

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

CRIMINAL APPEAL NO. 260 OF 2013

Sugriv S/o Ashruba @ Asaram Kale,
Age : 49 years, Occu. Agri.,
R/o. Manubai Jawala, Taluka Georai,
District Beed.

Appellant...
(Orig. accused No. 1)

Versus

The State of Maharashtra,
Through Police Station Officer,
Talwada Police Station, Talwada,
Taluka Georai, District Beed.

Respondent...

.....
Mr Joydeep Chatterji, Advocate i/b Mr S. G. Chapalgaonkar,
Advocate for the appellant
Mr S. R. Yadav, APP for respondent/State
.....

**CORAM : R. M. BORDE &
A. M. DHAVALA, JJ.**

DATE : 04.07.2017

ORAL JUDGMENT (Per A. M. Dhavale, J.) :-

1. In Sessions Case No. 142 of 2011 of District & Sessions Court, Beed, husband and mother-in-law of the deceased-bride were prosecuted for committing her murder by pouring kerosene on her person and setting her on fire. Mother-in-law was acquitted and the husband was convicted u/s 302 of the IPC and was sentenced to

suffer imprisonment for life and to pay fine of Rs. 5000/- in default to suffer further rigorous imprisonment for three months. He was acquitted u/s 498A of IPC. Aggrieved by the sentence and conviction, husband - Sugriv has preferred this appeal.

2. Facts relevant for deciding this appeal may be stated as follows:

On 20.04.2010, Lilawati Sugriv Kale, aged about 45 years, R/o. Manubai Jawala, Tq. Georai was admitted in Civil Hospital with burn injuries. The Executive Magistrate, Beed was called and her dying declaration was recorded, after taking certificate of Medical Officer that the patients was conscious and oriented. The patient disclosed that she had married to appellant -Sugriv about eight years back. It was her second marriage. He had deserted his first wife but had not divorced her. The said information was concealed by him from her at the time of marriage. She, her husband Sugriv, mother in law, brother in-law and brother-in-law's wife and their children were residing together. She was not treated with love and affection. There used to be regular quarrels and complaints and abusing. Her husband did not allow her to have a child and she was forced to undergo abortion twice about two-three years earlier. Once her family members had pushed her into a well and that time her nephew

had rescued her. On the earlier night, she was told by her husband that she should not stay there, was assaulted, kerosene was poured on her person and she was set on fire. That time, her mother in law had instigated her husband to pour kerosene and set her ablaze stating that nothing would happen. On sustaining burns, she raised shouts. The neighbours gathered there. She removed her saree, poured water on her person and extinguished the fire. Thereafter, she was taken first to Government Hospital, Georai and thereafter to Civil Hospital, Beed. She had 59% burns. Her husband and her mother in law were responsible for the incident. She was threatened that if she would disclose the said incident to anyone, she would be killed. Hence, she had not disclosed their names earlier. She had given such dying declaration without any pressure or influence. PW7 -Executive Magistrate read over the dying declaration and obtained thumb impression of the patient. On the basis of the information, C.R. No. 35/2010 was registered for offences u/s 498A, 307, 323, 504 r/w 34 of IPC at Talawada Police Station, Tq. Georai, Dist. Beed and the crime was investigated into by PW9-PSI Pawar. He visited the spot which is in house of the accused no. 1 having single room of 15x15 with verandah. Investigating Officer seized burnt pieces of saree and a can of 5 ltrs smelling of kerosene and one match stick. He recorded statements of material witnesses and arrested accused no. 1.

The investigation revealed that, before recording of dying declaration by the Executive Magistrate, another dying declaration (marked Exh.70) was recorded on the same day at 11:30 am by Police Officer attending Police Chowki in the Civil Hospital, Beed. The patient was admitted at 9:10 am with history of accidental burns. Her dying declaration before police officer revealed that, in the night the deceased was sleeping in the house with a kerosene lamp on. Due to dash by a cat, the kerosene lamp fell on her back and she sustained burns. She raised shouts. Her husband woke up and extinguished the fire and her husband, niece Savita and nephew Dada brought her to Government Hospital at Talwada. She had sustained injuries to her back and legs. She had received no ill-treatment of any sort from her in-laws. On 16.05.2010, the injured Lilawati died in the hospital. Thereafter, inquest panchanama and post-mortem were conducted. Post-mortem notes revealed that, she had sustained 48% burns on her back and legs. Her mother-in-law was aged 114 years at the time of incident. After completion of investigation, charge-sheet was submitted in the court. In due course, the case was committed to the court of Sessions.

3. The learned Addl. Sessions Judge, Beed framed charge at Exh. 22 u/s 498A, 302 r/w 34 of the IPC. The Judgment shows that,

accused No. 2 due to extreme old age was unable to attend the court and the learned Sessions Judge could not even record her statement u/s 313 of Cr.P.C. The prosecution examined nine witnesses. Defence of the accused is 'death by accident' as disclosed in her dying declaration before the police. On the basis of evidence on record, the Sessions Judge discarded the defence mainly on the ground that no kerosene lamp was found in the house at the time of spot panchanama which was admitted by the defence and the dying declaration implicating the accused was recorded by Executive Magistrate after following the due procedure. He found that accused No. 2 Narmadabi was too old aged 110 years, and was unable to move. He found the evidence of abetment by accused No. 2 doubtful and acquitted accused No. 2. He also discarded evidence of previous ill-treatment led by brothers of deceased PW4 Ashok @ Asaram and PW6 Limbaji. Relying on the evidence, he convicted the appellant u/s 302 of IPC and sentenced him as referred above. Hence this appeal.

