

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

CRIMINAL APPEAL NO. 603 OF 2002

Mariba Piraji Chapewad,
Age : 35 years, Occu. Labour,
R/o. Kalyannagar, Naned ... Appellant

VERSUS

The State of Maharashtra
Through Police Station, Bhagyanagar,
Nanded, Tq. & Dist. Nanded. ... Respondent

.....
Mr Satyajit Dixit, Advocate (appointed) for the appellant
Mr S. J. Salgare, APP for respondent/State
.....

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

RESERVED ON : 14.11.2017.
PRONOUNCED ON : 18.12.2017.

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

1. In Sessions Case No. 84/2001, the appellant was convicted u/s 302 IPC for pouring kerosene on person of victim Ganesh and setting him on fire and thereby committed his murder and was sentenced to imprisonment of life and to pay fine of Rs. 10,000/- in default RI for six months. The accused was acquitted u/s 3(2)(v) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989. The appellant being aggrieved by the conviction has preferred this appeal.

2. The facts relevant for deciding this appeal may be stated as follows.

. On 22.01.2001, in the evening, Police of Bhagya Nagar Police Station, Nanded received information of M.C. Case, hence, PW8 ASI Shripad Jankar visited Civil Hospital, Nanded. After obtaining certificate from Medical Officer about consciousness and mental fitness of the victim, he recorded dying declaration of Ganesh Suryawanshi (the deceased), who had sustained 65% burns. He had disclosed to PW8 ASI Jankar that, as he was a labourer, on 22.01.2011 at 05:30 p.m. he consumed 100 gm. of liquor in Liquor Shop of Shetti at Kalyan Nagar, Nanded. When he came out, the accused Mariba came there and told him to supply liquor to him. Deceased Ganesh further disclosed that, he told the accused that he had no money then the accused suddenly brought some kerosene in a glass and poured it on his person and set him on fire by lighting a match stick. His banyan caught fire and he sustained burns on chest, abdomen, face, back and on thighs. This dying declaration was read over to deceased Ganesh and he admitted it to be correct and then signed it. This dying declaration was taken to the Police Station and at 09:35 p.m. crime was registered at C.R. No. 16/2001 u/s 307 IPC. The same was investigated into by PW11 PSI Prashant Deshpande.

On the same night, PW4 Khaja Farukh Hussain, JMFC, Nanded received a request letter from PW8 ASI Jankar for recording dying declaration. He received the letter at 08:00 p.m. and recorded dying declaration at 08:10 to 08:30 p.m. He also obtained the opinion of Medical Officer about consciousness and mental fitness of the patient. The dying declaration by JMFC is substantially similar and slightly different. It shows that, on the same day at 05:30 p.m. the accused Mariba abruptly came in front of him outside the shop of Shetti, poured kerosene on his person from a glass and set him on fire by lighting a match stick and thereby he sustained 65% burns on face, both hands, chest, abdomen and legs. It was also read over to burn patient and his signature was obtained. The investigation also revealed that, PW7 Suresh Nikalje was at the relevant time in the Liquor Shop of Shetty. On hearing shouts of Ganesh (deceased), he came out and saw that Ganesh had sustained burn injuries. The deceased gave oral dying declaration that the accused demanded Rs.10/- for purchasing liquor and as he could not advance the same, kerosene was poured on his person and he was set on fire. He saw accused leaving the spot in hurry. Thereafter, he gave intimation to brother Ankush (PW1) and mother Haribai (PW5). PW1 had been to the spot and the deceased had given dying declaration before him while he gave dying declaration to his mother Haribai in the hospital.

The clothes of the deceased were seized and forwarded to the office of CA. The reports received from the CA Office disclose kerosene residues on T-shirt, nicker and full pant of the deceased. On 26.01.2001, the deceased succumbed to the burn injuries. His PM was conducted and the cause of death was 65% superficial to deep burns. The statements of material witnesses came to be recorded. The spot panchanama and inquest panchanama were drawn. After completion of investigation, the charge-sheet was submitted in the court.

