

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

CRIMINAL APPEAL NO.198 OF 2002

Nandu S/o. Vitthal Sonawane, .. Appellant
Age-30 years, Occu-Mason, (Ori. accused)
R/o.Village Pokhardi,
Tq. Nagar, Dist. Ahmednagar

Versus

The State of Maharashtra .. Respondent

Mr.V.R.Dhorde, Advocate for the appellant
Mr.S.D.Ghayal, APP for the respondent/State

**CORAM : T.V.NALAWADE &
S.M. GAVHANE, JJ.**

RESERVED ON : 26.09.2017

PRONOUNCED ON : 10.10.2017

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

. The appellant accused who has been convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/- (Rupees Ten Thousand), in default, to suffer rigorous imprisonment for two years for the offence punishable under Section 302 of the Indian Penal Code (for short the IPC) as per the judgment and order dated 09.04.2002 passed by the 3rd Adhoc Additional Sessions Judge, Ahmednagar, in Sessions Case No.196/2001 has preferred this appeal challenging said conviction and

sentence.

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

A] The deceased Kavita was daughter of PW-4 Baban Harer resident of Dehare, Tq. & Dist. Ahmednagar. She was married to accused five years prior to the incident and after marriage she went to the house of the accused at Pokhardi, Tq. & Dist. Ahmednagar for cohabitation. She has two issues Akash and Ashwini from the wedlock with accused.

B] While the deceased was cohabiting with accused in the night on 27.09.2001 at 12.00 night when she was sleeping with accused and children in the house she sustained 96% burns. Thereupon, accused admitted her in Civil Hospital, Ahmednagar at 02.00 am on 28.09.2001. The Medical Officer on duty in the Hospital informed Police Station MIDC, Ahmednagar that accused has admitted Kavita the deceased in the hospital for medical treatment on burn injuries. After getting the said information on telephone the concerned police constable took entry in the station diary at 02.05 hours. The Police Station Officer directed Head Constable Avahad to make necessary arrangement for recording the dying declaration (for

short the D.D.) of patient Kavia and to make further enquiry. HC Avahad recorded statement of injured Kavita at 9.15 am on the same day.

C] The Police Head Constable Avahad then went to the spot of incident i.e. the house of the accused on 28.09.2001 and prepared panchanama of spot of incident between 10.00 to 10.55 am in presence of panchas Popat Ramchandra Kale (PW-3) and Balasaheb Ambadas Warule. He seized two golden beads, burnt piece of saree, one piece of white burnt petticoat, ash of the clothes, a piece of bangle, one iron stove and glass-lantern with kerosene from the spot of incident under same panchanama.

D] Police Head Constable Avahad also issued letter to the Special Judicial Magistrate on 28.09.2001 informing him that deceased Kavita is admitted in Civil Hospital, Ahmednagar in injured condition and requesting him to come and record the D.D.. After receiving the said letter Special Judicial Magistrate, Ahmednagar (PW-2) requested Medical Officer Dr. Swati Naik (PW-7) to examine the patient and verify whether the patient is conscious and able to give statement. Both Pws.2 and 7 went to the burns ward and Medical Officer Dr. Swati Naik (PW-7) examined the patient and made endorsement that patient was conscious, co-operative and well oriented and

able to give statement. Thereafter, the Special Judicial Magistrate (PW-2) recorded D.D. (Exh.20) of Kavita the deceased which runs as under:

"She stated that her marriage was performed with accused prior to five years. She is having two children. There used to be quarrel between her and husband. Her husband is having relation with one Alka Barawkar, there was quarrel on that count. Incident took place yesterday in the night of 12.00 hours. While she was asleep, her husband poured kerosene and set her on fire. She shouted and her husband extinguished the fire by putting blanket (रग). Her husband brought her in the hospital. She had stated earlier about quarrel to her parents. They did nothing. She, her husband and her children are in the house. At that time children were sleeping. It is stated that she held her husband responsible for the said incident".

