.) Ramsingh @ Jalia V/s. State of M.P. (supra) has no bearing to the case in hand as they are on total different footing than that of the case in hand, therefore, will not help the accused.

Here I stop my judgment to hear the accused on the point of sentence. ”

With this, after hearing appellants - accused on the point of sentence, they were convicted for the offence punishable under Section 302, read with Section 34 of IPC and sentenced them to suffer life imprisonment and to pay fine and in default, to suffer rigorous imprisonment.

15. In the instant case as recorded by us in forgoing paras, there are two versions. The learned trial Court proceeded to weigh the probability of version relied by the defence and came to the conclusion that appellants/accused having not been able to prove their case, the prosecution case should be accepted. The learned trial Court for all practical purpose presumed accused persons to be guilty of the offence of murder as they could not succeed in establishing their innocence and as the officially recorded dying declaration (Exhibit-52) of deceased Ashwini regarding accidental burns was found to be suspicious. This according to us, is not a correct approach to the appreciation of evidence. It is trait that in criminal trial, the burden lying on the prosecution never shifts and onus of persuading the Court that accused is guilty is always on the prosecution. The cardinal principle to be observed in the trial of a criminal case is that the accused should always be considered to be innocent till the offence alleged to have been committed by him is affirmatively and satisfactorily proved. If any authority is required for this basic principle then it can be started that as far as back in ***Sharad Birdhi Chand Sarda Vs. State of Maharashtra***, reported in ***AIR 1984 SC 1622***, the Honourable Apex Court has categorically held that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It

is not law where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by the court. Thus, the burden of proving guilt of the accused beyond all reasonable doubts always rests on the prosecution and, if prosecution fails to adduce satisfactory and reasonable evidence to discharge that burden, it cannot fall back upon evidence adduced by the accused persons in support of their defence to rest its case solely thereupon. In a given situation, the Court legitimately may raise a strong suspicion that in all probabilities accused persons were guilty of offence but it is well settled principle of law that suspicion however grave cannot be a substitute for proof.

16. We are, therefore, unable to accede with the course adopted by the learned trial court in convicting appellants/accused of the offence punishable under Sections 302 r/w. 34 of IPC only because their defence that the death of Ashwini is accidental was not believable. The impugned judgment as such is totally unreasonable and perverse. Let us, therefore, consider the evidence on record in order to examine, whether the charge for the offence of murder of Ashwini Vilas Sabe levelled against the appellants/accused is proved by the prosecution.

17. The evidence of PW-5 Sahebrao – brother of deceased Ashwini shows that after sustaining burns, she was taken to the Government Hospital, Nanded. His evidence further shows that Ashwini succumbed to burn injuries in that hospital on 20.9.2010 itself. Evidence of Autopsy Surgeon PW-9 Dr. Maroti Dake, Assistant Professor of Government Medical College, shows that he conducted Post Mortem examination on

26.9.2010 and found that deceased Ashwini had suffered 89% ante-mortem injuries. According to opinion of this Autopsy Surgeon, Ashwini Vilas Sable, died because of shock due to burns. Let us, therefore, examine whether death of Ashwini occurring on 20.9.2010, is homicidal, authored with requisite intention and knowledge by appellants/accused in furtherance of their common intention for the reason that she failed to fulfill their demand of Rs. 30,000/-.

18. The entire case of prosecution in respect of charge for the offence punishable under Section 302 of IPC rests on circumstantial evidence. There is no eye witness to the fact alleged by the prosecution of incinerating Ashwini by appellants/accused. As Ashwini succumbed to burn injuries, statements made by her as to cause of her death becomes relevant as her dying declarations. The prosecution is heavily relying on the evidence of PW-5 Sahebrao Baswante her brother who reached the spot of incident i.e. house of deceased Ashwini soon after the incident and heard her dying declaration. Instead of directly coming to the evidence of PW-5 Sahebrao, let us examine evidence of PW-2 Baburao Baswante – father of deceased Ashwini, which unfolds the prosecution case and demonstrates the reason for PW-5 Sahebrao to visit the house of deceased Ashwini in the morning hours of 20.9.2010. As per the version of PW-2 Baburao, his daughter Ashwini used to inform him on telephone that appellants/accused persons demands Rs. 30,000/- from her and on that count they inflicts physical and mental harassment. PW-2 Baburao Baswante further stated that on 10.9.2010, Ashwini telephoned him and requested him to arrange money and, therefore, he sent his son to the house of Ashwini with the requisite amount on 20.9.2010.