3. In due course, the case was committed to the court of Sessions, Nanded. The ld. Addl. Sessions Judge, Nanded framed charge. The investigation also revealed that the accused belongs to Wadar community whereas the deceased belongs to Mang community, hence the charge u/s 302 of IPC and 3(2)(v) of SC & ST Act were framed. The accused pleaded not guilty. The prosecution examined 12 witnesses whereas the defence examined one witness. It is the defence of the accused that, the accused had a quarrel with his brother and, therefore, he himself committed suicide by setting himself on fire. The ld. Addl Sessions Judge, Nanded was pleased to accept the prosecution evidence to hold the accused guilty u/s 302 IPC. Hence, the accused has preferred this appeal.

4. Since the ld. advocate for the accused did not appear, advocate Shri. Satyajit Dixit was appointed at State expenses to represent the accused. He has taken us through the evidence on record and argued that the prosecution evidence regarding the oral dying declaration is not trustworthy and reliable. There is evidence of defence witness that deceased committed suicide by pouring kerosene on his own person and setting himself on fire. There are contradictions in two dying declarations Exh. 34 recorded by PW8 ASI Jankar and Exh. 23 recorded by PW4 Khaja Hussain, Judicial Magistrate (F.C.). He argued that, nobody would set anybody on fire only for non-payment of Rs. 10/- for consumption of liquor. There is no proper explanation from where the accused brought kerosene. There was quarrel between the deceased and his brother and therefore the evidence of brother and mother is not reliable. The main witness Suresh Nikalje (PW7) has turned hostile. Hence, the appeal be allowed and accused be acquitted.

5. Per contra, Mr S. J. Salgare, learned APP for the State strongly supported the judgment of the trial Court. He argued that the ld. Judicial Magistrate (F.C.) has followed due procedure. He has obtained opinion of the Medical Officer PW12 Dr. Malge about consciousness and mental condition of deceased Ganesh and

thereafter recorded the dying declaration. He has deposed the substance of the dying declaration. It was read over to the deceased and thereafter his signature was obtained. There is nothing suspicious to raise doubt about the dying declaration Exh. 23 recorded by Judicial Magistrate. Similarly, the earlier dying declaration recorded by PW8 ASI Jankar Exh. 34 is also consistent. The minor variations will not make the same suspicious and unreliable. It is supported by three oral dying declarations before Ankush PW1 and PW5 Haribai. The hostile witness PW7 has admitted that the deceased gave oral dying declaration to his brother PW1-Ankush. The deceased had sustained only 65% burns and died after four days and therefore no doubt can be raised about his physical and mental capacity to give declaration.

6. On careful consideration of the arguments, the points for our consideration with findings thereon are as follows ;

Sr.No.	Point	Finding
1	Whether the accused poured kerosene on the person of the deceased Ganesh and set him on fire and thereby committed offence of murder?	Not proved.
2	Whether any interference is warranted in the conviction and sentence?	Yes.

3	What order?	Appeal is allowed. Accused is acquitted of the charge.
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REASONS

7. **As to point No. 1 :** In this case as per oral evidence of the witnesses PW1 Ankush (brother), PW5 Haribai (mother), PW4 Khaja Hussain, JMFC, PW8 Jankar (ASI), deceased Ganesh had sustained burns on his face, chest, back, both arms and waist. He was brought in the Civil Hospital, Nanded. PW12 Dr. Malge had examined and treated him. He had also supported the evidence about burn injuries sustained by Ganesh. On 26.01.2001, the deceased succumbed to the burn injuries. Thereafter, inquest panchanama Exh. 17 was drawn in presence of PW2 Narsingrao and post-mortem was conducted by PW10 Sudhir Kulkarni, Medical Officer. The PM report shows that, deceased Ganesh died due to shock due to burns superficial deep to deep to extent of 65%. His entire head, neck, face, right and upper limbs, anterior and posterior parts were totally burnt. There was only 2% burn on left lower limb. In the light of the above unchallenged evidence, it is certain that, deceased Ganesh Suryawanshi, aged 20 years, sustained burns on 22.01.2001 at about 05:30 p.m. and he was taken to the Civil Hospital, Nanded but succumbed to the burn injuries on 26.01.2001. The moot question is who has caused the burn injuries to deceased Ganesh. According to

the prosecution, the accused poured kerosene on his person and set him on fire whereas according to the accused deceased Ganesh himself poured kerosene and set himself on fire. The defence has examined DW1 Uttam, who has posed himself as eye-witness. Thus, the defence story runs parallel to the story of the prosecution.