E. After recording D.D. as above PW-2 had delivered it to the MIDC Police Station and on the basis of said D.D. Crime No.118/2001 for the offence punishable under Section 307 of the IPC came to be registered in MIDC Police Station on 28.09.2001 at 13.05 hours. The victim Kavita died in the hospital on 28.09.2001 at 03.15 pm

while taking treatment. Therefore, offence under Section 302 of the IPC was added in the crime initially registered in the police station. The intimation in this respect was given to the JMFC, Ahmednagar. The Police Head Constable Shelke then recorded the inquest panchanama of the dead body between 17.20 to 18.05 hours on the same day. Dead body was referred for postmortem examination. The Medical Officer Dr. Patil (PW-5) and Dr. Swati Naik (PW-7) conducted postmortem examination in the evening and issued postmortem report (Exh.25). It was opined that probable cause of death was due to hypothalamus struck due to 96% of superficial and deep burn. Further investigation was carried by the Investigating Officer API Patil (PW-8). He recorded statements of witnesses and sent seized articles to the Chemical Analyzer for analysis. Accused was arrested on 28.09.2001 and he was got medical examined as he sustained 5% superficial burns to both the hands and doctor issued certificate. He was in jail during trial. API Patil collected the report of the Chemical Analyzer.

F. After completion of the investigation charge-sheet was submitted in the Court of JMFC, Ahmednagar, who committed the case to the Sessions Court, Ahmednagar as offence under Section 302 of the IPC was exclusively triable by the Sessions Court. Then the case was assigned

to the 3rd Adhoc Additional Sessions Judge, Ahmednagar.

G] The charge was framed against the accused for the offence punishable under Section 302 of the IPC, to which accused pleaded not guilty and claimed to be tried. His defence is denial. No defence witness has been examined by the accused. It appears that according to accused death of the deceased was suicidal.

H] To prove guilt of the accused the prosecution examined in all eight witnesses and mainly relied upon the panchanama (Exh.22) of spot of incident, Chemical Analyzer's report and D.D. (Exh.20).

I] On considering the evidence adduced by the prosecution learned trial Court held that the prosecution has proved offence under Section 302 of the IPC against the accused and sentenced him as referred earlier in introductory para (supra) of this judgment, which is under challenge in this appeal by the appellant/accused.

J] By order dated 16.09.2002 impugned order of sentence has been suspended during pendency of the appeal and the accused was released on bail.

3. We have heard learned Advocate for the

appellant/accused and learned APP appearing for the respondent/State and with their able assistance we have perused the evidence adduced by the prosecution and the impugned judgment and order.

4. Learned Advocate appearing for accused submitted that only the evidence relied upon by the prosecution is D.D. (Exh.20) recorded by Special Judicial Magistrate (PW-2) in presence of PW-7 Dr. Swati Naik. There is no dispute that deceased sustained 96% burns. As per evidence of PW-2 Special Judicial Magistrate he obtained thumb impression of the left hand of the deceased on the D.D. while as per the evidence of PW-7 Dr. Swati impression of left great toe of the deceased was obtained on the D.D.. The evidence on record shows that both the hands and legs of the deceased were burnt. Therefore, according to the learned Advocate it was not possible to obtain either toe impression of left leg or thumb impression of left hand of the deceased on the D.D.. Moreover, there is inconsistency in the evidence of PW-2 and PW-7 in respect of thumb impression of left hand or toe impression of the deceased on the D.D. (Exh.20). According to learned Advocate it has also come on record that relatives of the deceased were present and therefore, according to him there is possibility of tutoring the deceased at the time of D.D. (Exh.20). It

