

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1069 OF 2006

1. Salim Lailasha Kale	]	
Aged : 26 Yrs., Occ.: Agriculturist	]	
	]	
2. Lailasha Landya Kale	]	
Aged : 61 Yrs., Occ.: Agriculturist	]	
	]	 Appellants /
Both residing at Chhatrapati Shahunagar,	]	(Original Accused
Opp. ITI, Indapur, District Pune.	]	Nos.1 & 2)
<i>Versus</i>		
State of Maharashtra	]	 Respondent

ALONG WITH
CRIMINAL APPEAL NO.868 OF 2010

Gondawanya <i>alias</i> Cundawanya	]	
Ishwar Shinde,	]	
Age : About 48 Yrs., Occ.: Labour,	]	
R/o. Saraswatinagar, Near I.T.I., Indapur,	]	 Appellant /
Tal. Indapur, Dist. Pune.	]	(Original Accused)
<i>Versus</i>		
State of Maharashtra	]	 Respondent

Mr. Uday P. Warunjikar for the Appellants in
Cri. Appeal No.1069 of 2006.

Mr. D.G. Khamkar for the Appellant in Cri.
Appeal No.868 of 2010.

Mrs. G.P. Mulekar, A.P.P., for the
Respondent-State in both the Cri. Appeals.

CORAM : SMT. V.K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

RESERVED ON : 23RD JUNE, 2015

PRONOUNCED ON : 13TH JULY, 2015

JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. The Appellants in both these Appeals are convicted for the offences punishable under Sections 302, 364 and 342 r/w. 34 of the IPC by two separate Judgments dated 28th August, 2006 in Sessions Case No.43 of 2005 by the 3rd Ad-Hoc Additional Sessions Judge, Baramati and by Judgment dated 31st August, 2010 in Sessions Case No.35 of 2007 by the Additional Sessions Judge, Baramati. Both these Sessions Cases and the Appeals therefrom are arising out of one and same incident registered as C.R. No.76 of 2005. Hence, they are being decided by this common Judgment.

2. Appellants in Criminal Appeal No.1069 of 2006 are Original Accused Nos.1 and 2 and by the impugned Judgment of 3rd Ad-Hoc Additional Sessions Judge, they are sentenced to suffer R.I. for 10 years and to pay fine of Rs.10,000/- each, in default to suffer further R.I. for 6 months for the offence punishable under Section 364 r/w. 34 of the IPC, whereas for the offence punishable under Section 342 r/w. 34 of the IPC, they are sentenced to suffer R.I. for 1 year and to pay fine of Rs.1,000/- each, in default to suffer further R.I. for 2 months. Out of them, Appellant No.1 Salim is further convicted for the offence

punishable under Section 302 of the IPC and sentenced to suffer R.I. for life and to pay fine of Rs.10,000/-, in default to suffer further R.I. for 2 years.

3. The Appellant in Criminal Appeal No.868 of 2010, against whom the Supplementary Charge-Sheet was filed, as he was absconding at the time of the earlier Sessions Case, is sentenced to suffer R.I. for 10 years and to pay fine of Rs.5,000/-, in default to suffer further R.I. for 6 months for the offence punishable under Section 364 of the IPC, whereas for the offence punishable under Section 302 of the IPC, he is sentenced to suffer R.I. for life and to pay fine of Rs.5,000/-, in default to suffer further R.I. for 1 month, by the Additional Sessions Judge, Baramati. He is further sentenced to suffer R.I. for 1 year and to pay fine of Rs.500/-, in default to suffer further R.I. for 1 month for the offence punishable under Section 342 of the IPC.

4. For the sake of convenience, the parties are referred to by their original nomenclature as *"Accused No.1"*, *"Accused No.2"* for Appellant No.1 and Appellant No.2 in Criminal Appeal No.1069 of 2006 and *"Gondawanya"* for Appellant in Criminal Appeal No.868 of 2010.

5. Facts, as are necessary, for deciding these Appeals may be stated thus :-

On 3rd April, 2005, at about 2:30 pm, while PW-1 Nanasaheb Dhapte was returning to his house from the field, he saw some 5 to 6 persons from Pardhi community gathered in front of the house of his brother deceased Baba Dhapte. On enquiries with them, he came to know that his brother Baba owed some amount to those Pardhi persons and hence they wanted to take him along with them to recover the said amount. PW-1 Nanasaheb was knowing Original Accused No.4 Parvati Pachange and on enquiries with her, he came to know the names of other accused persons, including of Accused No.1 Salim, Accused No.2 Lailasha and Accused Gondawanya. In his presence, Accused Nos.1 and 2 lifted his brother Baba and put him on his motor-cycle. Accused No.2 sat on the pillion seat and both of them took Baba with them on their motor-cycle. Accused No.1 told PW-1 Nanasaheb to come at Indapur for further information.

