

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

CRIMINAL APPEAL NO. 344 OF 2002

The State of Maharashtra
through P.S.O. Police Station,
Shirur.

... Appellant
(Ori. Complainant)

VERSUS

1. Ramnath S/o Eknath Aaher,
Age : 27 years, Occu. Agri.
R/o. Bhadkhel, Tq. Patoda,
Dist. Beed.

2. Kalabai @ Kalawati W/o Eknath Aaher,
Age : 48 years, Occu. R/o. As above.

... Respondents
(Orig. Accused)

.....
Mr S. D. Ghayal, APP for the appellant/State
Mr M. R. Andhale, Advocate for respondents
.....

CORAM : T. V. NALAWADE &
A. M. DHAVALA, JJ.
DATE : 31.10.2017.

ORAL JUDGMENT (PER A. M. DHAVALA, J.) :

1. This is an appeal by the State against the acquittal of husband and mother-in-law of the deceased - bride for offences u/s 498A, 302 r/w 34 of IPC. The case was based on dying declarations and the judgment is delivered by ld. IInd Jt. Additional Sessions Judge, Beed, on 22.03.2002 in Sessions Case No. 81/1997.

2. The facts relevant may be stated as follows : -

On the night intervening 01.05.97 to 02.05.97, at 00:05 hrs., deceased Sangita Ramnath Aaher, aged 25 years, was brought to Civil Hospital at Beed with 57% burn injuries. Police Constable – Jyotiram Suryawanshi gave intimation to PI of Beed City Police Station vide letter Exh. 53, which discloses a statement that, the burnt patient had stated that she was forcibly burnt by her husband and mother-in-law and arrangement for recording her dying declaration should be made. The message was recorded at 00:05 hrs. as a Station Diary Entry. PW5-Police Head Constable-Jyotiram Suryawanshi, who was serving in the outpost at Civil Hospital Beed, also gave intimation to the police from City Police Station, Beed and sent a request letter (Exh. 50) to Executive Magistrate. At 07:30 a.m., he met the doctor on duty and obtained the opinion in writing that the patient was able to give a statement. Thereafter, he recorded dying declaration of Sangita with assistance of one Bhalerao (Exh. 40) as per her say and obtained thumb impression. The statement disclosed that, Sangita was married to accused no. 1 - Ramnath about five years back and had no issue. Her husband was a driver on private vehicle and at the relevant time he was not working. Since six months after the marriage, her mother-in-law

Kalawati (accused no.2) was asking her to bring Karni-Dharni (some articles from her maternal house) and as she did not bring articles from her maternal house, she was instigating accused no. 1 - Ramnath. Accused no. 1 - Ramnath was telling her that, she was not as per her liking and he wanted to contract second marriage and she should give consent in writing lest, she would be burnt and cut into pieces. Her husband used to assault her. Since 8 days prior to the incident, her husband at the instigation of his mother was demanding Rs. 50,000/- from her to be brought from her father for purchasing a Jeep. On the date of incident i.e. 01.05.1997, the demand was repeated from 09:00 a.m. and she was subjected to abuses and assault. Accused no. 2 - Kalawati was instigating accused no. 1 - Ramnath. At 04:00 p.m. when Sangita was sleeping in her house, both the accused came to her room. Her mother-in-law sprinkled kerosene on her person from a plastic can and her husband disclosed her that, as she was not bringing money, he was setting her on fire and set her ablaze. When she caught fire, both the accused left the spot. She came out of the room and her paternal aunt Kondabai (DW2) extinguished the fire by pouring water. Then her parents were called and she narrated the incident to them at 08:00 p.m. and thereafter she was brought to the hospital.