19. Now, let us examine the evidence of PW-5 Sahebrao, who is son of PW-2 Baburao and brother of Ashwini. PW-5 Sahebrao is not stating that his father PW-2 Baburao had asked him to go to the house of deceased Ashwini on 20.9.2010 or that, his father PW-2 Baburao had given the amount of Rs. 30,000/- to him for handing over the same to the appellants/accused persons. Rather, he plainly stated in his evidence that on 20.9.2010, at about 7.00 a.m, he had gone to the house of Ashwini at Ardhapur and on the way he met accused No.2 Yadav. As per version of PW-5 – Sahebrao, accused No.2 Yadav was running and upon being asked, accused No. 2 Yadav told him that he is going outside. Then, PW-5 Sahebrao went to the house of Ashwini, opened the door of her house and found Ashwini standing in burnt condition. PW-5 Sahebrao further testified that upon enquiry Ashwini told him that her husband, parents in law, brother in law, and sister in law burnt her. As per version of PW-5 Sahebrao, then alongwith parents in law of Ashwini, he took Ashwini in to the hospital in the auto-rickshaw and on the way, parents in law of Ashwini pressurized her and told her not to disclose that she was burnt by them. Cross examination of this witness shows that while Ashwini was being taken in auto-rickshaw to the hospital, lot of people gathered on the spot. Cross-examination of PW-5 Sahebrao further makes it clear that Balaji Sable, a 10 years old boy was sleeping in the house and one old woman was also present in the house when his sister Ashwini sustained burns. Thus prosecution is attempting to show from evidence of PW-5 Sahebrao Baswante that his deceased sister Ashwini made oral dying declaration to him as to the cause of her death.

20. Another oral dying declaration implicating the appellants/accused in the crime in question is coming on record from the mouth of PW-4 Vishwambhar Digambar Pardhe, husband of sister of deceased Ashwini. It is in his evidence that on 19.9.2010, he alongwith his wife had been to the house of Ashwini, when she told them that her husband, father in law, mother in law, brother in law, are demanding Rs. 30,000/- from her for centering work and there is danger to her life. As per version of PW-4 – Vishwambhar Pardhe, he, therefore, telephoned brother of Ashwini (presumably – PW-5 Sahebrao) and asked him to take back Ashwini from her matrimonial house. PW-4 Vishwambhar further deposed that, therefore, brother of Ashwini came to his house on that day at 11.00 p.m. and on the next day, at about 6.00 a.m., brother of Ashwini went to Ardhapur. It may be noted here that PW-5 Sahebrao is not endorsing this version of PW-4 Vishwambhar. According to PW-4, after some time, brother of Ashwini telephoned him and told him that Ashwini sustained burn injuries and she is taken to the hospital. As per his version, therefore, PW-4 Vishwambhar alongwith his wife, went to the hospital where Ashwini told him that her husband, parents in law and brother in law, poured kerosene and set her on fire as their demand of Rs.30,000/- is not fulfilled by her. Cross-examination of this witness shows that, he reached the hospital at 9.00 a.m., but did not go to the Burn Ward. He admitted that mother of deceased Ashwini came to the hospital after death of Ashwini.