6. Therefore, along with PW-2 Appasaheb Shinde and two other persons from the village by name Sadashiv Dhapte and Suresh Barne, PW-1 Nanasaheb went to Indapur. There they met

the Counsellor Milind Doshi and informed him about the incident. All of them along with Mr. Milind Doshi went to the locality of Pardhi, near I.T.I., Indapur. There, the present Accused were called. They came there along with deceased Baba. Counsellor Milind Doshi enquired with Baba whether he owes any amount to those Accused. He replied that he does not owe a single pie to those accused persons. However, the Accused persons refused to release Baba and asked PW-1 Nanasaheb, his brother, and other witnesses to come on the next day. Reluctantly, PW-1 Nanasaheb and other witnesses returned to their house.

7. On the next day, on 4th April, 2005, PW-1 Nanasaheb again went to the locality of the Accused persons at about 11 to 11:30 am. There he did not find either his brother, Baba, or the Accused persons. Hence, from there he went to the office of Tahasildar and also to the premises of Civil Court at Indapur, to take their search. Thereafter, they went to the house of Ex-Counsellor Mr. Giratkar. He informed them that Baba was admitted in Rural Hospital at Indapur. Hence, PW-1 Nanasaheb and Shivram Shinde, who was with him, went to the Rural Hospital at Indapur, where he found the dead body of his brother Baba with various bleeding injuries on his private part.

8. Meanwhile, PW-9 ASI Appasaheb Kolekar had been to Rural Hospital at Indapur in discharge of his official duty at about 11:30 am. There, PW-8 Dr. Anshuman Dhumal, who was attending the deceased, informed him that one injured patient was admitted in the hospital. Hence, PW-9 ASI Kolekar went near the patient, i.e. the deceased in the case, and made enquiry with PW-8 Dr. Dhumal whether he was in a position to give the statement. When PW-8 Dr. Dhumal confirmed that he was in a position to give statement, PW-9 ASI Kolekar recorded statement of deceased Baba vide Exhibit-69, in which deceased has given the detailed account of how he has sustained the injuries.

9. According to the said statement of the deceased, he was carried by Accused Nos.1 and 2 on their motor-cycle at the house of Accused No.1, there they insisted on him to give the amount and assaulted him by fist blows and kicks and then confined him in their house on that night. On the next day, they insisted on him to execute the stamp of Rs.2,00,000/- in Tahasildar Office. As he refused to do so, they removed all his clothes. Accused No.1 Salim and Accused Gondawanya then assaulted him by inflicting blows of knives on his private part and surrounding area. Then they again made him wear the clothes, closed his eyes and

brought him on motor-cycle at Baramati-Indapur Road. When they reached near Mosque, they heard the sound of truck approaching. Out of Accused No.1 and Accused Gondawanya, one untied the cloth from his eyes and pushed him by the side of the truck. The truck, however, did not touch him but, by that time, the Accused raised the shouts that accident had happened. They abused and assaulted the truck driver. Then some one present on the spot brought him in the Maruti Car and admitted him in Rural Hospital at Indapur.

10. In view of this detailed statement of the deceased (Exhibit-69), PW-9 ASI Kolekar initially registered C.R. No.52 of 2005 against the Accused for the offences punishable under Sections 307, 363, 365, 342, 323 and 504 r/w. 34 of the IPC. Subsequent to the death of the deceased, offence punishable under Section 302 of the IPC was added thereto. On the receipt of the information about the death of deceased Baba, at about 2:30 pm, PW-9 ASI Kolekar made Inquest Panchanama (Exhibit-46) and sent dead body for postmortem. The postmortem was conducted by PW-7 Dr. Eknath Chandanshive, who opined that the cause of the death was *“extensive hemorrhage due to cut through injury”*.

11. Further investigation of the case was taken over by PW-10 PSI Namdeo Sinalkar. He went to the spot of incident, which was in the dwelling house of Accused Nos.1 and 2 at I.T.I., Indapur. From that house, he seized one bed sheet, broom and one knife, which were stained with blood. He also collected the blood drops, which were lying on the tiles of the floor. Further he seized the motor-cycle, which was found in front of the house. From the house of Accused Nos.1 and 2, along with Panchas, he proceeded at Shriram Chowk, Bawada Naka of Indapur, where on the tar road, blood drops were found. They were collected by the cotton swab. One cloth, with which the eyes of the deceased were tied, was also seized and the Panchanama (Exhibit-71) was completed.

12. On the same day, PW-10 PSI Sinalkar seized the blood stained clothes of the deceased, which were produced by Head Constable Ladkat from the hospital, vide Panchanama (Exhibit-57). Then, from time to time, he recorded the statements of witnesses. On 12th April, 2005, he seized the blood stained shirt of Accused No.1 under Panchanama (Exhibit-73). Entire seized muddemal property was sent to Chemical Analyzer on 17th May, 2005 vide requisition (Exhibit-49). PW-11 Head Constable Sachin

Shinde carried the muddemal to Chemical Analyzer. The C.A. Reports are produced in the case at Exhibits "74" to "76". After due investigation of the case, PW-10 PSI Sinalkar filed Charge-Sheet in the Court, initially, against five Accused, including Accused Nos.1 and 2 and three other female Accused.

