

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

CRIMINAL APPEAL NO.223 OF 1999

The State of Maharashtra .. Appellant

Versus

Vishnu Ziparu Aagavane
Age-42 years,
R/o. Lane No.1, Macchibazar,
Machi wada, Moglai, Dhule .. Respondent

Mr.P.G. Borade, APP for the appellant
Mr.S.V. Dixit, Advocate for sole respondent

**WITH
CRIMINAL REVISION APPLICATION NO.99 OF 1999**

Kondaji Mahadu Jadhav .. Applicant
Age.69 years, Occ. Retired Police Patil,
R/o. Village Dahigaon, Tq. Kopargaon,
Dist. Ahmednagar.

Versus

1. The State of Maharashtra .. Respondents
2. Vishnu Ziparu Aagavane
Age. 43 years, R/o. Lane No.1,
Machli-Bazar, Mochi-Wada,
Moglai, Dhule.

Mr.Chaitanya Deshpande, Advocate for the applicant
Mr.P.G. Borade, APP for the respondent/State
Mr.S.V. Dixit, Advocate for respondent No.2

**CORAM :S.S. SHINDE &
S.M. GAVHANE,JJ.
RESERVED ON :08.06.2017
PRONOUNCED ON :04.08.2017**

J U D G M E N T [PER: S.M. GAVHANE, J.] :-

. This appeal is directed against the judgment and order dated 29.01.1999 in Sessions case No.17/1998 passed by Additional Sessions Judge, Dhule, thereby acquitting the respondent/accused of the offences punishable under Section 302 and 498-A of the Indian Penal Code [for short "the IPC"]. The father of the deceased - Shobhabai has filed Criminal Revision Application No.99 of 1999 against the above judgment and order of acquittal of the accused. Therefore, both these proceedings are being disposed of by this judgment.

2. The prosecution case as it appears from the police papers, is as under:-

A] The deceased Shobhabai was married to accused in

the year 1983. At the time of marriage the accused was in service in Maharashtra State Electricity Board, Dhule. Thereafter, accused was transferred to Parola, Dist. Jalgaon and the deceased was also residing with him. The deceased has daughters Sheetal (PW-4), Snehal and one son. Nirmala Chandrakant Salunke (PW-6) is the sister of the deceased and she resides at Dhule.

B] It is alleged that the deceased used to visit house of Nirmala as well as her parents house at Dhule from Parola and she was complaining to her parents and Nirmala that the accused always used to come under influence of liquor, used to suspect about her chastity and used to beat her. So also, the accused was not allowing her to wear good clothes and used to beat her and ill-treat her. Because of the same Sheetal-daughter of the deceased since her childhood was residing with Nirmala. Moreover, Snehal - younger daughter of the deceased was residing at her maternal uncle's house and only the son of the deceased, was residing with her at

Parola. Whenever the deceased used to visit Dhule to see Sheetal, she was complaining against the accused. The maternal uncle and father of the deceased convinced the accused not to ill-treat the deceased, but there was no improvement in his behavior.

C] Thereafter, the accused was transferred to Nawapur from Parola just few days before the incident. Then the accused and the deceased had shifted their luggage and household articles to Dhule and they started residing in Mogal area of Dhule and about 8 days prior to the incident Sheetal the elder daughter of the deceased started residing with the deceased and accused at Dhule. The accused used to go to his place of service at Nawapur and used to return every Saturday and Sunday to Dhule. It is alleged that the accused used to return to the house under influence of liquor and used to ill-treat and beat the deceased as he was suspecting her chastity.

D] The prosecution has further alleged that on

28.11.1997 the accused returned to Dhule from Nawapur under influence of liquor and he abused and beat the deceased. He left the house and again returned under influence of liquor and abused and beat the deceased in the night. On the next day i.e. on 29.11.1997 in the morning Sheetal-deceased's daughter went to school early in the morning. At that time Sheetal had noticed that her father was under influence of liquor. It is alleged that at about 07.30 to 08.00 am in the house accused had severely beaten the deceased and poured kerosene on her person and set her on fire, by lighting the paper on gas stove. As a result she sustained 99% burn injuries. The neighbourers put off the fire. Immediately at about 09.00 a.m. after the incident the deceased was admitted in the Civil Hospital, Dhule in the casualty ward by Chandrakant Salunke – husband of Nirmala.

E] Further it is the case of the prosecution that after the deceased was admitted in the Civil Hospital, Dhule on 29.11.1997, Shrawan Bagul (PW-3) Executive

Magistrate, Dhule was called in the Civil Hospital, Dhule by giving him memo at about 09.30 am to record the statement of the deceased. Accordingly, he alongwith police went to casualty ward in the civil Hospital, Dhule within two minutes. He enquired with the In-charge Dr. Dagadu Pawar (PW-5) about the condition of the deceased and told him that he has to record the statement/dying declaration of the deceased (Patient). He requested Dr. Pawar to examine the patient and to tell him whether the patient is in a position to give statement. Thereafter, at about 09.45 am. Dr. Pawar examined the patient Shobhabai and found that she was fully conscious and then he put his endorsement on the statement in the beginning. Then PW-3-Executive Magistrate recorded dying declaration of deceased regarding involvement of the accused in pouring kerosene on her person and setting her on fire on 29.11.1997 at about 7.30 to 08.00 a.m. and about harassment by the accused to her on suspecting her while nobody else was in the house and that he ran away.