8. Since the case is based on dying declaration, the ld. Addl. Sessions Judge has quoted the principles regarding appreciation of evidence based on dying declaration. It is necessary to quote some important decisions on this point. In **Khushal Rao v. State of Bombay AIR 1958 SC 22**, the principles on appreciation of evidence of dying declaration were crystallized as follows.

- (1) *that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;*
- (2) *that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;*
- (3) *that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;*
- (4) *that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;*
- (5) *that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions -and answers, and, as far as*

practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and

- (6) *that in order to test the reliability of a dying declaration, the Court has to keep in view the. circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it-; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.*

9. **In Tarachand Sutar v State of Maharashtra AIR 1962 SC**

130. The wife of the accused had died as a result of burns caused by fire set to her clothes by the accused who had sprinkled kerosene before setting her on fire. It is recorded that, when there is dying declaration of such burn patient, cogent reasons are necessary to be given to raise doubts about the correctness about such dying declaration.

21. *It is always a difficult question to speculate why the deceased accused a certain person of committing the crime, or why a witness deposes against a person with whom he has no ostensible cause of its enmity or why the police, in the discharge of its public duty should influence persons to make inaccurate statements, when Courts come to the conclusion that the accusation or the evidence does not appear to be true and that there are reasons to suppose that the. police had influenced the testimony of witnesses. Anyway, the same difficulty occurs in the present case. But it is clear that the*

relations between the wife and the husband were strained to such an extent that, according to the prosecution, the accused not only starved her, but also set fire to her clothes with the intention to cause her death. Such a conduct of the husband cannot be on account of ordinary domestic unpleasantness, but must be the result of a very acute feeling of desperation and a desire not to live any more with his wife. If such were the relations which one is inclined to infer from what the prosecution wants the Court to believe, it should not be difficult to imagine that the wife's motives in charging the husband falsely may be equally strong. She too must have been fed up with the misery of her life and might have committed suicide and put an end to her life, but when, as often happens, she was questioned, she accused her husband of setting fire to her clothes, not with a view to save herself from a conviction for attempting to commit suicide, but either on account of her feeling that her husband was responsible for all her troubles and that her disparate action was also due to the same cause or out of malice. Any way, a dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It, can only be believed if there are no grounds for doubting it at all.

10. We agree with the submissions of ld. APP Shri. Salgare that the dying declaration recorded by Judicial Officer after following the due procedure stands on a very high pedestal and it should not be normally disbelieved and it can be the sole basis for conviction. In this regard, we quote observations in **Chirra Shivraj v. State of A.P.** 2011 Cr.L.J. 971 SC.

12. *If dying declaration is trustworthy and if it can be shown that the person making the statement was not influenced by any exterior factor and made the statement which was duly recorded, it can be made basis for conviction. In the instant case, immediately after the incident, the deceased was taken to the Government Hospital, Nizamabad and upon getting information*

*with regard to the offence, the ASI had rushed to the Government Hospital, Nizamabad and the deceased had made her statement before him and thereafter she had made her dying declaration before a judicial officer around 8 p.m. The said statement was scrupulously recorded by the Judicial Officer who had found the deceased to be conscious and fit to make statement. Very recently, this 9 Court had examined whether a dying declaration can be the sole basis for conviction. After examining several judgments on the subject, this Court had observed in *Puran Chand v. State of Haryana*, 2010 (6) SCC 566, as under:*

"15. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration....."

18. The law is now well settled that a dying declaration which has been found to be voluntary and truthful and which is free from any doubt can be the sole basis for convicting the accused."

11. In **Ghanshyam Das Versus State of Assam 2005(13) SCC 387**, the oral dying declaration made by deceased just before he became unconscious was believed as there was no reason for false implication. In **Sukanti Moharana V State of Orissa 2009(9) SCC 163**, it is laid down in a case of bride burning, when the deceased had given oral dying declaration to her parents and other relatives that her husband had poured kerosene on her and set her on fire and

he closed the door of the room leaving her to burn by the fire, the absence of doctor's certificate and endorsement as to mental fitness of the deceased or absence of thumb impression of the deceased cannot be fatal to the prosecution case. The endorsement of doctor regarding mental fitness of the deceased is a rule of prudence and not the ultimate test as to whether or not the same was truthful or voluntary, particularly when there was contemporaneous evidence that the doctor had recorded that the patient was oriented and mentally clear. When the deceased had sustained 90-95% burns and her thumb was bandaged it was not possible to take her signature or thumb impression, that cannot be the ground to reject the dying declaration recorded by the doctor and supported by oral dying declaration. The following guidelines from **Vikas Versus State of Maharashtra (2008) 2 SCC 516** were quoted with approval.