13. The remaining two Accused, i.e. the present Appellant Gondawanya Ishwar Shinde and Jakhnur Shankar Pawar were showed as absconding in the said Charge-Sheet.

14. On committal of this case to the Sessions Court, Trial Court framed charge against those Accused vide Exhibit-32. The Accused pleaded not guilty and claimed trial, raising the defence of false implication.

15. In support of its case, Prosecution examined in all eleven witnesses and on appreciation of their evidence, the Trial Court was pleased to hold the guilt of Accused Nos.1 and 2 to be proved beyond reasonable doubt. Trial Court was, however, pleased to acquit the female Accused Nos.3 to 5, as no convincing evidence was brought on record against them.

16. Subsequent thereto, absconding Accused Gondawanya, the

present Appellant, came to be arrested on 22nd December, 2006 by PSI Vikas Ramgude. After completion of investigation against him, Charge-Sheet came to be filed in the Court. On committal of the said case, the Trial Court framed charge against him vide Exhibit-8. Accused Gondawanya also pleaded not guilty and claimed trial. In support of its case against him, Prosecution examined eight witnesses, including those material witnesses, who were examined in the earlier Sessions Case and some additional witnesses, like, the Investigating Officer of the said case.

17. On appreciation of the said evidence also, the Trial Court held guilt of the Accused Gondawanya also proved beyond reasonable doubt and convicted and sentenced him, as stated above.

18. In these Appeals, we have heard learned Counsel for Accused Nos.1 and 2 Mr. Warunjikar, learned Counsel for Accused Gondawane Mr. D.G. Khamkar and learned A.P.P. for the Respondent-State Mrs. Mulekar. In our considered opinion, in order to effectively deal with the rival submissions advanced by them, it would be useful to refer to the evidence on record.

19. Prosecution case against the Accused stands on the evidence of two eye witnesses, namely, PW-1 Nanasaheb and PW-2 Appasaheb, in whose presence the deceased was taken away on the motor-cycle by the Accused, and the Dying Declaration of the deceased (Exhibit-69), as recorded by PW-9 ASI Kolekar.

20. The evidence of PW-1 Nanasaheb goes to reveal that on 3rd April, 2005, at about 2:30 pm, while he was returning to his house from the field, on the way, he noticed 5 to 6 persons present in front of the house of his brother Baba. Out of them, he was knowing Accused No.4 Parvati Pachange and on enquiries with her, he came to know the names of other Accused. He further came to know that those persons had come to the house of his brother, as his brother Baba was owing some amount to them and Baba has failed to pay the said amount. He further saw that Accused No.1 Salim lifted his brother and put him on the seat of motor-cycle. Accused No.2 Lailasha sat on the pillion seat and then they took his brother away on the said motor-cycle. While doing so, Accused No.1 Salim told him to come at Indapur for further information. Accordingly, he and PW-2 Appasaheb, along with two other persons from their village, went there and

met the Counsellor Milind Doshi and informed him about the incident. Then, along with Counsellor Milind Doshi, they went to Pardhi locality of the Accused persons, near I.T.I., Indapur. They waited in grocery shop. There, Accused No.1 Salim, Accused No.2 Lailasha and Accused Gondawanya were called. They came there along with deceased Baba. Counsellor Milind Doshi made enquiry with Baba to know whether he owes any amount to the Accused. Baba told him that he does not owe a single pai. Thereupon Milind Doshi requested the Accused to release Baba. However, Accused refused to do so and asked PW-1 Nanasaheb and PW-2 Appasaheb to come on the next day.

21. There is corroborating evidence to this effect of PW-2 Appasaheb, who is residing near the house of PW-1 Nanasaheb. According to him, on that day, at about 2 pm, when he was returning to his house for lunch from the workshop on his bicycle, he noticed one bullet motor-cycle parked in front of the house of the deceased. He also found 4 to 5 persons present there. They were giving abuses. He has identified Accused No.2 Lailasha as one of the persons present outside. In his cross-examination, no doubt he has admitted that those 4 to 5 persons were unknown to him, but the fact remains that he is witness to

the incident that 4 to 5 persons with one motor-cycle were present outside the house of the deceased and one of those persons was Accused No.2 Lailasha. Even accepting that he is not speaking about the presence of Accused No.1 Salim and Gondawanya, the possibility that they must have been inside the house of the deceased, insisting on him for payment of money, cannot be ruled out.

22. The evidence of PW-1 Nanasaheb further reveals that on 4th April, 2005, at about 10 am, he again went to the locality of Pardhi vasti to find out about his brother. However, neither he found the Accused persons nor his brother there. Hence, after taking search of his brother, when he met an Ex-Counsellor Giratkar, he came to know that his brother was admitted in Rural Hospital at Indapur. Hence, he went there and found the dead body of his brother with serious injuries on his private part.