is, thus, submitted that D.D. (Exh.20) is not genuine reliable and trustworthy to hold accused guilty. Learned Advocate also submits that admittedly accused sustained 5% burns to his both the hands and he admitted deceased at 02.00 am on 28.09.2001 in the Civil Hospital, Ahmednagar. According to him had it been the case that the accused had intention or motive to commit murder of the deceased he would not have extinguished the fire and he would not have admitted the deceased in the injured condition in the hospital. This conduct of the accused shows that he is innocent and has not committed any offence. Moreover, it is submitted that neighbor of accused is not examined by the prosecution. It is submitted that PW-4 father of the deceased has not supported the prosecution case and he deposed about suicidal death of the deceased. Lastly, it is submitted that the prosecution has failed to prove offence under Section 302 of the IPC beyond reasonable doubt against the accused and therefore, conviction and sentence recorded against accused for the said offence by the impugned judgment is liable to be set aside by allowing the appeal.

5. On the other hand learned APP for the respondent/State submits that the evidence whatever adduced by the prosecution is sufficient to hold the

accused guilty for the murder of his wife the deceased and thus supported the impugned judgment and order.

6. At the out set, it is necessary to refer some admitted facts before considering the aspect whether death of the deceased is homicidal and the accused is responsible for her death. The said facts are that the deceased was married to accused prior to five years of the incident. She had one son and one daughter. At the material time of the incident, in the night on 27.09.2001 she was in the house with her husband accused and children. She sustained 96% burns at about 12.00 night. Accused extinguished the fire by putting blanket (रग) on her person. He sustained 5% burns to his both the hands. Immediately he had taken the deceased in the Civil Hospital, Ahmednagar at 02.00 am on 28.09.2001 for treatment and admitted her in hospital. The deceased scummed to burn injuries on 28.09.2001 in the hospital at about 03.15 pm. The cause of death given by Dr. Patil who conducted postmortem examination of the deceased is "due to hypothalamus struck due to 96% of superficial and deep burn."

7. As per the case of the prosecution in the night on 27.09.2001 accused poured kerosene on the person of the deceased and set her on fire and as such death of the

deceased was homicidal and as it appears from cross-examination of Investigating Officer API Patil (PW-8) it was suggested that it was transpired in the investigation that the deceased Kavita put herself on fire and as such she committed suicide. Thus, as per defence case death of the deceased was suicidal. To prove that death of the deceased was homicidal and accused was responsible to her death the prosecution has relied upon the following evidence and circumstances.

- i. Dying declaration (Exh.20)
- ii. Spot of panchanama (Exh.22) and C.A. Report (Exh.31).
- iii. Motive to the accused to cause death of the deceased.
- iv. Defence of accused.

8. The D.D. (Exh.20) was recorded by the Special Judicial Magistrate-Ramchandra Dimble (PW-2) on 28.09.2001 in presence of Dr.Swati Naik (PW-7) in the Civil Hospital, Ahmednagar. As regards recording of the said D.D. PW-2 has stated that he asked some questions to the patient for his satisfaction whether she can give the statement consistently. He stated that he introduced himself to the patient as a Special Judicial Magistrate and asked her to depose the true incident what she wants

to say. He deposed that the patient then narrated incident took place and he reduced into writing the same in his hand writing and after recording the statement he read over the same to the patient and asked her whether it is recorded as stated by her. So also, besides examining the patient to ascertain her position to make statement Dr. Swati Naik (PW-7) has stated that in her presence the Magistrate asked some questions to the girl. The girl stated the incident and the Magistrate reduced into writing the said information. After recording of the D.D. she again examined the patient. At that time the patient was sound and accordingly she put her endorsement and signed below the endorsement. Both PW-2 and PW-7 have not stated about the contents of D.D. (Exh.20). PW-2 has merely stated that he recorded D.D. as narrated by the patient and PW-7 has simply stated that PW-2 recorded D.D. as narrated by deceased. Therefore, it cannot be said that prosecution has proved the contents of D.D. (Exh.20). Hence said dying declaration cannot be taken into consideration and as such we hold that the prosecution has failed to prove D.D. (Exh.20). This conclusion is based on the ratio laid down by the Division Bench of this Court in the case of Sk. Bibal @ Chunnu Shaikh Nizam Vs State of Maharashtra reported in 2010 ALL MR (Cri) 779 wherein it was held that merely stating that dying declaration was recorded as per the

narration of the injured would not amount to proving the contents of the dying declaration and that the prosecution has failed to prove two D.D. (Exh.24 & 52).