45. The Court, referring to earlier case law, summed up principles governing dying declaration as under:

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.*
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.*
- (iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.*

- (iv) *Where dying declaration is suspicious it should not be acted upon without corroborative evidence.*
- (v) *Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.*
- (vi) *A dying declaration which suffers from infirmity cannot form the basis of conviction.*
- (vii) *Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.*
- (viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.*
- (ix) *Normally the court in Order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.*
- (x) *Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.*

12. **Bhagwan Tukaram Dangev v. State of Maharashtra** 2014 Cri. L. J. 1875 SC was a case involving multiple dying declaration. One recorded by Head Constable and other by Judicial Magistrate (F.C.). The victim was suffering from more than 80% and both the times the doctor found her fit and mentally stable. The dying declarations were consistent. It was held that those cannot be discarded despite minor variations here and there. In **Rangaiah v. State of Karnataka AIR 2009 SC 1411**, the deceased had taken

names of two persons who had stabbed him. Only one of them was prosecuted. No explanation was offered that the dying declaration was not recorded through the Judicial Officer. The doctor who had certified the fitness of the patient was not examined. The apex Court set aside the order of the High Court to restore the order of acquittal. Following observations from **Mohan Lal v State of Haryana 2007(9) SCC 151** were quoted with approval.

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munnu Raja & Anr. v. The State of Madhya Pradesh (1976) 2 SCR 764)]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See State of Uttar Pradesh v. Ram Sagar Yadav & Ors. (AIR 1985 SC 416) and Ramavati Devi v. State of Bihar (AIR 1983 SC 164)]

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy and Anr. v. The Public Prosecutor (AIR 1976 SC 1994)]

(iv) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg v. State of Madhya Pradesh (1974 (4) SCC 264)]

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. [See Kaka Singh v State of M.P. (AIR 1982 SC 1021)]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath and Ors. v.

State of U.P. (1981 (2) SCC 654)

(vii) *Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v. Krishnamurthi Laxmiati Naidu (AIR 1981 SC 617)]*

(viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See Surajdeo Oza and Ors. v. State of Bihar (AIR 1979 SC 1505).]*

(ix) *Normally the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See Nanhau Ram v. State of M.P. (AIR 1988 SC 912)].*

(x) *Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)].*

(xi) *Where there is more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declarations could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v. State of Maharashtra (AIR 1982 SC 839)]*

13. In **Chinnamma v State of Kerala AIR 2004 SC 2816**, there were two dying declaration one recorded by Head Constable and other by Judicial magistrate. The contents in the dying declarations were highly contradictory as to infliction of injury by the appellant. The motives given in the dying declarations were entirely different. There was possibility of the deceased being influenced by

her parents. It was held that the conviction on such dying declarations was unsustainable.

14. In **Sudhakar v State of M.P. AIR 2012 SC 3265**. There were multiple contradictory dying declarations. The deceased-wife had sustained 95% burns. The first dying declaration was recorded without the doctor's certificate about fitness and in presence of the accused husband and relations. The second and third dying declarations were recorded after obtaining certificate of the doctor about fitness. The same were supported by witnesses and medical evidence. It was held that the deceased had reasons to give a false declaration at the beginning. The second and third dying declarations were held voluntary and were believed to convict the accused.

15. In **State of Rajasthan v. Sheo Singh AIR 2003 SC 1783**, it was alleged that the accused had assaulted the deceased. There were eye-witnesses to the incident. There was a strong enmity between the parties. The first version of occurrence as disclosed by the eye witnesses to the police was not brought on record. It was held that there was a possibility that FIR was lodged after due deliberation with the police as there was delay in lodging the FIR, and as eye-witness did not state that the deceased's father had given dying declaration, the order of acquittal was held proper.