3. This dying declaration was registered as 0 number at Beed Police Station and was forwarded to Shirur Police Station and the crime was registered at C.R. No. 28/97 u/s 498A, 307 r/w 34 of IPC and the same was investigated into. During the investigation, burnt pieces of clothes of the deceased were seized from the spot under spot panchanama. The statements of witnesses were recorded. There was oral dying declaration by Sangita before her father PW2 - Fakira. On 03.05.97, Naib Tahsildar (PW7 - Mir Shoukat Ali) at the instance of Executive Magistrate - Mr Mule, recorded a fresh dying declaration. He had obtained written opinion of Medical Officer that the patient was in position to make the statement. Sangita in this dying declaration (Exh. 51) also implicated her husband and mother-in-law but she stated that her mother-in-law held her hands while her husband sprinkled kerosene and set her on fire. She stated that, neighbours had gathered and extinguished the fire and Gopinath (father-in-law's cousin) and accused No. 2 - Kalawati went to her father and gave message about the incident. There were also statements disclosing that deceased Sangita was subjected to physical and mental ill-treatment by way of beating, abusing and making dowry demand of Rs. 50,000/-. On 08.05.97, Sangita succumbed to the injuries. Then inquest panchanama and post-mortem was conducted. The investigation revealed that accused no. 2 - Kalawati

is real sister of Sangita's father/PW2-Fakira and she was residing at her maternal house for long period. She had been to her matrimonial house few days before the incident after stay of six months at her maternal house. PW10-API Santosh Singh carried out the investigation and submitted charge-sheet in the court. In due course, the case was committed to the court of sessions.

4. Ld. 2nd Additional Sessions Judge framed charge Exh. 5 u/s 302/34 and 498A/34 IPC against the accused. The accused pleaded not guilty. The prosecution examined 10 witnesses while the defence examined two witnesses. It is defence of the accused that deceased Sangita was not happy with her marriage with accused no. 1 Ramnath who was her cousin and younger to her by three years. Therefore, after marriage, she spent most of the time at her maternal house. She hardly stayed at her matrimonial house for 1-2 months during 7-8 years. She was brought by DW2 Kondabai to her matrimonial house after six months stay at her matrimonial house and it was against her wish. Thereafter within 3-4 days, when accused no. 1 had gone to attend Pangri Fair and accused no. 2 had gone for grazing cattles, deceased Sangita committed suicide by setting herself on fire. At that time, DW2 Kondabai was present and she had extinguished the fire. The accused had not subjected her to

any dowry demands or any cruelty. The dying declarations were manipulated and false.

4. After hearing the parties, ld. 2nd Additional Sessions Judge, Beed acquitted both the accused in a cryptic judgment mainly on following grounds:

- (i) The main dying declarations Exh. 40 & 51 are suspicious as those were having thumb impressions whereas; she had sustained burn injuries to her both the hands (9% & 5%).
- (ii) There is material inconsistency in dying declarations at Exh. 40 & 51 as to who poured the kerosene and when demand of Rs. 50,000/- was made (8 days earlier/1 year after marriage).
- (iii) He relied on **Paparambaka Rosamma & Ors. Vs. State of Andhra Pradesh 1999 SAR (Criminal) SC 646** to hold that the absence of certificate regarding fitness of mental status is legal infirmity making the dying declaration unsafe for reliance. There was no smell of kerosene to the clothes found by the doctors, who examined the deceased.
- (iv) Hence, this appeal by the State.

5. Ld. APP - Shri. S. D. Ghayal submitted that, deceased - Sangita married to accused no. 1 in the year 1991 and has died due to burns on 08.05.1997 i.e. within seven years of marriage. There is evidence to show that, there was dowry demand of Rs. 50,000/- for purchasing a Jeep and she was subjected to beating and abusing for meeting the demand.

6. There are four dying declarations (i) The first oral dying declaration before the Medical Officer, who has submitted a report to that effect (Exh. 53) to the Police. (ii) Dying declaration before father PW2-Fakira. (iii) Dying declaration before Head Constable - Jyotiram PW5 (Exh.40), which is treated as FIR and (iv) written dying declaration before PW7-Shoukat Ali, Naib Tahsildar, Exh. 51. Both PW5 & PW7 had made inquiry with Medical Officers and obtained opinion about fitness of the patient to make a statement. He argued that, deceased had sustained only 57% injuries and she survived for eight days. He argued that, the judgment relied upon by the Id. trial Judge has been overruled in **Kamalavva & Anr. v. State of Karnataka 2009 CRI.L.J. 4408 & Laxman v. State of Maharashtra (2002) 6 SCC 710**. He also submitted that, the deceased had not implicated her father-in-law and other relatives residing with her and she has consistently involved both the accused

in all the dying declarations. The discrepancies noted by the Id. trial Judge in the dying declarations are minor and those cannot be fatal. He submitted that, there is a general rule that, when independent witness like Special Executive Magistrate records the dying declaration, normally it should be believed and the dying declaration can be the sole basis for holding the accused guilty. He argued that, DW2-Kondabai has deposed falsely to save both the accused.