F] The carbon copy of the above said dying declaration (Exh.18) of the deceased was brought in the Police Station, Dhule by writer Head Constable on the same day i.e. on 29.11.1997. Treating the said carbon copy of the dying declaration as First Information Report (FIR), Sudhakar Patil (PW-7) the Police Head Constable (under suspension), registered crime No.211 of 1997 for the offence punishable under Section 307 of the IPC against the accused as per Exh.26. Then he handed over the papers for further investigation to Assistant Police Inspector - Mohan Zine (PW-8) attached to Dhule City Police Station, who commenced the investigation in the crime, after taking necessary entry in the station diary.

G] During the investigation API Zine, (PW-8) on the same day i.e. on 29.11.1997 prepared panchanama (Exh.6) between 12.30 to 13.00 p.m. about the condition of accused who was in police station in presence of Panchas Pandurang Gagle and Subhash Karnik. Then accused was sent for medical examination in the Civil Hospital, Dhule

and Dr. Prakash Patil (PW-2) had examined the accused and issued certificate (Exh.15). API Zine visited the spot of the incident i.e. house of deceased and prepared Panchanama (Exh.9) in presence of panchas Raju Chaudhary and Ejaj Ahmed Shaikh Ibrahim and seized the white colour plastic can containing kerosene and half burnt sari found in front of room of the house under the same panchanama. So also, he got prepared map of spot of incident from Circle Inspector, City Division, Dhule as per Exh.11.

H] While the deceased was under treatment in the Civil Hospital, she scummed to injuries on 29.11.1997 at about 01.30 p.m. ASI Saudane prepared inquest panchanama (Exh.7) in presence of two panchas Subhash Patait and Smt. Kalabai Salunkhe. Thereafter postmortem was conducted by Dr.Ajit Patil (PW-1). He noticed 99% burn injuries on the person of the deceased. Accordingly he issued postmortem notes (Exh.13) under his signature and signature of Dr.R.G. Bhusale. According to him probable cause of death was due to 99% thermal burns. Thereafter,

as death of the deceased was caused offence under Section 302 of the IPC came to be added on 29.11.1997 in the crime already registered against accused. On that day, API Zine arrested the accused. Thereafter, he recorded statements of some witnesses and mainly on 29.11.1997 he recorded the statements of Sheetal (PW-4) and Nirmala (PW-6) to whom the deceased made oral dying declaration that the accused poured kerosene on her person and set her on fire. API Zine sent the seized muddemal i.e. burnt pieces of Sari and kerosene can to the Chemical Analyzer for analysis and report.

I] After completion of the investigation Shri Zine submitted the charge-sheet in the Court of Chief Judicial Magistrate, Dhule, who then committed the case to the Sessions Court, Dhule as the offence under section 302 of the IPC was exclusively triable by the Court of Sessions.

J] The charge under Section 302 and 498-A of the IPC was framed against the accused by the learned

Additional Sessions Judge, Dhule to which the accused pleaded not guilty and claimed to be tried. His defence is denial. According to him on the say of Nirmala (PW-6) and her husband Chandrakant Salunke false case is filed against him. In his written statement filed at the time of statement under section 313 of Code of Criminal Procedure, he stated that the deceased has given false statement before the Executive Magistrate on the say of Nirmala, his sister-in-law, and her husband Chandrakant. His daughter Sheetal gave statement against him on tutoring her by her maternal aunt Nirmala and maternal aunt's husband – Chandrakant, as since five years of her age, she resides with them. He never consumed liquor and beat and illtreated his wife – the deceased. No witness in defence is examined by the accused.

3. To prove the charge against the accused, the prosecution has examined in all eight witnesses and it has relied upon dying declaration (Exh.18), oral dying declaration made to PWs.4 and 6 and panchanamas referred

to above. On considering the evidence adduced by the prosecution the trial Court held that the death of the deceased is homicidal and that the prosecution has failed to prove the offences under Section 302 and 498-A of the IPC and acquitted the accused by the impugned judgment and order. Therefore, this appeal against the acquittal by the appellant/State.

4. We have heard learned APP appearing for the appellant/State and learned advocate appearing for the respondent/accused. Learned APP submitted that the trial court has answered point No.1 about homicidal death of the deceased in the affirmative. However, although there is sufficient evidence, it has answered point No.2 and 3 in the negative. It has failed to appreciate the evidence of dying declaration recorded by the Executive Magistrate (PW-3). So also, it has failed to appreciate the oral dying declaration made by the deceased to PWs. 4 and 6 and it has unnecessarily doubted genuineness of dying declarations and held that dying declarations are not

acceptable. It is submitted that the view taken by the trial Court is not possible view and it ought to have held that the prosecution has proved the offence against the accused with which he was charged and ought to have convicted him. Accordingly learned APP has prayed to allow the appeal.

5. Learned advocate appearing for the respondent/accused on the other hand supported the impugned judgment and order. He submits that the trial Court has rightly disbelieved the evidence in the form of written and oral dying declarations and held that the prosecution has failed to prove the offences alleged against the accused. The learned advocate submits that the view taken by the trial Court was a possible view and there is absolutely no reason to interfere with the view taken by the trial Court as submitted by the learned APP. Accordingly learned advocate has prayed to dismiss the appeal. He submits that this is an appeal against acquittal and unless this Court finds that there is error

committed by the trial Court in recording the findings the order of acquittal cannot be reversed.

6. To support his submissions the learned advocate for the respondent has relied upon the ratio laid down by this Court in case of **State of Maharashtra Vs Nanasaheb Bhikaji Tambe (1992 Mh.L.J. 539)**, wherein it has been held as under:-

"An acquitted accused should not be put in peril of conviction save where substantial and compelling ground exists for such a course. The presumption of innocence embodied in our criminal jurisprudence is reinforced by an order of acquittal. Such an order should not be appealed against in the following cases:

(i) Where the view taken by the trial Court is reasonable and proper (1977) 2 SCC 99 and 124 Rel.