9. Assuming for the sake of argument that D.D.(Exh. 20) can be considered, let us consider whether the prosecution has proved that D.D. (Exh.20) is truthful, voluntary and free from any tutoring and that it is reliable. PW-2 Special Judicial Magistrate deposed that on 28.09.2001 he received requisition letter from Tofkhana Police Station at 10.50 am. As per said letter, he went to Civil Hospital, Ahmednagar on the same day at 11.20 am. He met the Medical Officer on duty and requested her to examine patient Kavita to verify whether she is conscious and in a position to give statement. He stated that he and the doctor reached in the burns ward in the hospital. He directed the persons present there to remove from the ward except patient. Doctor examined the patient Kavita in his presence and put endorsement that she is in a position to talk and handed over the paper to him. Though he has been cross-examined at length on the condition of the patient nothing is found in favour of the accused. So also, doctor Swati Naik (PW-7) who was Medical Officer in the Civil Hospital at the relevant time has stated that on 28.09.2000 she was on casualty Medical Officer duty. Kavita was indoor patient in burns

ward. The Magistrate had approached her for recording her D.D. The Magistrate asked her to examine the patient and verify whether she is in a position to give statement. Accordingly she and the Magistrate reached in the burns ward near the patient. She examined her. She asked some questions and she gave reply properly. She also examined her pulse, B.P. and noticed that she was in a position to give statement. She stated that accordingly she put endorsement on the paper which was supplied to her by the Magistrate and below the endorsement she put her signature. She too has been cross-examined at length on behalf of the accused on the aspect of condition of patient to give statement but nothing has been found in favour of the accused. Exh.20 D.D. also shows that prior to recording the same PW-7 Doctor made endorsement that patient is conscious, co-operative well oriented etc at 11.30 on 28.09.2001, on the top of the D.D. and at the bottom of the D.D. also said doctor made endorsement that statement completed, patient is conscious co-operative and well oriented etc.. It also appears that below both the endorsements PW-7 Dr.Swati Naik has put her signatures. It has come on record that deceased died on 28.09.2001 at 15.15 pm i.e. 03.15 pm. Therefore, on considering the evidence of both PW-2 and PW-7 we hold that patient Kavita/ the deceased was in a position to make statement on 28.09.2001 when D.D. (Exh.20) was

recorded between 11.30 to 11.55 am.

10. As referred earlier both the PW-2 and PW-7 have not stated about the actual contents of D.D. and as such prosecution has failed to prove the contents of D.D.. Therefore, it cannot be said as alleged in the D.D. that in the night at 12.00 hours on 27.09.2001 accused poured kerosene on the person of the deceased and set her on fire. It has come in the evidence of PW-2 Special Judicial Magistrate that he obtained thumb impression of left hand of patient on the statement and put the time when it was completed and he also signed it. Whereas Dr.Swati Naik (PW-7) in whose presence D.D. was recorded has stated that on Exh.20 D.D. it is mentioned that it bears the impression of her (deceased) left leg. She stated that she thinks so that it is the impression of her left great toe. The D.D. (Exh.20) also shows the endorsement at the bottom that there is a impression of left leg toe of Kavita the deceased. Thus, there is a inconsistency in the evidence of PW-2 and PW-7 regarding thumb impression of deceased below the D.D. (Exh.20). So also there is inconsistency in the evidence of PW-2 regarding obtaining thumb impression of deceased below the D.D. and in the endorsement below the D.D. that said impression is of left leg toe. Therefore, it is doubtful whether really D.D. (Exh.20) was recorded in presence of