7. Per contra, Mr Andhale, Id. advocate for respondents strongly supported the judgment of the acquittal. He relied on the evidence of DW2-Kondabai, which supports the defence story of suicide. He argued that, Kondabai's name was disclosed by the deceased in her dying declaration (Exh. 40). He also argued that, dying declarations Exh. 40 & 51 are not consistent with each other. There is material discrepancy regarding the role of the accused. In one dying declaration, accused no. 2 is shown to have sprinkled kerosene whereas; in other case, it is stated that accused no. 2 merely held hands of the deceased and accused no. 1 sprinkled the kerosene and set her on fire. There is also divergence with regard to the person who extinguished the fire. In one case, it is stated that Kondabai extinguished the fire whereas; in other case, it is stated that Gopinath extinguished the fire. He also relied on the oral evidence of

the witnesses to show that, the accused had no motive to commit murder and the prosecution case regarding ill-treatment for meeting the dowry demand is totally unreliable. The conduct of the parties is not consistent with such demand. The deceased was closely related to the accused before the marriage and she was spending most of her time at her maternal house even after marriage. The accused no. 2 – Kalawati had gone to the house of PW2 Fakira, father of the deceased, to report the incident which is not consistent with the allegations made against her. He submitted that, though the conviction can be based solely on the dying declaration, such dying declaration must be truthful, trustworthy and reliable. It should not be inconsistent with the other facts and evidence of the witnesses. The dying declarations cannot be believed and the Id. Trial Judge has rightly disbelieved the dying declarations. No interference is called for in the judgment of the acquittal.

8. The points for our consideration with our findings thereon are as follows :

Sr. No.	Points	Findings
1	Whether the prosecution has proved that the deceased Sangita met with homicidal death?	Not proved.
2	Whether the prosecution proved that accused nos. 1 and 2 committed	Not proved.

	murder of Sangita by pouring kerosene on her person and set her on fire?	
3	Whether accused nos. 1 and 2 in furtherance of their common intention subjected the deceased-Sangita to cruelty?	Not proved.
4	What order?	The appeal is dismissed.

REASONS

9. The prosecution has examined 10 witnesses and has produced documents, which can be grouped as follows:

[I] Witnesses to the Dying Declarations:

- (i) PW8 – Dr. Vijay, Oral DD dt. 02.05.97 at 00:05 a.m. Communicated vide letter Exh. 53. PW8 has also issued certificate about fitness of the patient while recording DD at Exh. 40 & 51.
- (ii) PW2 – Fakira, father, Oral DD on 01.05.1997 in journey to the hospital.
- (iii) PW5 – Head Constable – Jyotiram, Oral DD dt. 02.05.97 at 07:00 a.m. in the hospital (Exh. 40).
- (iv) PW7 - Shoukat Ali, Naib Tahsildar, Oral DD dt. 03.05.97.

[II] Medical Evidence:

- (i) PW4 – Dr. Syed Bari, PM notes (Exh. 37) showing 57% deep burns.
- (ii) Inquest panchanama (Exh. 25) admitted.

[III] Factual background and previous ill-treatment:

- (i) PW2 – Fakira, father of the deceased.
- (ii) DW2 – Kondabai.

[IV] Panch witnesses:

- (i) PW1 – Vitthal, panch to the spot panchanama Exh. 27.

[V] Police Witnesses:

- (i) PW3 – Head Constable of Shirur Police Station, who registered Crime at C.R. No. 28/97 at 05:05 p.m. and Station Diary No. 122/97. Letter received by him at Exh. 33 & 34.
- (ii) PW6 – Police Constable Ramesh attached to City Police Station, Beed, who carried papers to Shirur Police Station. - Formal Witness.
- (iii) PW9 – API – Laxman, who has merely filed charge-sheet. Formal Witness.
- (iv) PW10 – API – Santosh Singh, who conducted the investigation. He has produced and got exhibited.