(ii) Where there are valid reasons and consistencies on which the trial Court has based an acquittal. (1976) SCC 210 Rel.

(iii) Where the view taken by the trial Court is both reasonable and possible, even though a different view on facts is permissible. (1076) 3 SCC 465 & 564 Rel.

(iv) Where it is not possible to offset all the reasons given by the trial Court for recording a verdict of acquittal and it is merely argued that one or some of them are debatable. (1976) 1 SCC 614 Rel.

(v) When after holding one or more accused individually responsible for their acts, there being no justification for assailing the acquittal of the co-accused.

(vi) Where there is no evidence connecting the accused with the offence and the reasons given by the trial Court in support of an acquittal are sufficiently compelling and an appeal proceeds on the ground that the serious incident has taken place and an impression should not be created in the public mind that nobody has been punished. (1970) 3 SCC 678 Rel.

(vii) Where, undoubtedly, another view is

possible, but where it is impossible to indicate any serious infirmity in the trial Court's appreciation of evidence. (1976) 3 SCC 465 Rel.

(viii) Where a judgment of the trial Court is a generally well-considered one and at least two views are possible, an appeal would be unjustified. (1975) 4 SCC 186 Rel.

(ix) Where the important or integral fact, such as identity of the accused, was not fully established (1976) 4 SCC 405 Rel.

A mechanical appeal against an order of acquittal would not be permissible.

The occasions when an appeal against an order of acquittal would be permissible are as under:-

(i) Where the view of the trial Court was palpably wrong and all the reasons for the acquittal given by it could be dispelled. (1976) 2 SCC 206 Rel.

(ii) Where the trial Court's verdict is both factually and legally erroneous. (1976) 4 SCC

590 Rel.

(iii) Where the trial Court has simulated "mere frivolities" as reasons for rejecting the Prosecution case. (1976) 4 SCC 351 Rel.

(iv) Where the trial Court had rejected the evidence on flimsy grounds and on the ground of trifling contradictions. (1976) 4 SCC 311 Rel.

(v) In case of patent infirmities in the trial Court's approach of the case and its appreciation of evidence. (1975) 3 SCC 742 Rel.

(vi) Where the trial Court rejected the testimony of the eye-witnesses without at all considering the evidence in its intrinsic merit, but on the basis of sweeping observations and inherent improbabilities. (1975) 4 SCC 257 Rel.

(vii) Where the trial Court has overlooked several important aspects of the case, or in a situation where the law has been misapplied. (1976) 2 SCC 191 Rel."

7. Since the appeal is against the acquittal before

examining the evidence adduced by the prosecution it is necessary to see whether the acquittal of the accused is proper and the view taken by the trial Court was reasonable and probable or otherwise it is necessary to bear in mind the principle in this respect laid down by the Apex Court in the case of Murlidhar alias Gidda and another Vs State of Karnataka, 2014(4)Mh.L.J.(Cri)353 wherein in para No.12 the Apex Court has held thus:

"12. The approach of the appellate Court in the appeal against acquittal has been dealt with by this Court in Tulshiram Kanu Vs State, AIR 1954 SC 1, Madan Mohan Singh Vs State of U.P., AIR 1954 SC 637, Atley Vs State of U.P., AIR 1955 SC 807, Aher Raja Khima Vs State of Saurashtra, AIR 1956 SC 217, Balbir Singh Vs State of Punjab, AIR 1957 SC 216, M.G. Agrawal Vs State of Maharashtra, AIR 1963 SC 200, Noor Khan Vs State of Rajasthan, AIR 1964 SC 286, Khedu Mohton Vs State of Bihar, (1970) 2 SCC 450, Shivaji Sahabrao Bobade Vs State of Maharashtra, (1973) 2 SCC 793, Lekha Yadav Vs State of Bihar, (1973) 2 SCC 424, Khem Karan Vs

State of U.P., (1974) 4 SCC 603, Bisan Singh Vs
State of Punjab, (1974) 3 SCC 288, Umedbhai
Jadavbhai Vs State of Gujrat, (1978) 1 SCC 228,
K. Gopal Reddy Vs. State of A.P., (1979) 1 SCC
355, Tota Singh Vs State of Punjab, (1987) 2 SCC
529, Ram Kumar Vs State of Haryana, 1995 Supp
(1) SCC 248, Madan Lal Vs. State of J & K,
(1997) 7 SCC 677, Sambasivan Vs State of Kerala,
(1998) 5 SCC 412, Bhagwan Singh Vs State of
M.P., (2002) 4 SCC 85, Harijana Thirupala Vs
Public Prosecutor, High Court of A.P., (2002) 6
SCC 470, C. Antony Vs K.G. Raghavan Nair, (2003)
1 SCC 1, State of Karnataka Vs K. Gopalkrishna,
(2005) 9 SCC 291, State of Goa Vs Sanjay
Thakran, (2007) 3 SCC 755 and Chandrappa,
Chandrappa Vs State of Karnataka, (2007) 4 SCC
415. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate Court must bear in mind the following : (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial Court, (ii) The accused person is entitled to the benefit of reasonable doubt when

it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate Court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate Court is generally loath in disturbing the findings of fact recorded by the trial Court. It is so because the trial Court had an advantage of seeing the demeanor of the witnesses. If the trial Court takes a reasonable view of the facts of the case, interference by the appellate Court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial Court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate Court in interfering with such conclusions is fully justified, and (iv) Merely because of the appellate Court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial Court is a possible view. The evenly balanced views of the evidence must not result in the

interference by the appellate Court in the judgment of the trial Court."