23. Learned Counsel for the Accused has pointed out to various admissions given by PW-1 Nanasaheb in his cross-examination to the effect that though he listened altercations and abuses going on in the house of his brother in a loud manner, he did not raise any shouts, nor he obstructed the Accused when they were

carrying his brother on the motor-cycle. It is also pointed out that he or other witnesses did not make any attempt of retaining the custody of his brother either at that time or subsequently when the meeting with Counsellor Milind Doshi took place. He has also not lodged any F.I.R. of the said incident and, therefore, according to the learned Counsel for the Accused, his evidence is bereft of credibility. In our considered opinion, however, when no danger as such was apprehended at that time to the life of Baba, from the mere fact that PW-1 Nanasaheb did not obstruct them or did not lodge complaint against them, his evidence cannot become suspect.

24. For the present, suffice it to state that the evidence of PW-1 Nanasaheb, who is an eye witness to the incident, goes to prove that they had actually witnessed the deceased being taken away on the motor-cycle of Accused Nos.1 and 2. Evidence of PW-1 Nanasaheb further proves that the deceased was again seen alive in the company of Accused Nos.1 and 2 in the evening, when they met Counsellor Milind Doshi.

25. This brings us to the evidence relating to Dying Declaration

(Exhibit-69), which is the most crucial piece of evidence in the case, as it clinches the case against the Accused. On the aspect of Dying Declaration, the testimony of PW-8 Dr. Dhumal and PW-9 ASI Kolekar is of significance.

26. As per evidence of PW-8 Dr. Dhumal, on 4th April, 2005, while he was on duty as Medical Officer at Rural Hospital, Indapur, at about 11:15 am, deceased was brought in injured condition. He was, however, conscious. On external examination of the deceased, he found following injuries :-

- (i) Incised wound over right supra inguinal extending upto scrotum showing exposed testicles right side 15 x 6 cm x muscle deep. There was evidence of active bleeding through cut vessle and clotted blood was present.*
- (ii) Incised wound over left supra pubic region extending upto left inguinal region; 12 x 5 cm x muscle deep; active bleeding was evident through cut major vessel and clotted blood was found.*
- (iii) Incised wound over shaft penis 3 x 2 x ½ cm and bleeding.*

(iv) *Contusion over right iliac region 4 x 3 cm.*

(v) *Contusion over left poplin region 6 x 4 cm.*

27. He has opined that the age of the injuries was within six hours from medical examination. Injury Nos.1 to 3 can be caused by sharp object and Injury No.4 can be caused by hard and blunt object. He immediately informed about the admission of the patient to Indapur Police and started giving him preliminary treatment. Accordingly, at 11:40 am, Police came to the hospital. Police made enquiry with him whether injured was in a conscious state and in a position to make statement. Therefore, he examined the deceased again and then the statement of the deceased came to be recorded by PW-9 ASI Kolekar in his presence. He has put endorsement on the said statement about patient being conscious at the time of recording of the statement. The said endorsement is at Exhibit-66 on the statement (Exhibit-69).

28. This evidence of PW-8 Dr. Dhumal gets complete support and corroboration from the evidence of PW-9 ASI Kolekar, who had visited the hospital at about 11:30 am and made enquiry with PW-8 Dr. Dhumal. When PW-8 Dr. Dhumal confirmed that

deceased was conscious and in a position to give statement, PW-9 ASI Kolekar recorded the statement of the deceased, after disclosing his identity to the injured. He has further deposed that he has recorded the statement of the deceased as per his say. PW-8 Dr. Dhumal has made endorsement of deceased being conscious while recording of the statement. Then PW-9 ASI Kolekar has read over the said statement to the deceased. The deceased has admitted the contents thereof as true and correct and made thumb impression blow it. PW-9 ASI Kolekar has further deposed that the contents of the statement (Exhibit-69) are written in his own handwriting. The said statement bears his signature also. He immediately returned to the Police Station with the said statement and registered the crime on the basis of the said statement.

29. This statement of the deceased, which was initially treated as F.I.R. for registration of the offence and subsequently treated as Dying Declaration in view of the death of the deceased at about 1:10 pm, gives in detail, the manner in which the incident has occurred. The contents thereof are required to be reproduced here, as they are of vital importance as they clinch the guilt of the Accused.