21. These two oral dying declarations allegedly made by deceased Ashwini to PW-5 Sahebrao and PW-4 Vishwambhar, constitute material evidence against the appellant/accused in so far as the offence punishable under Section 302 of IPC is concerned. Clause (1) of Section 32 of the

Indian Evidence Act provides that, statements, written or verbal of relevant facts made by a person who is dead are themselves relevant facts when such statement is made by a person as to the cause of his/her death, or as to any of the circumstances of the transaction which resulted in his/her death, in case, in which the cause of that person's death comes into question. Such statements are called as dying declarations. Those can be written or verbal. A witness who hears such verbal declaration is expected to reproduce the words spoken by the declarant as to the cause of death or the circumstances of the transactions resulting in death. When witnesses to the oral dying declaration are none else but near and dear ones of the deceased and when such witnesses are having animosity or grudge against accused persons, the court must be on guard while accepting such declarations. This is so because the dying declaration as a piece of evidence stand on the same footing as any other piece of evidence. It has to be judged and appreciated in the light of surrounding circumstances and its weight determined by reference to the principle governing the weightage of evidence. It is not a statement on oath and the maker thereof cannot be subject to cross-examination. Therefore, if dying declaration suffers from any infirmity either of its own or as disclosed by other evidence or circumstances arriving to the notice of the Court then the Court must look for corroboration. If infirmities found are such as to render the dying declaration doubtful then the Court can refuse to accept the same.

22. The instant case is of plural dying declarations allegedly made by deceased Ashwini as to the cause of her death. Apart from two alleged oral dying declarations of deceased Ashwini, there is one more i.e. her officially recorded dying declaration (Exhibit 52) proved by the defence by

examining two defence witnesses. This dying declaration at Exhibit 52 is alleged to have been made to DW-2 Nagorao Awaliwar, Police Head Constable from 9.15 am to 9.45 a.m. of 20.9.2010. As per this dying declaration, deceased Ashwini is alleged to have stated that her husband – Pankaj (Accused No.1), had gone to Hyderabad for some work, her brother in law Masaji (accuse No.3) and sister in law Mayuri had gone to Tirupati for Darshan of Lord Balaji and at the relevant time she was with her mother in law Shantabai (accused No.4), father in law – Yadav (accused No.2) and sister in law Kunta (Juvenile in conflict with law). Deceased Ashwini is further alleged to have stated to DW-2 Awaliwar that on 20.9.2010 at about 7.00 a.m., her father in law had gone to the shop for bringing tea dust, her mother in law Shantabai and sister in law Kunta had gone to the borewell for fetching water and that she sustained burn injuries due to flaring of fire after after she poured kerosene on the firewood in the hearth and ignited it for preparing tea.

23. This officially recorded dying declaration at Exhibit 52 by DW-2 Awaliwar, Head Constable, according to version of PW-5 Sahebrao, is an outcome of pressure exerted on deceased Ashwini by her parents in law. Evidence of PW-9 Dr. Maroti Dake, who conducted post mortem examination on dead body of Ashwini shows that dead body so also clothes on it were smelling kerosene. PM report Exhibit-39 also reflects the same fact. Cause of sustaining burns by Ashwini as per the dying declaration at Exhibit 52 is, flaring of fire of hearth at the time of igniting it. If really, kerosene oil was earlier poured on fire wood and thereafter fire wood was ignited by means of match stick, then there was no occasion for fall of kerosene oil on the person and clothes of deceased Ashwini and that too in a

large quantity. However, it is seen from the evidence that her body was drenched with kerosene as even at the time of autopsy, it was smelling kerosene oil. Obviously, therefore, the dying declaration at Exhibit 52 depicting sustaining burns accidentally by deceased Ashwini is doubtful and infirm. We are unable to place implicit reliance on the same. Suffice to mention here that prosecution version differs from the version as given in this doubtful Dying Declaration at Exhibit 52.

24. We have pointed out evidence of PW-5 Sahebrao and PW-4 Vishwambhar in respect of the alleged oral dying declarations of deceased Ashwini. As already stated by us, such declarations are not the depositions before the court and are not made in presence of accused persons. Credence of both these oral dying declarations cannot be tested by cross-examination of the declarant, as maker thereof is not available for cross-examination. Because of these inherent weaknesses no initial presumption can be drawn that the oral dying declarations allegedly made by deceased Ashwini contains only the truth. Therefore, the court has to apply strict scrutiny and closest circumspection to these oral dying declarations before acting upon it. At this juncture, it needs to be mentioned that as regards oral dying declarations, the Honourable Supreme Court in para.12 of the oft-quoted case of ***“Bhagwan Das and another Vs. State of Punjab” reported in AIR 1957 SC 589*** has held that ordinarily it is not safe to rely on oral dying declarations. Let us, therefore, further examine the prosecution evidence in order to see whether the oral dying declarations allegedly made by deceased Ashwini gains corroboration from other evidence adduced by the prosecution.