(a) FIR (Exh.59) (identical to Exh.40).

[VI] **Formal Witnesses:**

(i) DW1 – Prabhakar - Headmaster.

10. Before adverting to the appreciation of evidence, it will be useful to discuss the evidence showing the background.

11. PW2 - Fakira is father of deceased Sangita. Accused no. 2 – Kalawati is his younger sister. Accused no. 1 – Ramnath is son of accused No. 2 – Kalawati. He was born in the house of Fakira at Nalwandi and was younger to Sangita by 2-3 years. DW2 Kondabai is sister of PW2 Fakira & accused No. 2 – Kalawati. The accused were residing at Bhadkel, which is 15 kms away from Nalwandi. Nalwandi is 56 kms away from district headquarters Beed. Accused no. 1 was having agriculture land. At the time of marriage, he was studying in 9th std. He was born on 01.07.1974 and marriage took place in 1991. DW2 Kondabai was a widow. She was residing at Nalwandi. At the time of marriage, PW2 Fakira had given dowry of Rs. 10,000/- and born the marriage expenses. There is no evidence that there was any demand of dowry or insistence for payment of dowry at the time of marriage. After the marriage, Sangita happily cohabited with

accused No. 1 – Ramnath for about one year. Sangita did not beget a child.

12. It is admitted fact that, on 01.05.1997 at about 04:00 pm Sangita sustained 57% burns in her matrimonial house. Her matrimonial house is situated in a edifice (Wada). One Gopichand (uncle of accused no.1) and accused no. 2 Kalawati went in a jeep to Bhadkel to report the incident to PW2 Fakira and thereafter PW2 Fakira and his family members came to Bhadkel by the same Jeep. Then Sangita was taken in the same Jeep to Civil Hospital at Beed at about midnight. DW2 Kondabai is a direct eye-witness, who has supported the defence. There is no eye-witness supporting the prosecution and therefore the prosecution case is based on circumstantial evidence. It is not in dispute that, Sangita had sustained 57% burns and as a result of such burns, she died on 08.05.1997. PW4 Dr. Syed Bari has conducted post-mortem on the dead body. As per his evidence and PM notes (Exh. 37), deceased Sangita had sustained superficial to deep burns with pus pocket in following regions.

- (i) Left upper limb – 9%
- (ii) Rt. Upper limb – 5%
- (iii) Trunk - 12%
- (iv) Back – 10%
- (v) Rt. Lower Limb – 10%
- (vi) Left lower limb – 10%
- (vii) Perinium – 01%

13. The opinion given by the doctor about cause of death is due to superficial to deep burns due to 57%.

14. The main issue is whether Sangita committed suicide or was it a homicidal death. Hence, both the points for determination will have to be decided together.

15. There are four dying declarations as follows:

- (i) As per evidence of PW2 Fakira, on receipt of information on 01.05.1997, at about 8:00 p.m., he came to Bhadkhel. He found his daughter Sangita sitting on the ground. She was covered with a bed-sheet. His wife told him that she had sustained burns to stomach, back, private parts and chest etc. PW2 stated that, Sangita told him that on that day since morning, on account of instigation by accused no. 2 there was a dispute between she and and accused no. 1. Accused no. 1 had abused her and beat her in the morning, when she was sleeping at 4:00 pm in the room, accused nos. 1 and 2 came there, awakened her

and then accused no. 2 sprinkled kerosene on her person and accused no. 1 set her on fire. Then both the accused fled away from the room and DW2 Kondabai came and extinguished the fire.