PW-7 and it is voluntary statement of the deceased. The trial Court observed about the said variance in the evidence of PW-2 and PW-7 in paragraph No.30 of the judgment but held that said fact itself is not sufficient to reject the recitals of the dying declaration which inspires confidence placing reliance upon the ratio laid down in the case of Chandra Narayan Vs Shibjee Yadav reported in 2000(1)Crimes 34 SC relied upon by the learned DGP. We have gone through the facts and the ratio laid down in the said decision. The ratio laid down in the said decision is not in respect of variance or the inconsistency in the evidence of the witness who recorded the dying declaration and doctor in whose presence the same has been recorded as observed above in the present case. In the circumstances present in that case it was held that D.D. which was recorded in presence of doctor who opined that deceased was in a fit condition to make statement was voluntary and truthful one. Therefore, observation of the trial Court in respect of inconsistency in the evidence of PW-2 and PW-7 in respect of left leg toe impression on D.D. (Exh.20) is not correct. In the above circumstances when prosecution has not proved contents of D.D.(Exh.20) and there is inconsistency in the evidence of PW-2 and PW-7 in respect of left leg toe impression below the said D.D. it cannot be said that D.D. (Exh.20) is voluntary, truthful and

reliable.

11. Another aspect to be noted is that as referred earlier the prosecution case is that on 28.09.2001 in the morning at 09.15 am Head Constable Avahad went in the Civil Hospital, Ahmednagar and recorded statement of the deceased in presence of doctor PW-7 and said statement is included in the case paper. However, API Patil (PW-8) has denied suggestion to him that Head Constable recorded statement in morning prior to 09.00 am after reaching the parents of the girl and Magistrate has recorded the D.D.. API Patil however, stated that at the time of filing the charge-sheet he read the statements recorded by the Magistrate and Avahad. He denied that there appears to be controversy between the statement recorded by Magistrate and Head Constable Avahad. He could not tell whether in the statement recorded by Head Constable Avahad it is stated by the victim that incident took place before the deceased went to sleep. He has denied that from the said statement it was transpired that Kavita/deceased put herself on fire. There is a statement dated 28.09.2001 of the deceased and it was recorded at 09.15 am. i.e. before D.D.(Exh.20) and there are endorsements of the doctor on it. Said statement is of course not proved by the prosecution or the accused. Therefore, it cannot be considered and read in evidence. If it is considered for

the sake of argument, it shows that accused poured kerosene on the person of the deceased. The deceased was annoyed and set herself on fire by lighting matchstick. This does not show involvement of the accused in setting the deceased on fire. In fact, prosecution should have proved this statement of the deceased and should have explained as to under what circumstances said statement was given by the deceased. Therefore, even if API Patil Investigating Officer has denied recording of above statement by Head Constable Avahad and subsequently admits that he had seen the said statement, the fact remains that prosecution has not brought true facts of its case before the Court which creates doubt about genuineness of D.D. (Exh.20).

12. The trial Court did not consider statement of deceased recorded by Head Constable Avahad and did not attach importance to said statement as it was not proved as observed in Paragraph Nos. 39 and 40 of the judgment. But the said observations are not correct in the circumstances present in this case because the fact remains that the prosecution has not brought true facts before the Court by suppressing statement of deceased recorded by H.C. Avahad.

13. The evidence of PW-4 father of the deceased who

has not supported the prosecution case shows that after knowing the incident of sustaining burns by the deceased, he went to Civil Hospital, Ahmednagar with his sister at 06.00 am. At that time the deceased was alive. He saw the deceased. He asked the deceased how the incident took place and the deceased informed him that she put herself on fire after pouring kerosene on her by herself. So also, she told him that some trifle quarrel took place between her and her husband. The above evidence of PW-4 is in the form of oral dying declaration to PW-4 by the deceased earlier in time on 28.09.2001 when he went to Hospital immediately after deceased sustained burns. This also creates a doubt about the genuineness of D.D.(Exh. 20) which was recorded after oral D.D. to PW-4.