30. In this statement (Exhibit-69), deceased has stated that on 3rd April, 2005, at about 2:30 pm, while he was in his house, Accused No.1 Salim, Accused No.2 Lailasha, Accused Gondawanya and three other female Accused came to his house on the motor-cycle. Accused No.1 Salim lifted him and kept him on the motor-cycle. Accused No.2 Lailasha sat on the pillion seat and they took him on the motor-cycle to their house. There, Accused No.1 Salim insisted on him to return his amount and on that count started beating him with fist blows and kicks. Though he was asking them which amount is due from him, Accused persons did not listen to him, confined him in the house for about whole night, giving him abuses and fists blows. On the next day, i.e. 4th April, 2005, at about 10 am, they insisted on him to execute a stamp paper in the Tahasildar Office admitting the liability of the amount of Rs.2,00,000/-. When he refused to do so, they removed all his clothes. Then Accused No.1 Salim and Accused Gondawanya assaulted him with knives in their hands on his private part and also on the thighs nearby, they inflicted several blows of knife on him. Then Accused No.1 Salim tied a cloth on his eyes. All of them then brought him near a Mosque at Indapur-Baramati Road. When they heard the sound of truck

approaching, they pushed him. He fell down. The persons present there shouted accident has happened. Some one untied the cloth on his eyes. He found that there was one truck near him, but he had not received any dash or touch of the truck. Even then, the truck driver was abused and assaulted. Some one gathered there took him to the hospital.

31. Thus, this statement of the deceased (Exhibit-69) clearly implicates Accused No.1 Salim, Accused No.2 Lailasha and Accused Gondawanya for the cause of his injuries, which ultimately has resulted into his death.

32. This Dying Declaration bears the endorsement of PW-8 Dr. Dhumal to the effect that patient was conscious and oriented at the time of recording his statement. The said statement further bears the endorsement of the Police Station to the effect that on this statement, C.R. No.52 of 2005 came to be registered at about 12:40 pm.

33. The evidence of PW-8 Dr. Dhumal further reveals that deceased succumbed to the injuries at about 1:10 pm. The case papers of the deceased are produced on record at Exhibit-67 and in the said case papers also, noting is appearing that at about

12:05 pm, Police had made enquiry about the consciousness of the patient for recording his statement and after examining the patient and finding that he was conscious, Police started recording his statement at about 12:05 pm. Case papers further reveal that, at that time, his pulse rate was 122 per minute and Blood Pressure was 100:70 systolic.

34. The evidence of PW-7 Dr. Chandanshive reveals that he has conducted the postmortem on the dead body of Baba and had found the injuries as noted by PW-8 Dr. Dhumal and which are also stated by him in his Postmortem Report. According to him, Injury Nos.1 and 2 were sufficient to cause the death. They were antemortem and caused by sharp object, like, Muddemal Article No.4-the knife. He has further opined that the cause of the death was *“due to extensive hemorrhage due to cut through injury to major vessel of both inguinal region”*.

35. If at all any further corroboration to this evidence is essential, then it is also coming from the Inquest Panchanama, the Spot Panchanama and C.A. Report. The Spot Panchanama (Exhibit-71) proved through the evidence of PW-9 ASI Kolekar reveals that in the house of Accused No.1 Salim, the blood

stained bed sheet, the broom and the blood drops were found, which were collected and sealed under Panchanama on the spot. Where the injured was thrown at that spot also the blood stains were found, which came to be collected and sealed. Then these sealed articles were sent to Chemical Analyzer, as deposed by PW-10 PSI Sinalkar. They were carried by PW-11 Head Constable Shinde in the same sealed condition and the C.A. Report reveals that the blood stains of "B" group were found on the bed sheet, the broom and the cotton swab collected from the house of Accused No.1. It also revealed that the clothes of the deceased, which were seized under Panchanama (Exhibit-74), were also of the "B" blood group. As per the C.A. Report (Exhibit-74), the knife, which came to be seized from the house of Accused No.1, was also having the blood stains of "B" group. Thus, it is necessarily establishing the use of the knife in commission of the offence and also supporting the recitals in the Dying Declaration that deceased was taken to the house of Accused Nos.1 and 2 and there he was inflicted knife blows by the Accused.

36. The main ground on which the Defence has challenged the Prosecution case is that the identification of these Accused is not established, as PW-1 Nanasaheb was not knowing them. He was

knowing only acquitted Accused No.4 Parvati Pachange. PW-2 Appasaheb has also identified only one Accused, i.e. Accused No.2 Lailasha, and not the other Accused. Hence, according to learned Counsel for the Accused, the evidence relating to Test Identification Parade was very much essential in the instant case, which Investigating Officer has not conducted, and without supporting evidence of Test Identification Parade, the dock identification of the Accused in the Court cannot be relied upon.

37. In our considered opinion, this submission cannot be accepted for the reason that evidence relating to Test Identification Parade is merely of a corroborating nature. Substantive evidence as regards identification of the Accused is their identification in the dock at the time of trial by the witnesses. For placing reliance on the evidence of dock identification, the Court has to consider whether the witnesses had sufficient opportunity to observe the Accused and to remember them. In this case, PW-1 Nanasaheb had more than sufficient opportunity to observe the Accused. As deposed by him, he has seen them in front of the house of the deceased and also seen them carrying the deceased on their motor-cycle. Further, he had also opportunity to observe them again at

Indapur, when they were called by Counsellor Milind Doshi. Therefore, there was sufficient opportunity for PW-1 Nanasaheb to observe the Accused.