- (ii) PW8 Dr. Vijay Pangrekar has deposed that, he was working as Medical Officer in Civil Hospital, Beed on 01.05.1997. Sangita was brought by her father at midnight 00:05 hrs. He had recorded history. He stated that, she told him that, she had sustained burn injuries from her husband and mother-in-law. He has given intimation to the Police vide letter exh. 53. This letter exh. 53 shows that, there was a report that Sangita Ramnath Aher, aged 25 years, r/o. Bhadkhel was brought to the Civil Hospital at Beed on 02.05.1997 at 00:05 hrs with 57% burns and she was in position to make statement. After signing the intimation letter below the signature, endorsement is made that the said patient had told him that her husband and mother-in-law had forcibly set her on fire. It was again signed and there was a further writing that arrangement for recording dying

declaration should be made. The letter bears endorsement that it was recorded as Station Diary Entry No. 22/99 at 00:30 hrs.

- (iii) PW5 Head Constable – Jyotiram Suryawanshi deposed that, on the relevant date at night, he was working in Police Chowki at Civil Hospital at Beed. At 1:00 a.m., Sangita was brought in burnt condition. He gave intimation to the main Police Station, Beed City (Exh.41). At 07:00 a.m., he met the doctor on duty, made inquiry about fit condition of Sangita to make a statement. The doctor made endorsement that the patient was able to speak and sign the same. PW8 Dr. Vijay has supported him on this point. Thereafter, he made inquiry with Sangita and her statement was recorded by his colleague Bhalerao and he obtained thumb impression of Sangita and himself signed the same. He again obtained the endorsement of the doctor on the said dying declaration Exh. 40. He stated that, the statement was recorded truly as per the say of Sangita and thereafter her thumb impression was obtained. This dying declaration has

been registered as FIR at C.R. No. 097 and forwarded to Shirur Police Station as the incident had taken place in Shirur.

- (iv) As per evidence of PW7-Naib Tahsildar-Mir Shoukat Ali, he was authorized to hold identification parade & record dying declaration. The Executive Magistrate – Mr Mule, on receipt of letter from outpost at Civil Hospital at Beed, requested him to record dying declaration of Sangita. The letter received by him on 02.05.1997 is at Exh. 50. He visited the hospital on 03.05.1997 at 07:00 a.m. He met PW8 Dr Vijay Pangrekar and after making inquiry with him, doctor examined the patient and gave opinion in writing that the patient was able and conscious to give statement. Accordingly, written endorsement was obtained by him. Thereafter, he isolated the patient and made inquiry with her. She told him her name and other details and also told him that she married five years back with Ramnath (A1). After one year, Ramnath was making demand of Rs. 50,000/- for purchasing a Jeep. She could not make arrangement as her parents

were poor. On 01.05.1997, at 4:00 p.m. his mother told him to catch her hands. Sangita further told PW7 that, her husband sprinkled kerosene on her person and set her on fire with matchstick. As she caught fire, her mother in law and husband fled away. She started screaming. There was no other member in the house. Cousin of her father-in-law by name Pandharinath came there and extinguished the fire. PW7 after verifying the papers stated that his name was Gopinath. Thereafter, Gopinath went to Nalwandi and gave intimation about the incident to her father. That time, her mother-in-law also accompanied him. They had brought her to Government Hospital at Beed and admitted her. He stated that, he read over the statement to her. She admitted it to be correct and thereafter her thumb impression was impressed. Again a report of Medical Officer was obtained that Sangita was able to give statement. The dying declaration proved is at Exh. 51.

16. No doubt, the conviction can be based solely on dying declaration. However, in order to base such conviction, it is

necessary that the court should be satisfied that the dying declaration is truthful, credible and reliable. If there are some inconsistencies in the dying declarations, the court may look for corroboration.

17. In the present case, deceased Sangita met with unnatural death by burning in her matrimonial house. She had sustained 57% burns and her above referred dying declarations were recorded. One of the dying declarations was recorded by Naib Tahsildar, who claims to be authorized to record dying declaration.

18. In case of multiple dying declarations, the law laid down may be stated as follows:

[I] In **Nallam Veera Satyanandam and others v Public Prosecutor, High Court of A.P. AIR 2004 SC 1708**, there were two dying declarations, one recorded by Executive Magistrate showing that she sustained injuries by accident while second was recorded after 10 minutes by Head Constable without taking necessary precautions. It is held that the dying declaration recorded by Executive Magistrate after following procedure cannot be discarded only because it helps the defence. In case of multiple dying declarations each dying declaration will have to be considered independently on its own merit as to its evidentiary value and one

cannot be rejected because of the contents of the other. In cases where there are more than one dying declaration, it is the duty of the court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.