25. PW-1 Shaikh Jakir s/o. Sheikh Kadir is next door neighbourer of deceased Ashwini. He acted as Panch witness for Spot Panchanama Exhibit 15 at the request of investigating Officer-PW-8 - Sayyad Azam Syed Yousuf, P.S.I. Ardhapur. Evidence of this panch witness coupled with that of the Investigating Officer goes to show that they inspected spot of the incident i.e. house of appellant/accused on 21.9.2010. They found and seized scalp hairs, burnt pieces of saree, match box, earth mixed with blood while recording Spot Panchanama Exhibit 15. Spot panchanama Exhibit 15 shows that the spot where incident of sustaining burn by deceased Ashwini took place, was having earthen floor, which was found to be wet even on 21.9.2010 and water was found to be accumulated at some places. In cross-examination, PW-1 Shaikh Jakir, it is brought on record that soon after hearing shouts from the house of appellants/accused at about 7.30 a.m. on 20.9.1010, he rushed to the house of the appellants/accused and saw deceased Ashwini engulfed in fire. Cross-examination of PW-1 Shaikh Jakir further reveals that a young boy named Balaji was pouring water on Ashwini and another woman named Laxmibai was weeping. Cross-examination of PW-1 Shaikh Jakir shows that none of accused/appellants were present there at that point of time. Though this new material benefiting accused persons is elicited from cross-examination of Panch Witness PW-1 Shaikh Jakir, the prosecution has chosen not to cross examine him on this aspect. Suffice to mention that, therefore, on these aspects evidence of PW-1 Shaikh Jakir remained unchallenged. Moreover, it gains corroboration from the recital in spot panchanama exhibit 15, which shows accumulation of water and wet floor even on second day of the incident. This must be due to pouring water on Ashwini by Balaji for extinguishing fire. Cross-examination of PW-1 Shaikh Jakir further shows that subsequently,

appellant/accused No.4 Shantabai and Accused No.2 Yadav came there and by auto-rickshaw of person named Salim, they took Ashwini to the hospital. At this juncture, reverting back to the evidence of PW-5, Sahebrao, it is seen that he also accepted the fact of presence of Balaji and one old woman in the house at the time when he saw Ashwini in burnt condition. His evidence, therefore, vouches truth-fullness of evidence of PW-1 Shaikh Jakir, who seems to be natural witness whose presence at the spot soon after the incident cannot be doubted. There is no reason to disbelieve this version of PW-1 Shaikh Jakir, which brings oral dying declaration of Ashwini under cloud of suspicion.

26. PW-5 Sahebrao in his evidence has stated that when he reached the house of Ashwini, he found Ashwini in standing condition, meaning thereby, that PW-5 Sahebrao reached to the spot immediately on sustaining burns by Ashwini. He has not seen any of the appellant/accused on the spot, nor on the way to the house of Ashwini; except appellant/accused No.2 Yadav. It does not stand to reason that within a short span of time in a spur of moment, as many as 5 persons, allegedly involved in murder of Ashwini would disperse from the spot unnoticed by PW-5 Sahebrao or any other person in the small village Ardhapur and that too in morning hours. Similarly, it does not stand to reason that if really parents in law caused burn injuries to Ashwini, they would again return to the house and take her to hospital. This conduct on their part is incompatible to their guilt. Their absence on the spot depicted from evidence of PW-1 Shaikh Jakir makes oral dying declarations by Ashwini doubtful.