38. Moreover, if at all there is any doubt about identification of the Accused, then it is amply removed by the Dying Declaration of the deceased. In the Dying Declaration (Exhibit-69), the names of all these three Accused are given and also the roles played by them. Needless to say, that, the deceased had more than sufficient opportunity to observe the Accused persons as he was in their custody for about 24 hours and during that period, the Accused had assaulted him, gave him kick blows, fist blows and also the knife blows. In such situation, there need not be any doubt about identification of the Accused.

39. The evidence relating to Dying Declaration of the deceased is assailed on the ground that it suffers from infirmities, like, it is not recorded by the Magistrate; secondly, it is submitted that it does not bear the time i.e. at which time recording of Dying Declaration is started and completed. Thirdly, it is not a complete statement of the incident and the contents thereof are not tallying with the history given before the Doctor by the

persons, who admitted the deceased in the hospital.

40. Now coming to the first contention that the Dying Declaration is not recorded by the Magistrate, the law does not require at all that in order to place reliance on the Dying Declaration, it has to be recorded by the Magistrate. The law also nowhere lays down that Dying Declaration should bear the time at which its recording started and completed. The law also does not expect that Dying Declaration should have two separate endorsements of the Doctor about the fitness of the deceased to give such statement.

41. In this respect, we are guided by the law as laid down by the Supreme Court in the landmark decision of **Laxman V/s. State of Maharashtra, AIR 2002 SC 2973**, wherein, after taking the review of all its earlier decisions, Apex Court has, in categorical terms, laid down as follows :-

“A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise, will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues

and is reduced to writing by some one like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary, nor is the presence of a magistrate absolutely necessary. Although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die, there is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight, has to be attached to such statement, necessarily depends on the facts and circumstances of each particular case.”

42. Learned A.P.P. has also placed reliance on the recent decision of the Supreme Court in ***Rafique alias Rauf and Ors. Vs. State of Uttar Pradesh, (2013) 12 SCC 121***, wherein also the Supreme Court has held that,

“24. We also wish to add that as on date, there is no statutory prescription as to the manner or the procedure to be followed for recording a dying declaration to fall it within the four corners of Section 32(1) of the Evidence Act. The presence of the Magistrate; certification of

the doctor as to the mental or the physical status of the person making the declaration, were all developed by judicial pronouncements. As have been repeatedly stated in various decisions, it will have to be found out whether in the facts and circumstances of any case the reliance placed upon by the prosecution on a statement alleged to have been made by the deceased prior to his death can be accepted as a dying declaration, will depend upon the facts and circumstances that existed at the time of making the statement. In that case, it would mainly depend upon the date and time vis-a-vis the occurrence when the statement was alleged to have been made, the place at which it was made, the person to whom the said statement was made, the sequence of events, which led the person concerned to make the statement, the physical and mental condition of the person who made the statement, the cogency with which nay such statement was made, the attending circumstances, whether throw any suspicion as to the factum of the statement said to have been made or any other factor existing in order to contradict the statement said to have been made as claimed by the prosecution, the nexus of the person

who made the statement to the alleged crime and the parties involved in the crime, the circumstance which made the person to come forward with the statement and last but not the least, whether the said statement fully supports the case of the prosecution.”

43. In this context, the Supreme Court has also made a useful reference to its earlier decision in ***Cherlopalli Cheliminabi Saheb Vs. State of A.P., (2003) 2 SCC 571***, wherein it was held that,

“It is not absolutely mandatory that in every case, a Dying Declaration should be recorded only by a Magistrate. The said position was reiterated in Dhan Singh Vs. State of Haryana, (2010) 12 SCC 277, wherein it was held that neither Section 32 of the Evidence Act, nor Section 162(2) Cr.P.C., mandate that the Dying Declaration has to be recorded by a designated or a particular person.”

44. It was further held in ***Sri Bhagwan Vs. State of U.P., (2013) 12 SCC 137***, that,

“Once the said statement though recorded by the Police under Section 161 of the Cr.P.C. assumes the character of Dying Declaration

falling within the four corners of Section 32(1) of the Evidence Act, then whatever credence that would apply to a Declaration governed by Section 32(1) should automatically deem to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of Dying Declaration as deeming it and falling under Section 32(1) of the Evidence Act and thereby commend all the credence that would be applicable to a Dying Declaration recorded and claimed as such."

45. Therefore, from the mere fact that the statement (Exhibit-69) is not recorded by the Magistrate but by the Police, it will not loose the status of Dying Declaration and the credibility which it commands. Moreover, in the present case, there was absolutely no time for the Police to give the requisition to the Magistrate and to get the Dying Declaration recorded. Immediately after

PW-9 ASI Kolekar was informed about the admission of patient, considering the serious injuries suffered by the patient, he took upon himself to record the statement of the deceased and in view of the death of the deceased, within one hour therefrom, the said statement is required to be treated as Dying Declaration, though initially it was treated as the complaint and even the offence was registered thereon at 12:40 hrs.