[II] In **Amol Singh Versus State of Madhya Pradesh (2008) 5 SCC 468**, deceased Saraswatibai had given dying declaration before Naib Tahsildar at 4:35 am and she died at 9.10 a.m. due to 89% injuries. Earlier to the said dying declaration, one more dying declaration was recorded by police in presence of two witnesses. There was variance between the two dying declarations which the High Court found insignificant holding that the dying declarations were consistent in substance as to the complexity of the accused persons. The High Court upheld the conviction. It is held in para 13, 14 & 15, which reads thus:

13. *Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. (See: Kundula Bala Subrahmanyam v. State of A.P. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of*

various dying declaration, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.

14. It is to be noted that the High Court had itself observed that the dying declaration (Exh.P11) scribed by the Executive Officer, (PW9) at about 0435 hours in the same night was not in conformity with the FIR and the earlier dying declaration (Exh.P3) scribed by ASI Balram (PW 8) in so far as different motives have been described. That is not the only variation. Several other discrepancies, even as regards the manner in which she is supposed to have been sprinkled with kerosene and thereafter set on fire.

15. Therefore, the discrepancies, make the last declaration doubtful. The nature of the inconsistencies is such that those are certainly material. That being so, it would be unsafe to convict the appellant. The conviction is set aside and appellant is acquitted of the charges.

[III] In **State of Andhra Pradesh Versus P. Khaja Hussain (2009) 15 SCC 120**, it was alleged that, the accused poured kerosene over his wife Pinjari and set her on fire. The prosecution version primarily rested on two dying declarations. One recorded by Magistrate and other by Police official. The first was recorded at 11:30 a.m. and later was recorded by Head Constable after one hour. The High Court found variations in two dying declarations which were found to be trivial. The Apex Court found that there was no explanation as to why second dying declaration was recorded by Head Constable. Considering the facts, the judgment of acquittal was restored.

19. When the above guiding principles are applied to the facts of the present case, we find that there is more than reasonable doubt about the prosecution story regarding homicide. We are not impressed with the reasoning of the trial court that when both the hands of the deceased were burnt, how her thumb impression could be taken. Her hands showed 9% and 5% burns, it means one hand was not fully burnt. There is no cross-examination to show that her thumb impression was burnt. Therefore, those grounds relied upon by the 1d trial judge cannot be considered.

20. We agree with 1d APP that the view in **Paparambaka Rosamma & Ors. Vs. State of Andhra Pradesh 1999 SAR (Criminal) SC 646** that there should be medical certificate showing not only fitness about body but also of mind for relying upon dying declaration, is no more good law as held in *Kamalavva & Anr. v. State of Karnataka & Laxman v. State of Maharashtra* (cited supra). There should be satisfactory material to show physical and mental ability of the patient to make a statement. It is not essential that such physical and or mental ability must be established only by way of medical certificate.

21. We find that, deceased Sangita was niece of accused no. 2 –

Kalawati. She was daughter of her real brother PW2 Fakira. Though at the time of marriage accused no. 1 Ramnath was studying in 9th class and was aged around 17-18 years and though Sangita was elder to him by 2-3 years, PW2 Fakira arranged their marriage. There was voluntary payment of dowry of Rs. 10,000/-. There was no demand or insistence of dowry at the time of marriage.

22. PW2 deposed that, after cohabitation of one year without ill-treatment, there was demand for dowry of Rs. 50,000/- by accused no. 1 for purchasing a Jeep. Thus, according to him, this demand was made about five years before the incident dt. 01.05.1997. In para 7, he admitted that, she was residing at matrimonial place for some days and thereafter she used to reside at her maternal house for 4-5 months. His evidence shows that, Sangita resided at her matrimonial house for about six months and just four days before the incident, his sister DW2 Kondabai had taken Sangita to her matrimonial house. Kondabai was residing in the house of the accused even at the time of incident.