14. Exh.22 is the panchanama of spot of incident. PW-3 Panch Popat Kale has stated about preparing this panchanama between 10.30 to 10.45 am and seizure of one burnt piece of Saree, one piece of white burnt petticoat, Ash of the clothes, one piece of burnt blouse, one iron stove and one glass lantern under said panchanama. In the cross-examination he stated that first he was called in MIDC Police Station. He admitted that the articles were shown to him in the MIDC Police Station. So also, panchanama was shown to him in the police station and police obtained his signature thereon and on many other

papers. He stated that when he signed in police station, the another pancha was not present. So also, he stated that he did not visit the village Pokhardi spot of incident and that he does not know as to how and from where the articles which were shown to him were collected. In the above circumstances the evidence of PW-3 is not believable to hold that really police seized above said articles in presence of these panchas from the spot of incident i.e. house of the accused and then panchanama was prepared. Panchanama shows that this panchanama was prepared by Police Head Constable Avahad and he called three panchas in front of house of the accused at Pokhardi. Admittedly, the prosecution has not examined other panchas and Head Constable Avahad. When evidence of PW-3 pancha is not sufficient to state that prosecution has proved panchanama (Exh.22) and seizure of articles under said panchanama the prosecution should have examined Police Head Constable Avahad. Therefore, we hold that prosecution has not proved the panchanama (Exh. 22) and seizure of articles from the spot of incident as alleged.

15. Once it is hold that the prosecution has failed to prove spot panchanama and seizure of articles as above the evidence in the form of Chemical Analyzer's report (Exh.31) regarding analysis of said articles is of no

help to the prosecution. Therefore, even if C.A. Report (Exh.31) shows that kerosene residues were found on articles 2 to 4 i.e. partially burnt saree, partially burnt petticoat, and partially burnt clothes pieces, it cannot be said that said kerosene residues were found on the said clothes of the deceased as the accused poured kerosene on the person of the deceased. Even if for the sake of argument it is accepted that kerosene residues were found on the clothes of the deceased as mentioned in the C.A. Report (Exh.31) the finding of said kerosene residues will be of no consequence because it has come in the evidence of PW-4 father of deceased that the deceased poured kerosene on her person and set herself on fire as she disclosed the same to him when she was admitted in the hospital. Thus, spot panchanama and C.A. Report (Exh. 31) are of no assistance to the prosecution to prove that the death of the deceased was homicidal.

16. As regards motive to the accused to commit murder of his wife the prosecution case is that accused was having illicit relation with Alka Barawkar and on that count frequently there used to be quarrel between accused and the deceased. As said earlier the contents of the D.D. (Exh.20) in this respect are not proved. So also, PW-2 Special Judicial Magistrate who recorded above D.D. and PW-7 Dr. Swati Naik in whose presence said D.D.

was recorded have not stated that the deceased in the course of recording D.D. (Exh.20) stated that her husband the accused was having illicit relation with Alka Barawkar and therefore there used to be quarrel between her and the accused. PW-4 father of the deceased has stated that his daughter never informed him that her husband is having illicit relation with one girl i.e. Alka Barawkar. In the course of his cross-examination on behalf of Public Prosecutor he stated that it did not happen that his daughter the deceased told him that her husband is having illicit relation with Alka Barawkar and therefore, he (accused) was not paying attention in the house. Moreover, he stated that it did not happen that his daughter the deceased told him that her husband was saying her that she should talk with Alka Barawkar and go alongwith her and therefore, there used to be quarrel between her and her husband. Moreover, he stated that it did not happen he gave understanding to his son-in-law accused. He denied portion marked 'B' in respect of above facts in his statement before police saying that the same is incorrect. Said portion marked has been proved by the Investigating Officer PW-8 as Exh.30. However, as PW-4 has denied truth of said portion Exh.30 it cannot be said that deceased had told her father PW-4 about illicit relation of the accused with Alka Barawkar and that therefore he was not paying attention in the house.