16. In **Laxmi (Smt) Versus Om Prakash AIR (2001) 6 SCC 118**, it is observed “*Nemo moriturus praesumitur mentire* – no one at the point of death is presumed to lie. A man will not meet his Maker with a lie in his mouth” — is the philosophy in law underlying admittance in evidence of dying declaration. It was observed that, the dying declaration made to Police Office though to be generally discouraged is very much admissible in evidence. As far as possible, the Magistrate should be called for recording the dying declaration unless the condition of the patient so precarious that the police officer has no alternative but to himself record the dying declaration. In that case, there were five dying declarations but the physical and mental fitness to make a dying declaration was doubtful and there were other infirmities. It is held that, when there are more than 1 dying declarations inconsistent with each other, that will not cure the infirmity arising out of the doubts about mental and physical fitness of the maker.

17. In **Raju Devadev v. State of Maharashtra AIR 2016 SC 3209**, it is held that, it is the duty of the court in a cases of multiple dying declarations to consider each dying declaration independently on its own merits and one cannot be rejected because of the contents

of the other.

18. Though the dying declaration can be the sole basis for conviction, it is well settled that such dying declaration should be given by person having physical and mental fitness and it should be voluntary, truthful and should inspire the confidence. Otherwise if there are some infirmities or inconsistencies, the court should look for corroboration.

19. In the present case, the prosecution solely relies on the dying declaration of the deceased. Rest of the evidence is mostly consistent with the defence story that the accused himself poured kerosene on his person and set himself on fire. The evidence will have to be carefully scrutinized with care and caution to find out whether the dying declarations are fully truthful and reliable and whether there is any reasonable doubt about the probability of the defence story being true or not.

20. When a case is not based on eye-witness evidence, the motive plays important role. It is a common knowledge that, no person pours kerosene on somebody else and sets him on fire without any reason or for some flimsy reason. Most of the above referred cases are of dying declarations of brides Harassment, ill-treatment

and setting a bride on fire are unfortunately historical and in existence at large scale in India. The same is not the case with regard to the setting on fire a stranger or a person little known to the accused. As per presumption u/s 114, having regard to the human conduct, it cannot be easily accepted that the accused would kill the deceased by pouring kerosene on his person and setting him on fire without any reason or for flimsy reason.

21. Nobody has seen the accused pouring kerosene on the person of the deceased Ganesh and setting him on fire but it must be stated that there is some consistency in the evidence of dying declarations that the accused poured kerosene on the person of the deceased Ganesh and set him on fire.

22. PW4 Khaja Farooq Hussain is a Judicial Magistrate. He deposed that, the CJM had authorized him to record dying declaration and he had earlier recorded 100 dying declarations. On 22.01.2001 he received message letter from Head Constable of Bhagya Nagar Police Station (Exh.22) for recording dying declaration of the deceased Ganesh Suryawanshi, who was admitted in Civil Hospital, Nanded, with 65% injuries. He received the letter at 08:00 p.m. and he immediately went to the Hospital by 08:10 p.m. He got

personally satisfied about the conscious state and mental fitness of the patient. He isolated the patient and obtained opinion of Medical Officer that the patient was fit. Thereafter he isolated the patient and disclosed his identity, created confidence and made some formal questions for verification. Then he recorded the dying declaration. He deposed the substance of the dying declaration. As per his evidence, the deceased told him that, on 22.01.2001 at 05:30 p.m. he had gone to the shop of Shetty for consuming liquor. When he came out, the accused Mariba met him and without any reason poured kerosene on his person. Mariba had brought kerosene in a glass. Then the accused set him on fire by lighting a match stick and he sustained 65% burns. He read over the statement to the patient and he certified that it was true and correct and thereafter he obtained the signature of the patient. He had obtained the endorsement of Medical Officer on the dying declaration both before and after the statement. The dying declaration is at Exh. 23. He forwarded the said dying declaration along with covering letter Exh. 24 on the next date to the CJM, Nanded and produced his authority letter given by CJM Exh. 25. In his cross-examination, following facts are brought on record.

1. He had not seen the bed head ticket.
2. Before dying declaration, Ganesh was surrounded by his relatives.

3. The dying declaration does not disclose his evidence that he had told the patient that he was a Magistrate and was recording dying declaration.
4. He has also not recorded that he personally verified the fitness of the patient.
5. He admitted that MO did not examine the patient Ganesh in his presence but stated that the doctor was attending to him.
6. He could not tell whether upper lip and front nose of the patient were burnt. He admitted that fingers of the hands of Ganesh were burnt but could not tell whether the skin was peeled of. He did not record in the dying declaration that it was read over to the patient.