23. As far as the allegations of dowry demands are concerned, the subsequent conduct of the parties does not support it. No meetings were held, no efforts for persuasion were made. Sangita

did not file any proceedings either for maintenance or u/s 498A of IPC. If there was dowry demand of Rs. 50,000/- in 1992, the accused could not have waited for five years and could not have accepted Sangita in their house few days before the incident.

24. DW2 Kondabai is sister of accused no. 2 as well as sister of PW2 Fakira. She has stated that, Sangita used to live at matrimonial house for 2-3 days and thereafter used to return to her matrimonial house. She used to reside at her maternal house for a long period extending upto one year. She was not cohabiting with her husband. She was not liking accused no. 1 – Ramnath as he was younger to her and she had expressed her dislike to DW2 Kondabai. She deposed that, she herself reached Sangita to her matrimonial house at Bhadkhel. As per her evidence, at the time of incident accused no. 1 Ramnath had gone to a fair at Pangri while Kalawati had gone for grazing cattle and she and Sangita were only persons in the home. Sangita told her that, she did not wish to live in matrimonial house and she wished to return back. DW2 insisted her to stay for some days more but, she objected and went inside the room, latched the door and set her on fire.

25. PW1 Vitthal is a panch witness residing in Bhadkhel. He

has supported Kondabai. His house is near the house of accused in the same edifice. He has also stated that Sangita was residing at her maternal house for long time and she had returned to her matrimonial house just 4-5 days before the incident. When he heard hue and cry, he had gone to the house of the accused. Kondabai had extinguished the fire and told him that Sangita had set herself on fire. He further deposed that, when PW2 Fakira came there, accused no. 2-Kalawati asked him why Sangita was sent to the matrimonial house against her will.

26. PW2 Fakira has stated that, after the incident Gopinath and accused no. 2 came in Jeep to him and told him about the burn injuries sustained by Sangita. The conduct of accused no. 2 in going to the house of her brother after the incident is not consistent with the allegations that she had set her on fire. PW2 has also admitted that accused no. 1 studied in his village. We find no substance in the evidence of PW2 that accused nos. 1 and 2 were making demand of dowry of Rs. 50,000/- and as the dowry was not brought, there was ill-treatment. The allegations regarding ill-treatment are extremely vague.

27. When this fact is not proved, we find that the accused had

no motive to do ghastly act of setting Sangita on fire. The prosecution has not examined any of the neighbours except PW1, who has not supported the prosecution. PW1-Vitthal and DW2-Kondabai who were present at the time or immediately after the incident have supported the accused.

28. In the light of these facts, when the evidence of dying declarations is appreciated, we find some material discrepancies in the two written dying declarations Exh. 40 & Exh. 51. As per dying declaration Exh.40 recorded by Head Constable – Jyotiram (PW5), Sangita was sleeping at the time of incident in the house. Her husband and mother-in-law came there. Her mother-in-law poured kerosene on her person and both of them asked her why she was not bringing money and her husband set her on fire. Dying declaration Exh. 51 recorded by Naib Tahsildar with regard to the same material incident shows that her husband asked her mother-in-law to hold her hands and her mother-in-law held her hands and the main act of pouring kerosene and setting her on fire were committed by her husband. It is needless to state that in this small incident it is very material as to who poured kerosene on the person of Sangita and the variance is not on the trivial aspect. In both the dying declarations, it is recorded that both the accused thereafter fled away but in dying

declaration Exh. 51, it is recorded that her father-in-law's cousin Gopinath and her mother-in-law Kalawati went to her father in a Jeep to report the incident. This conduct of accused no. 2 – Kalawati is not consistent with the allegations against her as well as the statement that both the accused had fled away.

29. In dying declaration Exh. 40, it was disclosed that DW2 Kondabai had poured water to douse the fire. In dying declaration Exh. 51, it is recorded that, Sangita told PW7 that the neighbours gathered and extinguished the fire and then her husband's uncle Gopinath came there. In the second dying declaration, the presence of Kondabai itself is not shown. These two material discrepancies by themselves are sufficient to discard the evidence of dying declarations. There are additional discrepancies in the evidence. In dying declaration Exh. 40, it is alleged that, since eight days prior to the incident her husband at the instigation of her mother-in-law was harassing her by abusing and beating her but there are admissions to show that Sangita had been to her maternal house only four days before the incident. Therefore, the reference to harassment for eight days before the incident is certainly false. In the first dying declaration, it is alleged that, accused no. 1 was telling Sangita that he disliked her and wanted to contract second marriage and she

should give consent in writing otherwise she would be set on fire or would be cut off. This entire allegation of threats is absent in the dying declaration Exh. 51 recorded by PW7 (Naib Tahsildar) – Shoukat Ali.