8. We have carefully considered the submissions made by the learned APP appearing for the appellant/State and learned Advocate appearing for the respondent and with their able assistance we have perused the evidence adduced by the prosecution. So also, we have gone through the impugned judgment and order. Bearing in mind the principle laid down in the cases of State of Maharashtra cited (Supra) and Murlidhar alias Gidda cited (supra) we shall proceed to consider whether the view taken by the trial Court acquitting the accused is possible or otherwise?

9. Case of the prosecution is that death of the deceased is homicidal. To prove the same it has relied upon the evidence of Dr. Ajit Patil (PW-1) and postmortem notes (Exh.13). In his evidence Dr. Ajit Patil has stated that on 29.11.1997 a dead body of the deceased was brought by the police constable in the hospital and he

found external superficial deep burn injuries of 99% on the person of the deceased as mentioned in column No. 17 of PM notes and they were ante mortem. Accordingly, he issued the postmortem notes (Exh.13) which bears his signature and signature of Dr. Bhusale. According to him probable cause of death was due to 99% thermal burns. In the cross-examination his evidence regarding sustaining 99% burns to the deceased and cause of death has not been challenged. There is no suggestion to him or other prosecution witnesses that the deceased sustained burns accidentally or that the deceased committed suicide. Even in his statement under Section 313 of the Code of Criminal Procedure accused has not stated that the deceased sustained burns accidentally. Postmortem notes (Exh.13) also show that probable cause of death of the deceased was shock due to 99% thermal burns. For the above reasons on the basis of above evidence we hold that the prosecution has proved that the death of the deceased was homicidal. The trial Court on properly appreciating the evidence held that death of the deceased was

homicidal. We find no fault with the said finding of the trial Court.

10. Now it is to be seen whether the accused is responsible for death of the deceased. Admittedly there is no direct evidence to show the same. To connect the accused with the death of deceased the prosecution has mainly relied upon the evidence of following categories.

i. The evidence of Sheetal (PW-4) and Nirmala (PW-6) respectively daughter and sister of the deceased on cruelty allegedly caused by the accused to the deceased i.e. motive to commit murder.

ii. Written dying declaration (Exh.18) dated 29.11.1997 recorded by the Shrawan Bagul, Executive Magistrate (PW-3) in presence of Dr. Pawar (PW-5).

iii. Oral dying declaration made by the deceased to Sheetal (PW-4) and Nirmala (PW-6).

iv. Certificate Exh.15 issued by Dr. Patil

(PW-2) regarding condition of the accused.

11. Now we shall consider the evidence of PWs.4 and 6 on cruelty to the deceased. Sheetal (PW-4) daughter of the deceased stated that prior to the incident the accused her father was serving as Clerk in M.S.E.B. at Parola. He was transferred to Nawapur from Parola prior to one month. However, her parents were residing in Moglai, Dhule. While her father was serving at Parola she (witness) was staying at Dhule with her maternal Aunt. While the accused was residing at Parola she used to go to Parola to meet her parents in Diwali vacation. In her presence accused-her father used to beat her mother. He was suspecting chastity of her mother. He was addicted to liquor. Her father used to harass her mother on consuming the liquor. Therefore, on Monday in the morning while the accused was sleeping she, her mother the deceased, her brother and sister went to her maternal uncle's house at Dahegaon, Tq. Kopargaon, Dist. Ahmednagar. At that time her mother told the grand

parents that her husband is harassing her on consuming liquor. Her grand parents convinced her mother. Thereafter, she (witness) came to Dhule with her maternal aunt and her mother stayed there. Thereafter, accused came to her and told her to call her mother from the house of her maternal uncle and to bring the household articles at Dhule because he was transferred. Thereafter, her mother was shifted to Dhule and started residing with her (witness's) grand father. Further, she stated that she resided with her parents in Moglai, Dhule for 8 to 15 days. During that period also her father the accused used to assault her mother. She has further stated that one day prior to the incident i.e. on 28.11.1997 her father had come to house at 07.00 am from Nawapur consuming liquor and assaulted her mother. Thereafter, he went out and again came to house consuming liquor and again assaulted her mother. Thereafter, she went to school at about 11.00 am. She returned to home from school at 5.00 to 05.30 pm. At that time her father was at home and he assaulted her mother and brother. Thereafter, they went

to sleep. In the morning she woke up early. At that time her father had consumed liquor and there was quarrel between her mother and father. In the morning she went to school. Thereafter one Pinki came to school at about 08.30 am to call her and she was informed that her mother the deceased is serious and that she should go to her house.

12. In the cross-examination PW-4 has stated that she is elder daughter of the accused. Since her childhood she is residing with her maternal aunt Nirmala (PW-6). Her sister Sonali is residing at Dahegaon with her maternal uncle. Even after the incident she has been residing with maternal aunt at Dhule. The deceased her mother and she (witness) used to tell her maternal aunt and maternal aunt's husband Chandrakant about dispute of her parents and they were saying her father accused not to quarrel and in their presence accused used to say that he would not repeat the same in future. But, there was no change in his behavior. So also, she stated that

thereafter she and her mother used to go to her maternal aunt and used to complaint that there is no change in the behavior of the accused and that he used to harass deceased. She admitted that as the accused was not paying heed to the say of her maternal aunt and maternal aunt's husband they had stopped convincing him. She stated that after Diwali her father/accused had gone to Navapur for service and he used to come to Dhule on every Saturday and Sunday. But, if he consumed the liquor then at any time he used to come to Dhule. Her evidence that the accused used to assault the deceased on consuming liquor while he was residing at Parola on suspecting her chastity, that on 28.11.1997 on the earlier day of the incident the accused had come to Dhule from Nawapur on consuming liquor and assaulted deceased and her son has gone unchallenged in the course of her cross-examination by the accused.