23. Dying declaration Exh. 24 was recorded by PW8 ASI Jankar. He has deposed that on receipt of information about admission of burn patient as a Medico Legal Case, as per directions of superiors he visited the hospital. He obtained the certificate of the doctor about consciousness and capacity of the patient to make a statement and obtained endorsement to that effect. He deposed that, deceased Ganesh told him that on 22.01.2001 at 5:30 p.m. Mariba demanded money from him for consumption of liquor. He was told that Ganesh was not having money and he informed the accused accordingly. Then the accused poured kerosene from a glass on his person and set him on fire. He sustained burns to chest, stomach,

chest and waist. The said statement was in the handwriting of PW8 Jankar and it was as per say of deceased Ganesh. It was not read over to him and not asked whether it was correctly recorded or not but it bears the signature of Ganesh.

24. In cross-examination PW8 Jankar could not tell the name of doctor who was treating the patient. Doctor had not examined Ganesh in his presence. He did not record the timing of recording the dying declaration. He himself had not made endorsement that Ganesh was conscious and fit to make statement.

25. PW12 Dr. Malge has supported PW4 and PW8. He has stated that, on 22.01.2001, he was on duty in Ward No. 10 in Civil Hospital at Nanded. He stated that, the patient Ganesh was brought with 65% burns. On the same day, at about 08:00 p.m. Magistrate called him for inquiry about the condition of the patient. The Magistrate himself also made inquiry about the condition of the patient. He examined the patient and found him to be conscious and fit. Accordingly, he made endorsement. He identified his endorsement on dying declaration Exh. 23 recorded by the Judicial Magistrate both, at the top and below. He stated that, he was present near the patient throughout the time of recording the statement. The

endorsements on both the dying declarations Exh. 23 and Exh.34 purportedly bear the signatures of PW12 Malge but PW12 has not deposed about giving endorsement to the Head Constable for recording the statement. In fact, he has not deposed anything about recording of dying declaration by Head Constable. He stated that, Ganesh was admitted in the hospital at 06:30 p.m. He stated that, at that tie, there was no Head Constable in the Police Chowki in the hospital nor was he present with the patient. He admitted that the patient was critical on that night and his hands (upper extremities) were fully burnt.

26. Evidence of PW12 Dr Malge throws doubt about the recording of declaration by PW8, as Malge was on duty and he has not deposed that the Head Constable had recorded the dying declaration. Pertinently, Mr Jankar met the Judge at 08:00 p.m. and gave requisition Exh. 22. Then at the same time he could not have been in the burn ward. His dying declaration does not disclose the time when its recording was begun and when it was closed but the endorsement on the same shows that it was recorded at 08:00 p.m. The FIR came to be registered with the Police Station at 09:35 p.m.

27. Both the dying declarations suffer from infirmity that there

is no explanation how the deceased could sign the dying declaration when his both upper extremities were fully burnt (9% each).

28. There is variance between the dying declaration Exh. 23 recorded by Judicial Magistrate and Exh. 34 recorded by Head Constable with regard to the motive. According to dying declaration Exh. 34, the deceased told ASI Jankar (PW8) that the accused met him in front of the Liquor Shop of Shetty and asked him whether he would provide him liquor or not. He told the accused that he had no money and then the accused **brought** kerosene in a glass and poured it on his person and set him on fire. The dying declaration recorded by Judicial Magistrate, however, shows that deceased Ganesh did not tell PW4 any previous talk between him and the accused. The deceased told him that he came out of the shop of Shetty and the accused suddenly poured kerosene from one glass on his person and set him on fire and he sustained 65% burns. The first question asked by Judicial Magistrate to him was when and where the incident took place. Normally the patient would have stated that the incident took place on that day at 5:30 p.m. but the answer recorded is that the incident took place on 22.01.2001 at 05:30 p.m. It is somewhat mechanical. The statement that, deceased Ganesh told Magistrate that he had sustained 65% burns, is also unnatural.

29. PW7 Suresh was the first person to know about the incident. He deposed that, at about 5:05 p.m. there was oral dispute between the deceased and the accused in his presence near the liquor shop of Shetty. then he went to the liquor shop. Thereafter, he heard the shouts from outside. he does not state after how much time he heard the shouts but the evidence shows that the incident had taken place at 05:30 p.m. PW7 Suresh stated that he came out and found that Ganesh was burning. He stated that, he went to the house of Ganesh and informed this incident to his brother. As he has not supported the prosecution, he was cross-examined by the Id. APP with the permission of the court. he stated that he went to liquor shop and immediately came out.