30. PW5 Jyotiram had obtained certificate of medical officer but the said certificate is only regarding ability to make a statement. There is no specific certificate that she was physically and mentally fit to make a statement. It is common knowledge that, in case of burn injuries, the doctors are required to provide sedatives to the patient to relieve her of the pains. In such cases, the patient will not be mentally fit to give a statement.

31. PW5 Jyotiram is Head Constable when there was information regarding such serious offence, some senior Police Officer from Beed Police Station should have been sent to record her dying declaration. There is no explanation why such arrangement was not made. If the dying declaration was to be recorded by PW5 Jyotiram, it could have been recorded at 1 or 2:00 a.m. as well.

32. PW5 Jyotiram should have deposed at least substance of the statement given by Sangita to him. He has not stated that, after

recording the statement, he read it over to her and she admitted it to be correct and then her thumb impression was obtained.

33. The Police of Beed City Police Station had given request letter to Executive Magistrate to record dying declaration of Sangita. PW7 Shoukat Ali was not Executive Magistrate. Mr Mule was Executive Magistrate, he told PW7, who was Naib Tahsildar, to record a dying declaration.

34. PW7 has not personally verified whether the patient was physically and mentally in good condition to give statement or not. He has obtained opinion of doctor but it does not disclose fitness of both physical and mental status of Sangita. The thumb impression of Sangita has not been attested by PW7. There is no record to show that, PW5 or PW7 have made inquiry as to whether Sangita was in position to sign or not.

35. The prosecution has also relied on the oral dying declaration given by Sangita to her father PW2 Fakira and to the Medical officer PW8 Dr. Vijay. For the reasons discussed herein above, we find that the evidence of PW2 Fakira does not inspire confidence and, therefore, the alleged oral dying declaration before

him cannot be accepted.

36. Dr. Vijay has deposed that, he had recorded the history and Sangita had told him that she sustained burn injuries from her mother-in-law. He has immediately reported the matter to the police vide letter Exh. 53. The alleged history given by Sangita to PW8 is not there in the letter but there is separate endorsement made below the letter. In that case, the prosecution ought to have produced the case paper of Sangita where the history was recorded. Besides, the prosecution ought to have produced copy of Station Diary Entry recorded on the basis of the said letter. Besides, if PW8 had reported that Sangita told him that her husband and mother-in-law set her on fire, then it was duty of the police officer to register it as FIR but it has not been treated as FIR. No Station Diary Entry has been produced. The case papers are not produced. In the light of the facts discussed earlier, we find that this oral dying declaration before PW8 Vijay is not free from doubt. If Sangita had given such a dying declaration, he should have first recorded her physical and mental condition to make statement and thereafter could have recorded it in the writing and should have obtained her thumb impression or signature. Nothing of this sort has been done. Hence, we find that, it is not free from doubt.

37. We find the evidence of DW2 Kondabai reliable. Her cross-examination has not shaken her credibility. She is related to both the parties closely. She has no reason to depose falsely. There was no motive for the accused to do such ghastly act. There is material inconsistency in two dying declarations. Considering all the facts, we find that the prosecution has failed to establish that accused nos. 1 and 2 had set Sangita on fire. At least it can be said that, the prosecution case on this point is not free from reasonable doubt. Though we don't agree with the reasoning, we find that the view taken by the ld. trial Judge is reasonable and probable view and hence no interference is called for. Hence, we answer the points formulated by us accordingly and pass the following order.

ORDER

- (i) The Criminal Appeal is dismissed.
- (ii) The bail bonds of the accused stand cancelled.
- (iii) The muddemal property be destroyed after the appeal period is over.

[A. M. DHAVALE]
JUDGE

[T. V. NALAWADE]
JUDGE