13. As referred earlier it has come in the evidence of PW-4 that her mother had disclosed about ill-treatment

to her by the accused, to her brother i.e. maternal uncle of this witness from Dahegaon. Admittedly brother of the deceased has not been examined by the prosecution. So also, it has come in the evidence of PW-4 that the deceased used to disclose about alleged cruelty to her by the accused to her parents i.e. grand parents of PW-4 and they have convinced the deceased. But they have also not been examined by the prosecution.

14. It is clear from the evidence of PW-4 that since her childhood she has been residing with her aunt Nirmala (PW-6) and she resided with her parents only for 8 to 15 days when they shifted to Dhule from Parola. Therefore, when she has not specifically stated about the day and date when her father accused assaulted her mother at Parola on suspecting her chastity, when the deceased was married to accused in the 1983 prior to 14 years of the incident, the deceased has three children from the accused and she never made a complaint to the police prior to the incident in respect of the alleged cruelty

to her by the accused, before accepting or rejecting the evidence of PW-4 about cruelty to her mother the deceased by the accused other evidence on record is to be considered.

15. The next evidence on cruelty is of Nirmala(PW-6) who is elder sister of the deceased. She stated that the deceased was married to accused in 1983 and at that time the accused was serving in MSEB, Dhule. After one and half year of the marriage he was transferred to Parola, Dist. Jalgaon. He was staying there with the deceased. The deceased used to visit her house (house of the witness at Dhule) from Parola. At that time the deceased was complaining that her husband used to beat her and also suspect her character and not allowing her to wear good clothes. She stated that the deceased has begotten two daughters and one son from the wedlock with accused. And the elder daughter is Sheetal (PW-4). She has further stated that since 1989 Sheetal was residing with her for education purpose. Further she deposed that the deceased

used to visit her house to meet her daughter frequently and at that time she was complaining that her husband the accused used to beat her under influence of liquor and also used to suspect about her character. She and her relatives tried to convince the accused not to give ill-treatment to the deceased, but there was no improvement in his behavior. Prior to one and half year of death of the deceased the luggage and household articles of the deceased were shifted to Dhule from Parola. The accused used to go on his duty from Dhule to Parola. The accused remained absent. Therefore, the department issued him notice. Then again deceased went to Parola with some luggage and stayed at Parola with accused. Then accused was transferred to Nawapur from Parola. Then they had shifted their luggage from Parola to Dhule.

16. In the cross-examination PW-6 stated that since childhood Sheetal (PW-4) was with her and prior to 8 to 10 days she had been to her parents house. After the incident Sheetal is residing with her. Two daughters and

one son of the deceased are staying with her and with her parents. She stated that she has not stated in her statement before police that after 1989 Sheetal (PW-4) was residing with her and deceased Shobhabai used to come to her. So also, she stated that deceased never complained to her that her husband was assaulting her under influence of liquor. Thus, there is material omission in the statement before police of PW-6 in respect of above facts and said amounts to improvement while deposing before the Court. Another aspect to be noted is that this witness has no direct knowledge of the alleged cruelty to the deceased by the accused and whatever this witness has deposed about cruelty to the deceased by the accused is hear say in nature. Even this witness has also not stated particular date and time when the deceased had told her that the accused was harassing her on suspecting her chastity. In fact, she should have specifically stated in that respect. Thus, the evidence of this witness regarding cruelty to the deceased by the accused being vague in nature is not believable and is of

no help to the prosecution to infer that the accused caused cruelty to the deceased, within the meaning of cruelty defined under section 498-A of the IPC. Therefore, the uncorroborated evidence of PW-4 on cruelty to deceased is also not believable.

17. Before appreciating the evidence in the form of written and oral dying declarations, it is necessary to refer principles regarding appreciation of evidence in the form of dying declarations laid down by the Apex Court and this Court, in the following decisions.

" (a) In the case of **J and Another Vs State of Maharashtra (2013) 2 Supreme Court Cases 224**, it was held that in case of multiple dying declarations, they can be believed and each dying declaration has to be separately assessed and evaluated and assessed independently on its own merit as to its evidentiary value and one cannot be rejected solely because of certain variations in another declaration.

(b) In the case of Anwar Shah Babu Shah Fakir and others Vs The State of Maharashtra 2012 All MR (Cri)2774, it was held that in case of more dying declarations, each dying declaration needs to be considered separately and it becomes duty of the Court to find out, whether the other evidence is consistent with the dying declarations. If the other evidence is consistent with one dying declaration, that dying declaration can be safely accepted and relied upon and other dying declaration can be discarded.

(c) In the case of Sudhakar Vs State of Madhya Pradesh (2012) Supreme Court Cases 569, it was held that where multiple dying declarations made by the deceased are either contradictory or at variance with each other to a large extent, test of common prudence would be to first examine which dying declaration is corroborated by other prosecution evidence. Moreover, attendant circumstances condition of deceased at the time of making of each statement concerned, medical evidence, voluntariness and genuineness of statement made by deceased, physical and mental fitness of deceased and

possibility of deceased being tutored are some of the factors which would guide exercise of judicial discretion by Court in such matters.

(d) In the case of **Rajkumar Shivnath Yadav Vs Union Territory of Daman & Diu & another 2016 ALL MR (Cri)392**, it was held that endorsement of doctor on dying declaration is not *sine qua non* or must. Essential requirement is satisfaction of person recording it that deceased was in fit condition to give statement. It is not necessary that dying declaration should be recorded in question and answer form only.