- (i) He heard shouts as save me when he was near betel shop.
- (ii) Thereafter he saw Ganesh burning.
- (iii) He denied that, he saw accused hurriedly going from the spot.
- (iv) He admitted that, brother of Ganesh PW1 Ankush came there and Ganesh told him that Mariba (accused) burnt him.

30. PW1 Ankush has stated that, at 05:30 p.m. PW7 Suresh came to him and informed him that Ganesh was set on fire near adda of Shetti (the words by the accused are absent here). then he came

to the spot and found his brother lying on the road. his brother Ganesh told him that Mariba had demanded from him Rs. 10/- for liquor and as he refused to make payment, Mariba threatened him then poured kerosene on his person and set him on fire.

31. PW5 Haribai is mother of the deceased. she has stated that, she met her son in the hospital and he told her that the accused Mariba asked Ganesh to provide liquor and as he had no money, there was verbal exchange (it is shown as oral dispute). Thereafter, accused Mariba brought kerosene in a glass and poured on the person of Ganesh and set him on fire by lighting a match stick.

32. The cross-examination of PW1 Ankush, brother of the deceased Ganesh shows that, there was no previous dispute between the the accused and deceased Ganesh and accused and himself. He denied even the suggested dispute regarding a plot. His evidence shows that deceased Ganesh was doing painting work whereas the accused used to take contracts of stone. PW5 Haribai has stated that her son was a labourer. These admissions indicate that, the deceased was quite poor whereas the accused was doing work of taking contracts of stones.

33. In the light of these facts, we find that the prosecution has failed to prove the motive for commission of murder. It is not acceptable that, the accused would pour kerosene and set deceased Ganesh on fire without any previous dispute and without any occasion at the time of incident as disclosed in the dying declaration Exh. 23 recorded by Judicial magistrate. It is equally improbable that the accused would have set Ganesh on fire only because Ganesh did not provide him liquor or Rs. 10/- for purchasing liquor. It is quite improbable that the accused who was financially better placed would have demanded Rs. 10/- from the deceased Ganesh who was a poor labourer. Even if it is assumed that the accused would have demanded liquor or Rs. 10/- for liquor, the non-payment thereof could not have incited the accused to pour kerosene on his person and set him on fire.

34. It is also not explained how the accused was having a glass of kerosene in his possession. It is nobody's case that it was premeditated act of the accused. Some statement disclose that the accused went and brought kerosene. There is evidence that the house of the accused is near the spot. Still it is highly improbable that the deceased would have been on the same spot till the accused would go to his house, collect some kerosene and come with a glass

and pour the same on the person of Ganesh. We find a serious infirmity in the dying declarations that there was no motive for the accused to commit the ghastly act and about availability of kerosene for setting Ganesh on fire. The absence of motive is serious lacunae raising grave doubt about the prosecution story.

35. In the light of these facts, it is necessary to refer to the evidence of defence witness no. 1 Uttam. He stated that he runs a betel shop in front of Hotel Maratha Darbar owned by Dinkar Shetty. Thus, his presence on the spot is natural as he has a betel shop in front of the spot. He stated that, at the relevant time, there was a quarrel between deceased Ganesh and his brother and then the brother took Ganesh to his house. Ganesh consumed liquor. Ganesh came back in front of the hotel. Then he himself poured kerosene on his person and set himself on fire. PW1 Uttam stated that, he and others extinguished the fire by pouring water from a bucket in betel shop then Ganesh became unconscious due to burns. He stated that accused Mariba was not on the spot. he was knowing both Mariba and Ganesh for three years before the incident. he stated that, both used to come to liquor shop of Shetty for consuming liquor. The spot is 25 ft away from his betel shop. He stated that, there is heavy traffic on the road in front of his shop and there were customers

present at the time of incident. Ganesh was taken to hospital by his brother within 10 minutes. DW1 admitted that he had not narrated the story earlier to anybody. He denied that, Ganesh was shouting that Mariba had set him on fire. There is evidence to show the statement of Uttam was recorded by police but the prosecution gave up him as he was not supporting the prosecution.