46. As regards the contention that it does not bear the time, as stated above, the evidence of PW-9 ASI Kolekar and PW-8 Dr. Dhumal goes to reveal that the patient was admitted in the hospital at 11:30 am. Immediately PW-9 ASI Kolekar came there and started recording the statement, after ascertaining the consciousness of the patient. Moreover, even if on the Dying Declaration the timing is not noted by the Doctor or PW-9 ASI Kolekar, the said time appears in the case papers (Exhibit-67), which show that at about 12:05 pm, Police asked for fitness of the patient for recording his Dying Declaration and it was certified accordingly. Further, the endorsement made by the Police Station on the said Dying Declaration reveals that on this Dying Declaration (Exhibit-69), C.R. No.52 of 2005 came to be registered at 12:40 pm. Therefore, this is not a case where

timing of recording Dying Declaration is not appearing at all.

47. There is absolutely no necessity of Doctor making two endorsements on the Dying Declaration about the fitness of the Declarant. What is important is the satisfaction of the person recording such Dying Declaration about the fitness of the Declarant.

48. As held in ***Sohan Lal alias Sohan Singh and Ors. Vs. State of Punjab, (2003) 11 SCC 534***, relied upon by learned A.P.P., wherein the authority of ***Koli Chunilal Savji Vs. State of Gujarat, (1999) 9 SCC 562***, is quoted with approval to the effect that,

“Normally the Court in order to satisfy whether the deceased was in a fit mental condition to make the Dying Declaration, looks up to medical opinion. But where the eye witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of Doctor as to the fitness of the mind of the Declarant, the Dying Declaration is not acceptable. What is essentially required is that the person who records a Dying

Declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the Declarant was fit to make the statement, even without examination by the Doctor, the Declaration can be acted upon, provided the Court ultimately holds the same to be voluntary and truthful. A certification by the Doctor is essentially a rule of caution and therefore voluntary and truthful nature of the statement can be proved otherwise also."

49. In the instant case, it is not that Dying Declaration is without certification of Doctor. There is an endorsement made by the Doctor certifying the fitness of the deceased to make such statement and that endorsement is properly proved by PW-8 Dr. Dhumal, who was also present at the time of recording the Dying Declaration. Nothing is elicited from the cross-examination of either PW-8 Dr. Dhumal or PW-9 ASI Kolekar to show that their satisfaction about the mental fitness of the deceased to give such Dying Declaration was not correct. Hence, merely because the deceased had sustained some grievous injuries, which ultimately resulted into the bleeding and hemorrhage and consequently his death, it cannot be said that he was not in a fit

condition when his Dying Declaration came to be recorded. Though reliance is placed on some opinion given by PW-7 Dr. Chandanshive in his cross-examination that, *as the injuries sustained by the deceased were to the delicate part of the body and there was profussed and excessive bleeding and in case of such excessive bleeding, patient may go in shock*, it has to be noted that these are the general opinions of the expert. In each case, the Court has to rely on what the Doctor, who was attending the patient, actually has to say. Here PW-8 Dr. Dhumal, who was attending the deceased, has given categorical certificate and opinion about the fitness of the deceased to make such statement and further the case papers also reveal that at the relevant time, condition of the deceased was fit as the pulse rate and B.P. was normal.

50. As regards the authorities relied upon by learned Counsel for the Accused, the facts and circumstances stated therein are totally different from the facts of the present case. For e.g., in the Judgment of ***Rasheed Beg and Ors. Vs. State of Madhya Pradesh, 1974 CRI. L. J. 361***, there were two Dying Declarations made by a boy of 12 years and it was found that those Declarations were recorded when the boy was serious and

was loosing consciousness. It was further found that the person, who bore enmity with the named accused had accompanied the boy from the place of the incident to the hospital and he was also present when the Dying Declarations were recorded. Hence, it was held that,

“The possibility of the boy being tutored to name the accused could not be ruled out. Hence, it was found not safe to fasten the guilt on the named accused without any corroborative evidence in support of the Dying Declarations.”

51. Similarly, in the second authority of ***Munnu Raja and Anr. Vs. The State of Madhya Pradesh, AIR 1976 SC 2199***, it was found that the victim was in a precarious condition and hence the said Dying Declaration was disbelieved.

52. In the third authority of ***Padman Meher and Anr. Vs. State of Orissa, 1980 (Supp) SCC 434***, again the medical evidence showed that the deceased had suffered such serious injuries that caused great shock and part of his body had been paralyzed. The spinal cord was cut, which has affected the blood circulation and the central nervous system and that it was

impossible for him to talk. Hence, his Dying Declaration was not relied upon.