27. PW-2 Baburao in his evidence has elaborately stated the entire

story about the incident told by his son PW-5 Sahebrao telephonically soon after the incident. What transpired when PW-5 Sahebrao reached to the house of Ashwini till Ashwini was taken to the hospital is recited by PW-2 Baburao in pursuance to telephonic information received by him from PW-5 Sahebrao. In a similar way, PW-6 Sau. Kantabai – mother, has also elaborately narrated in her evidence, details of the incident informed to her by her son PW-5 Sahebrao. However, both these witnesses though stated details about the telephonic narrations of PW-5 Sahebrao regarding the incident soon after the incident, they have not deposed that their son informed them about any oral dying declaration allegedly made by Ashwini to PW-5 Sahebrao. If really, deceased Ashwini had made any statement as to cause of her death to PW-5 Sahebrao, then PW-5 Sahebrao who had immediately informed the entire incident to his parents, he would have certainly disclosed to his parents, that Ashwini told him that her matrimonial relatives including her husband have burnt her. PW-5 Sahebrao in normal course would not have missed to disclosed such an important aspect to his parents, particularly when he narrated the entire happenings in detail. Conduct of PW-5 Sahebrao in not disclosing or informing about alleged oral dying declaration to his parents while elaborately disclosing all other facts to them soon after the incident, casts a shadow of doubt on the oral dying declaration of Ashwini allegedly made to him. As such, we do not find it safe to rely on oral dying declaration allegedly made to PW-5 Sahebrao.

28. There is one more circumstance reflected from the charge sheet which casts a shadow of doubt on the alleged dying declaration of Ashwini made to PW-5 Sahebrao. According to this oral dying declaration, apart

from appellants/accused, her sister in law also participated in the event of incinerating her. The charge sheet shows that this sister in law is Miss Kunta Yadav sable – an eleven years old child. It is hard to digest that such a small girl will join hand with other accused person to sprinkle kerosene oil on her sister in law Ashwini and then to light her by means of burning match stick.

29. When two dying declarations verbally made to near relatives by deceased Ashwini are compared then it is seen that she allegedly told her brother PW-5 Sahebrao that 5 persons, viz, her husband, parents in law, brother in law, and sister in law, burnt her whereas, to PW-4 Vishwambhar, she allegedly disclosed 4 persons viz, her husband, father in law, mother in law and brother in law poured kerosene on her person and set her on fire. It is thus clear that even oral dying declarations allegedly made by deceased Ashwini are not consistent. In her alleged oral dying declaration to PW-4 Vishwambhar, Sister in law of Ashwini i.e. Miss Kunta is not named as assailant. As such a question which naturally arose is which of the two oral dying declarations may be true and which one is untrue. Since the sphere of scrutiny of dying declaration is restricted area, this court cannot afford to sideline such material circumstance and naturally, therefore, it is not safe to place reliance on both these alleged oral dying declarations as it is difficult rather impossible to give findings as to which one is truthful and which one is untruthful. It is to be kept in mind that in a criminal case when there is conflicting evidence in respect of the same circumstance, then naturally the benefit thereof has to go to accused persons. Both these oral dying declarations therefore need to be discarded.

30. Next circumstance relied by the prosecution is recovery of bottle of kerosene oil at the instance of appellant/accused No.2 Yadav on 24.9.2010. PW-8 Sayyad Azam in his evidence has stated while in custody, appellant/accused No.2 Yadav gave a statement that he will show the place where he has kept the kerosene can. A memorandum panchanama at Exhibit 35 is stated to have been prepared. As per the version of PW-8 Sayyad Azam, then they went to the house of accused persons alongwith panchas and appellant/accused No.2 Yadav produced a green kerosene bottle kept on the tin roof shed of his house. Same came to be seized as per the recovery panchanama Exhibit 36. In our opinion, no over-bearing importance needs to be given to such recovery. Panch witness to this recovery PW-3 Chandrakant has turned hostile to the prosecution. Kerosene oil is an article of daily use in rural areas. Kerosene bottle is available almost in each and every house in villages where electricity is a scarce commodity. The bottle of kerosene is stated to have been found on the tin shed of the house of appellants/accused. Recovery panchanama Exhibit 36 shows that kerosene bottle was kept on the tin sheet roof of the house of accused persons. It is thus clear that the place from where bottle was found was open and accessible to all and sundry. The possibility of anybody else keeping bottle of kerosene on the roof made of tin sheet cannot be ruled out. Evidence of PW-8 Sayyad Azam, PSI, shows that he visited the spot i.e. house of appellants/accused and prepared spot panchanama Exhibit 15 on 21.9.2010. Strangely enough, this prudent investigator had not made any attempt to see whether bottle or can of kerosene is there in the house, even though to his knowledge Ashwini had sustained burns by kerosene. It was on 24.9.2010, that the bottle of kerosene is shown to have been recovered from the tin sheet roof of the house which was already inspected by the

Investigating Officer on 21.9.2010. As such, evidence of recovery of every day article i.e. Kerosene Oil is not of any assistance to infer guilt of accused persons.