36. After carefully going through the evidence of DW1 Uttam, we do not find any strong reasons to discard his evidence when the defence story as put up by DW1 Uttam is placed side by side with the prosecution story. We find that, the prosecution story become doubtful.

37. Even if it is assumed that, evidence of Judicial Magistrate (F.C.) should be believed as it is, still we find that there is a possibility that the deceased might have been tutored so as to avoid prosecution of commission of suicide u/s 309 IPC. He was surrounded by his relatives before the recording of dying declaration. The accused had no motive to commit his murder. There was no previous enmity. Therefore, we have grave doubt about the truthfulness of the dying declaration as given by the deceased to the JMFC.

38. It is true that, there is no specific reason why the deceased would falsely implicate the accused without reason but in this regard we rely on the observations in para 21 in the judgment of **Tarachand Sutar** (cited supra). The dying declaration cannot be believed merely because no possible reason could be given for accusing the accused falsely. It can be believed if there are no grounds doubting at all. We find that, the absence of motive and the possession of kerosene in a glass in the hands of the accused at the time of the incident (when the attack was not premeditated are serious infirmities for which there is no answer in the evidence of the eye-witnesses. it was duty of the Judicial Magistrate if he felt that such assault was not probable without any cause, to ask further questions with regard to the cause of the incident or motive but the ld. JMFC has not made any questions as to why the accused would set on fire deceased Ganesh without any reason. The ld. Addl. Sessions Judge found the conduct of DW1 unnatural in not giving information to the police and relatives and that his presence was not suggested to the witnesses and therefore DW1 was disbelieved. But the Addl. Sessions Judge did not give reasons how the prosecution witnesses could be believed when the accused had absolutely no motive for commission of murder of deceased Ganesh. At least there was no motive for

commission of such a ghastly act and secondly, Suresh had also not taken the deceased Ganesh to the hospital immediately. He first went to the house of the Ganesh to give information. In the circumstances, if Suresh was present on the spot his priority should have been to reach the injured Ganesh to the hospital and then to give information to the police. In addition there is no material to discard evidence of defence witness Uttam.

39. We have often found in such cases, whenever a person is brought to the hospital and subsequently dies, the investigating officer only collects the documents regarding the inquest and post-mortem. The Investigating Officer does not collect the documents at the time of admission of such patient in the hospital like bed head ticket, case paper showing history of injuries and the intimation given by doctor to the police and who had brought the patient to the hospital. These are very material documents to find out the truth. The ld. APP in the trial court and the trial Judges also do not pay attention to these material documents. We therefore express that, henceforth the Investigating Officer should always collect such documents during the investigation and if such documents are not collected, the ld. APP in the trial court should secure and prove such documents by making application u/s 311 of IPC so that there will be

proper material before the ld. trial Judge for finding out the truth.

40. In the light of above observations, we find that, we do have reasonable doubt about the prosecution case and we find that there is a possibility that deceased Ganesh might have committed suicide. the benefit of such reasonable doubt should go to the accused. The ld. trial Judge has not considered these material aspects and therefore conviction recorded by her u/s 302 IPC is not tenable.

41. Since the State has not preferred any appeal, it is not necessary to consider the acquittal under the charge of SC & ST Act, but it is necessary here to mention that if such offence under SC & ST act are disclosed, it was duty of the prosecution to hand over the investigation to the competent police officers as contemplated under the relevant provisions of the law.

42. We appreciate the valuable assistance provided by learned Counsel Shri Satyajit Dixit on our request by representing the appellant.

43. In the result, we hold that the appeal deserves to be allowed. Hence, the order.

ORDER

- (I) Criminal Appeal No. 603 of 2002 is allowed.
- (II) The conviction of appellant/Mariba u/s 302 IPC recorded by Addl. Sessions Judge on 19.08.2002 in Sessions Case No. 84/2001 is hereby set aside and the appellant is acquitted of the charge u/s 302 IPC. If fine amount is deposited by him, it shall be refunded to him. The muddemal property shall be preserved till the appeal period is not over. the bail bonds of the appellant shall stand cancelled.
- (III) Advocate Mr Satyajit Dixit appointed for representing the appellant shall be paid fees quantified at Rs. 5,000/- (Rupees Five Thousand only).

[A. M. DHAVALE]
JUDGE

[T. V. NALAWADE]
JUDGE

sgp