53. In the last authority of ***Shaikh Bakshu & Ors. Vs. State of Maharashtra, 2007 AIR SCW 4120***, the Police Officer has recorded the Dying Declaration before intimation of the incident reached Police Station. There was also no reason why second Dying Declaration was later recorded and hence both the Dying Declarations were disbelieved, in view of other infirmities in Prosecution case.

54. In the instant case, the intimation was given by PW-8 Dr. Dhumal to the Police Station and in pursuance thereof, PW-9 ASI Kolekar has reached to the hospital and recorded the statement of the deceased, which was treated initially as F.I.R. and subsequently as Dying Declaration. The facts of the present case are, therefore, quite distinct from the facts of the authorities relied upon by learned Counsel for the Accused.

55. In the instant case, the Dying Declaration is also getting support from other evidence on record and hence it can be safely relied upon, especially, having regard to the fact that, both, PW-8 Dr. Dhumal and PW-9 ASI Kolekar are totally

independent witnesses, whose bonafides cannot be questioned and nothing is elicited in their cross-examination to show that they had any reason to implicate the Accused falsely.

56. The last submission advanced in respect of the Dying Declaration is that the Dying Declaration is silent as to the evidence given by PW-1 Nanasaheb that when he approached Counsellor Milind Doshi, deceased was brought there by the Accused. In our considered opinion, the omission of this incident in the Dying Declaration is not material or fatal to discredit the same. The Dying Declaration is in respect of the cause of the death and the circumstances in which the death has occurred and not in respect of the other incidents.

57. Next submission advanced by learned Counsel for the Accused is that the medical case papers (Exhibit-67) and the evidence of PW-8 Dr. Dhumal revealed that the deceased was admitted in the hospital for road traffic accident, as informed by the relatives, who had brought him, and hence this history of road accident belies the Prosecution case.

58. However, in our considered opinion, to appreciate this contention, the contents of the Dying Declaration in this respect

are required to be considered in proper perspective. They reveal that the deceased was thrown on the road by the Accused when they found that the truck was approaching. Deceased has categorically stated that though he found truck near him, he had not received any dash, push or touch of the truck. The persons who were gathered there, including the Accused, created a show of the accident and gave abuses to the truck driver and thereafter one of the persons gathered there, brought the deceased to the hospital in his Maruti Van. PW-8 Dr. Dhumal has no reason to know whether the person, who has brought the deceased to the hospital, was relative of the deceased or not. The person who has brought him to the hospital was also under the impression that it was a case of road traffic accident, as deceased was found in injured condition near the truck on the road and that is why he appears to have told Doctor the history of road traffic accident.

59. From the injuries, which were found on the body of the deceased, also this case of road traffic accident, which was tried to be made out by the Accused, is falsified. All the injuries found on the body of the deceased were to his private part and caused by sharp edged weapon like knife. In case of accident, such

injuries cannot be caused, that too only to one part of the body, like the private part, without touching or causing even a scratch to other parts of the body. Hence, no such suggestion is put up either to PW-8 Dr. Dhumal, who has, immediately on arrival, examined and treated the deceased and PW-7 Dr. Chandanshive, who has conducted the postmortem, that these injuries are possible in road traffic accident, being aware that if such suggestion was put, it would be flatly denied as it is against the most important probability factor.

60. To support the contents in the Dying Declaration, though Prosecution has also examined PW-4 Pandurang Gaikwad, the Truck Driver, he has, however, not supported the Prosecution case, being won over by the Accused. Even then he has admitted that, at the relevant time, his truck was on that particular road. Therefore, merely because witnesses are won over by the Accused, the credibility of Dying Declaration, which is a stand alone document proved through the evidence of independent witnesses, cannot be affected.

61. As regards the Spot Panchanama and Seizure Panchanama of the clothes of the Accused also, the Panchas have turned

hostile. As rightly held by the Trial Court, in these days, it is a common phenomena that witnesses are won over by the Accused on the strength of muscle or money power. That is why the Supreme Court has also held in umpteen number of its authorities that in such situation, the evidence of Police Officer can be relied upon. The presumption that a person speaks truth on oath applies equally to the Police Officer also, though he may be an Investigating Officer. The Court cannot start appreciating his evidence with a presumption that as he is a Police Officer, he is not going to speak truth. Such presumption will be against the tenates of the law.

62. The last submission advanced by Defence that Police has falsely implicated the Accused in the case as they are prosecution witnesses in Sessions Case No.21 of 2003 instituted against Police Constable Hirwe and others is also required to be rejected, because copy of the Charge-Sheet filed in the said Sessions Case reveal that the name of Accused No.2 Lailasha is alone appearing therein as witness. There remains, therefore, hardly any substance to uphold this contention.

63. To sum up, therefore, once evidence relating to Dying

Declaration is found to be completely trustworthy, credible and reliable and which puts seal on the guilt of the Accused, it has to be held that the conviction and sentence of the Appellants, as recorded by the Trial Court, is required to be upheld and accordingly it is upheld. Consequently, both the Appeals stand dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K. TAHILRAMANI, J.]