(e) In the case of **Sk. Biban @ Chunnu S/o. Shaikh Nizam Vs State of Maharashtra 2010 ALL MR (Cri) 779** (Bombay High Court) it has been held that merely stating that the dying declaration was recorded as per the narration of the injured would not amount to proving the contents of the dying declaration."

18. Bearing in mind the above principles regarding appreciation of evidence we proceed to scan evidence on record to see whether dying declaration (Exh.18) and oral

dying declarations made by deceased to PWs. 4 and 6 are truthful, voluntary and free from any tutoring and that they are reliable.

. The dying declaration (Exh.18) is recorded by Executive Magistrate, Dhule (PW-3) in presence of Dr. Dagadu Pawar (PW-5) in the casualty ward in the Civil Hospital, Dhule between 09.45 am to 09.55 am on the day of incident i.e. on 29.11.1997. Executive Magistrate, (PW-3) has deposed that on that day one Police from Dhule City Police Station came to his residence at about 09.30 am with memo (Exh.17). Then he alongwith said police went to the casualty ward in the Civil Hospital, Dhule and reached in the hospital within two minutes. Then he enquired with the In-charge Doctor and disclosed his identity to him. He also showed the memo to the In-charge Doctor, he pointed out the patient admitted in the casualty ward, he requested the Medical officer that he wanted to record the dying declaration of the patient and therefore, he should examine the patient and verify if

the patient is in conscious state of mind or not. Then the Medical Officer examined the patient and put his endorsement that the patient is conscious and also put his signature below it. He further stated that, he made preliminary enquiry with the patient about the name and age of the person. Then he started recording dying declaration at about 09.45 am. Then she (patient) narrated the incident to him and as per her version he recorded her statement. Then he read over the contents of the said statement to the patient and she admitted all the contents of the said statement. She also told him that she sustained burns to her hand, so she can put her thumb mark, then accordingly he obtained her thumb mark below her statement and attested the same. He completed said statement at about 9.55 am. Then at the end of the said statement also he obtained the endorsement of the Doctor that while giving the statement the patient was fully conscious and the Doctor also put his endorsement and put his signature at the end of it. He gave carbon copy of the said statement/dying declaration (Exh.18) to police.

19. In the cross-examination PW-3 stated that his statement was not recorded by the Investigating Officer. From the memo it was transpired that one Chandrakant had brought the patient in the hospital at about 08.40 am on 29.11.1997 and that the patient had sustained 99% burn injuries. There were other patients in the said ward where the injured was kept. He, Constable and the Medical Officer were near the patient. When he reached near the patient he asked the relatives of the patient to go out of the ward. Before recording the statement Doctor orally told him that the patient is in a condition to give statement. Whole body of the patient was covered with the clothes and he does not remember whether the saline was injected or not. He stated that, he has not recorded her statement in question and answer form. In the dying declaration (Exh.18) the word "माझा नवरयाने" is written after recording the dying declaration and it is written as per her say, after reading over the contents of the same to the patient. He stated that at the time of recording her

statement the patient was demanding water. There was severe pains to the patient. During the statement she was taking pause and she gave her statement intermittently. He stated that he returned to office and sealed the original statement in his office. He has denied that while recording the statement, the condition of the patient mentally and physically was not fit.

20. Dr. Pawar (PW-5) in whose presence dying declaration (Exh.18) was recorded has stated that on 29.11.1997 he was on duty as Casualty Medical Officer in Civil Hopsital, Dhule. One Shobhabai /deceased was admitted in the casualty ward. At about 9.35 am. the Executive Magistrate (PW-3) came to him and requested him that he has to record the statement of injured and asked him to examine the patient, as to whether she is in a position to give the statement. Accordingly at about 9.45 a.m. he examined the patient Shobhabai and found that she was fully conscious and accordingly I put endorsement on the statement in the beginning. Then in his presence the

Executive Magistrate recorded the statement of said injured and after completion of the same he again examined and found that patient was fully conscious while giving the statement. He also at the end of the statement made his endorsement and put his signature below the statement with date and time i.e. 09.55 am.

21. In the cross-examination PW-5 stated that the deceased sustained 99% burns. It is not necessary to mention that the patient is mentally as well as physically fit, in the endorsement. He has only mentioned that she was fully conscious to give the statement. He has denied that in a primary shock the patient may not express the things properly which took place. He stated that in the said condition patient may ask for water. He stated that he had not heard conversation which took place between the patient and the Executive Magistrate. He stated that before examining the patient and recording her statement he put some questions to her regarding her name and thereafter he asked the Executive Magistrate to

record the statement. According to him at the time of recording the statement condition of the patient was critical and he did not find that she was taking interval and stopping while giving her statement. According to him the mental fitness and physical fitness are the same. He has denied that both the endorsements on dying declaration (Exh.18) were put by him after recording the dying declaration. So also, he has denied that at the time of recording the statement he was not present near the patient and as a routine course he put the endorsements on the dying declaration. Thus nothing was found in favour of the accused in the cross-examination of PW5-Doctor.

22. On careful consideration of evidence of both the PWs. 3 and 5 it is clear that on the day of incident after the incident the deceased was admitted in the civil hospital at about 9.30 am in injured condition as she sustained 99% burns and thereafter in presence of Doctor (PW-5) the Executive Magistrate (PW-3) started recording

her statement/dying declaration at 09.45 a.m. and completed the same at about 9.55 am as per Exh.18 and at that time she was fully conscious and in a position to make statement. Moreover, it is clear from their evidence that to ascertain whether the deceased was conscious and in a position to make statement both have made preliminary enquiry with the deceased regarding her name etc. as referred earlier. Therefore, when both of them have satisfied about the condition of the deceased and the fact that she was conscious to make statement simply because she sustained 99% burns and she was demanding water, and PW-5 has stated that condition of deceased was critical, it cannot be said that she was not mentally fit or conscious to make statement. Therefore, it can be said that while the deceased was conscious her dying declaration (Exh.18) was recorded by PW-3 in presence of Doctor (PW-5).