31. There is no other evidence worth saying to connect accused persons to the alleged offence of murdering Ashwini. In the result, we are of the considered opinion that, the prosecution has failed to prove that accused persons or any of them in furtherance of their common intention had committed murder of deceased Ashwini by pouring kerosene oil on her person and by setting her ablaze.

32. So far as charge for the offence punishable under Section 498-A r/w 34 of IPC is concerned, it is in evidence of PW-2 Baburao and PW-6 Shantabai that after marriage, Ashwini was treated properly for one month and thereafter accused persons started demanding Rs. 30,000/- to deceased Ashwini. As per the version of these witnesses, this fact was told to them by Ashwini on telephone. Consistent version of the parents of deceased Ashwini shows that she told them that the accused persons harassed her physically and mentally. PW-5 Sahebrao has stated that his sister Ashwini had informed him that her husband demands Rs. 30,000/- for centering work and exerts mental and physical pressure on her to fulfill that demand. As against this, PW-4 Vishwambhar has stated that deceased Ashwini had told him that her husband, father in law, mother in law and brother in law demands Rs. 30,000/- for centering work and also informed him that there is danger to her life. Evidence of parents as well as brother of deceased Ashwini does not show, as to what type of physical and mental harassment was there to deceased Ashwini. Rather, their evidence shows that deceased

Ashwini had not disclosed exact nature of so called physical and mental harassment. Evidence of PW-4 Vishwambhar does not show any disclosure regarding physical and mental harassment to him by deceased Ashwini. PW-5 Sahebrao mentioned that Ashwini attributed physical and mental torture only to her husband whereas other witnesses are roping in other inmates of house of her husband. It is thus clear that inconsistent evidence on the aspect of cruelty is coming from the near and dear ones of deceased Ashwini. There is not a single piece of disinterested evidence on this aspect. The concept of cruelty varies from place to place and individual to individual and according to socio economic status of the persons involved. The question, whether the act complained of were act of cruelty has to be determined from the whole facts and relationship between the parties. For proving the offence of cruelty punishable under Section 498A of IPC, harsh and harmful conduct of certain intensity and persistence is required to be brought on record by clear and cogent evidence. Section 498A of IPC will not come into place in every case of harassment or cruelty. In the case in hand, the prosecution has not brought on record the acts allegedly done by appellants/accused, constituting cruelty and falling in the definition of the term "cruelty" found in explanation to Section 498A of the IPC, for scrutiny of the Court. Evidence by prosecution is lacking assurance which is required in criminal trial apart from being too vague. Therefore, accused persons are certainly entitled to the benefit of doubt, so far as this offence is concerned.

33. In the result, the appeal deserves to be allowed by quashing and setting aside the impugned judgment and order passed by learned 4th Additional Sessions Judge, Nanded, in Sessions Case No. 131 of 2011, and

hence the following order :-

[a] The appeal is allowed. Appellants/accused are acquitted of the offences punishable under Section 302 and 498A r/w. 34 of IPC.

[b] Appellant/accused No.1 Vilas @ Pankaj s/o. Yadav Sable and Accused No.3 Masnaji S/o. Yadav Sable are in jail. They be released forthwith if not required in any other case.

[c] Appellant/accused No.2 Yadav S/o. Mainaji Sable and accused No. 4 Shantabai w/o. Yadav Sable, are on bail. They need not surrender. Their bail bonds stand cancelled and sureties discharged. Fine amount, if any, recovered from appellants/accused be refunded to them.

(A.M. BADAR)
JUDGE

(S.S. SHINDE)
JUDGE

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