Therefore, evidence of PW-4 referred to above is of no help to the prosecution to prove alleged motive to the accused to commit murder of his wife the deceased. During investigation statement of Alka Barawkar and her husband were recorded by the Investigating Officer. But admittedly they have not been examined by the prosecution. If the prosecution would have examined them they would have thrown light on the above aspect.

17. Admittedly accused extinguished the fire by putting blanket on the person of the deceased and sustained 5% burns to his both the hands as per certificate Exh.13 and admitted the deceased in the hospital at 02.00 am on 28.09.2001. Had it been the case that the accused had intention to commit murder of the deceased as allegedly he was having illicit relation with one Alka Barawkar, he would not have extinguished the fire and would not have admitted the deceased in injured condition in the hospital in the night immediately after she sustained burns. Therefore, the above conduct of the accused shows that he had no alleged motive to commit the murder of the deceased.

18. For the above reasons we hold that the prosecution has failed to prove the motive as above attributed to the accused in committing the murder of the

deceased, which is significant in the case of present nature when there is no direct evidence showing involvement of the accused and case is based on D.D. and circumstantial evidence referred earlier.

19. Now coming to the defence of the accused, in his statement under Section 313 of the Code of Criminal Procedure he has stated that the parents of Kaviata (deceased) tutored her. Kavita the deceased gave false statement on the say of her parents and police. The attempt is made to involve him in the case. He has not specifically stated that whether the deceased sustained burns accidentally or she committed suicide. As referred earlier it has come in the evidence of PW-4 father of the deceased that when she was admitted in the hospital in injured condition he met her and at that time she disclosed that she put herself on fire after pouring kerosene on her person by herself. So also, it was suggested to PW-8 the Investigating Officer that it was transpired that Kavita the deceased put herself on fire. Thus, it appears that defence of the accused is that death of the deceased was suicidal. It is settled law that accused is not supposed to prove its defence beyond reasonable doubt and what he or she has to do is to bring on record preponderance of probability of the defence. If we consider the evidence of PW-4 father of the deceased

referred to above in respect of oral dying declaration made to him by the deceased that she herself poured kerosene on her person and set her on fire and finding of kerosene residues on the clothes i.e. articles 2 to 4 of the deceased as per C.A. Report (Exh.31) the accused has brought probability on record that the death of the deceased was suicidal. As such there is substance in the defence version of the accused.

20. For the reasons discussed here in above we hold that the prosecution has failed to prove beyond reasonable doubt that death of the deceased was homicidal and that the accused is responsible for her death by causing 96% burns to her which resulted into her death. Therefore, findings recorded by the trial Court relying upon D.D. (Exh.20) that death of the deceased was homicidal and that accused has caused death of the deceased by causing burns to her by pouring kerosene on her person and setting her on fire and holding the accused guilty for the offence under Section 302 of the IPC are incorrect, unsustainable and not in accordance with the evidence adduced by the prosecution. Naturally, therefore, impugned judgment and order passed by the trial Court convicting and sentencing the accused for the offence punishable under Section 302 of the IPC is liable to be quashed and set aside and accused is entitled to be

acquitted of the said offence by giving benefit of doubt by allowing the appeal. In the result, we pass the following order.

ORDER

- I] The appeal is allowed.
- II] The impugned judgment and order dated 09.04.2002 passed by the 3rd Adhoc Additional Sessions Judge, Ahmednagar in Sessions Case No. 196/2001 convicting and sentencing accused Nandu Vitthal Sonawane for the offence punishable under Sections 302 of the IPC is quashed and set aside and he is acquitted of the said offence.
- III] The fine amount, if any, deposited by the accused shall be refunded to him.
- IV] His bail bond stands canceled.
- V] Appellant-accused shall furnish personal bond in the sum of Rs.15,000/- with surety in like amount as per Section 437-A of the Code of Criminal Procedure before the trial Court forthwith.

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]