23. Now it is to be seen whether the dying declaration Exh.18 recorded by PW-3 was recoded as per

say of the deceased. As referred earlier PW-3 has only stated that he started recording dying declaration at about 09.45 am. Then the deceased narrated the incident to him and as per her version he recoded her statement. Then he read over the contents of the statement to the patient and she admitted all the contents of the said statement. PW-3 has not stated about actual incident narrated to him by the deceased as mentioned in the dying declaration Exh.18. In fact, he should have stated about the statement actually made by the deceased as recorded in Exh.18 which runs as under:-

"जबाब लिहून देते की माझ्या राहात्या घरी सकाळी सुमारे 7 ते 8 वाजेच्या सुमारास माझा अंगावर माझ्या नवरायाने प्लॅस्टीकच्या डिब्बीतील रॉकेल ओतले मी आरोळी मारली घरात कोणीही नव्हते गॅस सुरू होता त्याचेवर कागद पेटवीला व माझ्या अंगाला लावून दिला व मी शिलगले मला पेटवीले आणी पळून गेला माझ्यावर संशय घेतो मला कोणाशीही बोलू देत नाही बायांशी सुध्दा बोलू देत नाही माझी माझी जमीनीवर लोळली व विझली माझ्या नव-याचे पुर्ण नांव विष्णू झिपरू आगवणे आहे. एम.एस.ई.बी.

बोर्डात एल.डी.सी. म्हणून नोकरीस आहे. माझ्या नव-यानेच मला जिवानिशी
ठार मारणेसाठी जाळले मी वाचले पण मला काय जिवाचा भरोसा नाही."

24. In the above circumstances when PW-3 has not specifically stated that the deceased stated as above before him at the time of recording the dying declaration the evidence of PW-3 that he recorded dying declaration as per narration of the injured would not amount to proving the contents of the dying declaration, as held in the case of Sk.Biban @ Chunnu S/o. Shaikh Nizam (Supra) by the Bombay High Court. Apart from this even PW-5 Doctor Pawar in whose presence PW-3 recorded dying declaration Exh.18 has also not stated that the deceased narrated the incident in detail as referred above. Therefore, we hold that the prosecution has failed to prove the contents of the dying declaration Exh.18 and truth of the said contents. Therefore, the evidence of PWs.3 and 5 and dying declaration Exh.18 are of no use to the prosecution to state that the accused poured kerosene

on the person of the deceased in his house and set her on fire as alleged.

25. Now coming to the oral dying declaration allegedly made by the deceased to her daughter Sheetal (PW-4) and her sister Nirmala (PW-6), the evidence of PW-4 is that on the date of incident early in the morning her father was under the influence of liquor, quarrel was going on. Then she left for the school early in the morning as it was Saturday. At about 8.45 a.m. one Pinki came to her school for calling her. She informed that her mother – deceased is serious. Then she went to the house of her maternal aunt Nirmala (PW-6) in Phansi Pool locality of Dhule. She noticed that door of her aunt's house was locked. Then the neighbourers told that her mother sustained burn injuries, she was admitted in the hospital and that she was also called in the hospital. She further stated that her mother was admitted in the hospital in the accidental ward and she sustained burn injuries all over her body. Then she enquired with her

mother that how she sustained the burn injuries. At that time her mother told her that her father (accused) poured kerosene on her person and set her on fire. She stated that on the same day, her mother succumbed to injuries.

26. In the cross-examination PW-4 has stated that after she went to the Civil Hospital, her aunt accompanied her to that ward. Her mother only told her that her father poured kerosene on her person and set her on fire and she kept mum. She stated that police came to the cot of her mother and she was also there. Then her statement was recorded by the police in the evening after death of her mother. She stated that she did not tell to police that her mother told her that her father (accused) poured kerosene on her person and then set her on fire. Police made enquiry with her mother and her mother could not talk. She has denied that on the say of her uncle and aunt she is giving false evidence and she gave false statement before police. From the above evidence of PW-4, it is clear that her evidence regarding oral dying

declaration to her by the deceased is material omission in her statement before police and improvement while deposing before the Court. Therefore, her evidence that the deceased made statement to her regarding pouring kerosene on her person and setting her on fire by the accused is not believable. Moreover, from the evidence of PW-4 it appears that immediately after the alleged dying declaration to this witness by the deceased, she kept mum and when the police made enquiry with the deceased, the deceased could not talk. Therefore, it is doubtful whether the deceased was in a position to make oral dying declaration to this witness.

27. The evidence of PW-6-Nirmala – sister of the deceased, is that the incident took place on 29.11.1997. At about 7.30 am to 7.45 am two persons came to her house and informed her that her sister is burnt and she was taken to Civil Hospital, Dhule. So, immediately she rushed to the hospital. She saw her sister and noticed that she sustained burn injuries on all over her body.

Then she enquired to her how it was happened. She told her that one day before her husband beat her severely and in the morning poured kerosene on her person and set her on fire. She stated that on the very day at about 1.30 p.m. her sister succumbed to the injuries.

28. In the cross-examination PW-6 has stated that within 5-10 minutes she reached in the hospital after receiving message. Her husband Chandrakant met her in the hospital. She enquired with her husband as to how it has happened and he told that she (deceased) sustained burn injuries and the persons from the locality took her in the Civil Hospital, Dhule. Further, she stated that it was the only talk took place between her and her husband, when she reached in the hospital. She stated that she does not know whether her husband shifted the deceased in the hospital or not. In-fact, it has come in the evidence of API-Zine (PW-8), the Investigating Officer that Chandrakant Salunke admitted injured Shobhabai in the hospital. Moreover, PW-6 stated that

when she received the message of sustaining burns to the deceased, her husband Chandrakant was not present in the house. Thus, it is clear that Chandrakant Salunke had taken the deceased in injured condition in the hospital. But, his wife PW-6 is suppressing the said fact. When he had taken the deceased in the hospital in injured condition, it was natural for the deceased to disclose to him as to how she sustained burn injuries and her natural conduct would have been that she would have disclosed the incident as alleged by the prosecution to him. But as stated above PW-6 states that her husband Chandrakant did not tell her anything except the fact that the deceased sustained injuries and the persons in the locality brought her in the hospital. Moreover, it is pertinent to note that it has come in the evidence of PW-6 that after deceased was shifted in the casualty ward, then only she (witness) was allowed to see her and she was shifted to burn ward after 11.30 am. There is no evidence to show that at what time exactly the deceased made statement to PW-6 that her husband (accused) poured

kerosene on her person and set her on fire. In-fact, PW-6 should have stated specifically in that respect. There is nothing on record to show that when this witness met the deceased in the hospital, the deceased was conscious and in a position to make statement. Therefore, the evidence of this witness regarding oral dying declaration by the deceased to her is not trustworthy.

29. It has come in the evidence of API Zine (PW-8), the Investigating Officer that it was transpired that Chandrakant Salunke admitted injured in the hospital. He recorded his statement. So also it has come in his evidence that Rajiyabeg Shaikh and Sharifabi, both the ladies were residing adjacent to the house of accused and their statements were recorded on the day of incident i.e. on 29.11.1997. So also, Sindhubai Ramchandra Satput also resides near the house of the accused. He stated that from the statements of two ladies it was transpired that when fire was put off by the neighbours, the accused was not present at the spot of incident. Admittedly,

the above witnesses have not been examined by the prosecution. In-fact, they should have been examined by the prosecution. Because it was possible for the deceased when she was taken in the hospital in injured condition, she must have disclosed something about the incident to the said witnesses. So also when as per the statements of said witnesses, the accused was not present at the spot of incident when fire was put off, the presence of the accused at the spot of incident is doubtful and not established by the prosecution. Naturally, therefore, it cannot be said beyond doubt that the accused poured kerosene on the person of the deceased and set her on fire as alleged.

30. The next piece of evidence relied upon by the prosecution is the Certificate Exh.15 issued by Dr. Patil (PW-2) regarding condition of the accused. It has come in the evidence of PW-2 that on the date of incident at 2.15 pm accused was brought by police for medical examination in the hospital and he examined the accused.

It was found that there was smelling of alcohol, speech was regular, gaits were steady, pupils were dilated and behaviour was normal. In his opinion the accused had consumed alcohol but he was not under influence of alcohol. Accordingly, he issued Certificate Exh.15. Thus, it is clear from the evidence of PW-2 and Exh.15 that the accused had consumed liquor, but that does not mean that in the morning on the above said date the accused had consumed alcohol and at about 7.30 to 7.45 am accused poured kerosene on the person of his wife (deceased) and set her on fire as alleged by the prosecution.

31. Thus, on close scrutiny of the evidence referred to above adduced by the prosecution, we are of the opinion that the evidence adduced by the prosecution is not sufficient to infer that the accused was responsible for death of the deceased. The Trial Court in para 8 of the judgment elaborately discussed the evidence of PW-3 who recorded dying declaration (Exh.18) in presence of

Dr. Pawar (PW-5), as well as evidence of PW-4 and PW-6 to whom allegedly the deceased made oral dying declaration and on ultimate analysis rightly held that the prosecution has failed to prove that the accused was responsible for the death of the deceased. Similarly, the Trial Court has properly considered the evidence adduced by the prosecution in respect of the cruelty allegedly caused by the accused to the deceased and held that the prosecution has failed to prove that the accused caused cruelty to the deceased. Thus, the Trial Court on proper appreciation of the evidence rightly held that the prosecution has failed to prove the offences under section 302 and 498-A of the IPC against the accused.

32. For the reasons discussed above, we hold that the view taken by the Trial Court acquitting the accused for the offences with which he was charged was a reasonable and possible view, on the basis of evidence adduced by the prosecution. There is nothing on record to suggest that there is serious infirmity in the Trial

Court's appreciation of evidence or to say that both factually or legally the Trial Court's verdict is erroneous. Therefore, there is no reason to interfere with the impugned judgment and order passed by the Trial Court. In this view of the matter, we hold that the appeal deserves to be dismissed. Accordingly, we dismiss the same. Bail bond, if any, of the accused stands cancelled.

. In view of dismissal of Criminal Appeal, Criminal Revision Application No.99 of 1999 filed by Kondaji Mahadu Jadhav – father of deceased Shobhabai against impugned judgment and order, stands disposed of.

33. The respondent/accused to furnish personal bond of Rs.15,000/- (Rupees Fifteen Thousand) with surety in like amount as per section 437(A) of the Code of Criminal Procedure before the Trial Court, within one week from today.

34. Shri Dixit, learned Advocate appointed to represent the respondent/accused assisted us to arrive at the proper conclusion in the matter. We quantify his fees at Rs.6000/-.

[S.M. GAVHANE, J.]

[S.S. SHINDE, J.]