4. Mr Joydeep Chatterji, learned counsel for the accused has taken us through the evidence on record. He relied on the earlier dying declaration recorded by police officer which is admitted and marked as Exh. 71. It is totally consistent with the defence raised by

the appellant. He argued that, the dying declaration at Exh. 62 recorded by the Executive Magistrate cannot be relied upon as there is clear attempt to falsely implicate accused No. 2. PW1 has admitted that accused No. 2 was sick, bed ridden and was even unable to talk. He relied on Thurukanni Pompiah Vs. State of Mysore AIR 1965 SC 939. Gaffar Badshaha Pathan Vs. State of Maharashtra (2004) 10 SCC 589. Mohamed Hanif Ansari Vs. State of Maharashtra 2008 ALL MR (Cri) 2083 & Tukaram Dashrath Padhen Vs. State of Maharashtra 2012 All MR (Cri) 2754. Relying on these rulings, he submitted that, when a conviction is to be based solely on dying declaration, it should be wholly reliable and if any integral portion of the deceased's version of the occurrence is found to be untrue, it is unsafe to rely upon the dying declaration. The evidence with regard to dying declaration should be of sterling quality and should inspire the confidence before it can be acted upon. In the present case, it is not so.

5. Learned Addl. Public Prosecutor – Mr. S. R. Yadav relied on dying declaration (Exh. 73) recorded by Special Executive Magistrate (PW7). He argued that, all the safeguards are followed before recording dying declaration. Certificate of Medical Officer was obtained. PW7-Mhaske has himself verified that the patient was

conscious and oriented to give statement. The dying declaration was recorded on 20.04.2010 and Lilawati has died on 16.05.2010. She had only 48% burns. Hence, the dying declaration is reliable. Earlier dying declaration before police officer was given under fear. Hence, there is no reason to interfere with the conviction and sentence passed against the appellant.

The points for our determination & finding thereon are as follows :-

Points	Findings
1. Whether deceased-Lilawati met with Homicidal death?	Not proved.
2. Whether accused No.1-the appellant committed murder of Lilawati?	Not proved.
3. What order?	The sentence & conviction of the appellant are set aside. The appellant is acquitted. He be set at liberty.

6. The prosecution has examined 9 witnesses and relied upon documents which can be conveniently grouped as follows:

Previous ill-treatment & Oral Dying Declaration	: PW4/Ashok Jadhav & PW6 Limbaji, brothers of the deceased.
Spot Panchanama	: Panchas 1 & 2 and sketch map drawn by PW3.
Medical Evidence	: Dr. C. S. Wagh (PW5) who conducted post-mortem.
Dying-Declaration	: PW7-Tahsildar Mhaske & PW8-Dr. Prakash Rasal. Dying Declaration (Exh. 73).
Investigating Officer	: PW9 – PSI Pawar.

As to Points No. 1 & 2 :

7. The evidence of PW5-Dr. Wagh shows that, on 16.05.2010, he conducted post-mortem on the dead body of deceased-Lilawati. She had 48% burns and she died due to septicemic shock due to 48% deep burns. His post-mortem notes are at Exh. 53. He had issued provisional death Certificate at Exh. 54. He opined that burn injuries were possible if somebody is set on fire after sprinkling kerosene. The post-mortem notes show that there were 16% burns on the back and 16% on right lower extremity & 16% on left lower extremity. Dr. Wagh admitted that there were no injuries on face, hair & chest etc and kerosene if poured and a person is set on fire, the fire will spread over the entire body.

8. PW1 Ganpat is neighbour of the accused. He stated that the incident took place inside the house of the accused. Accordingly spot panchanama Exh. 41 was drawn. Burn pieces of saree were found inside the house. One can smelling of kerosene was also found in the house. One match-stick was also seized. PW4 has admitted that, Lilawati in burnt condition was brought by the accused first to Georai and then to Civil Hospital at Beed. The evidence on record shows that Lilawati died due to severe burn injuries. These burns can be possible accidentally or by suicide or by homicide. Therefore, the

evidence on point Nos. 1 & 2 is common and the finding on point No. 1 is dependent on finding on point no. 2.

9. The prosecution mainly relied on dying declaration recorded by PW7-Mhaske/Executive Magistrate on 20.04.2010 (Exh. 73).

10. It is necessary to record the previous background of the deceased and the accused. PW2 Asaram @ Ashok and PW4 Limbaji are brothers of deceased - Lilawati. They were residing at Pusali, Tq. Badnapur. PW6 stated that she married to the appellant in 1997. It was second marriage of both Sugriv & deceased-Lilawati. Accused No. 1 Sugriv was previously married and has either divorced or deserted his first wife. While Lilawati was married to one Madan Bhojane and thereafter they had separated. PW6 admitted that Lilabai was having one daughter from Bhojane who was residing with her father but PW4 denied this fact. Lilawati had no issue from the accused. Both PW4 & PW6 have made vague allegations about the ill-treatment. PW4 stated that Lilawati was ill-treated as she could not conceive a child and there is also evidence that there was demand of money by the appellant for installation of pipeline. The date, time and amount of demand of dowry claimed is not disclosed.

PW6 has also deposed about ill-treatment to Lilawati by the accused. The allegations regarding the ill-treatment are as vague as those could be. Such vague evidence is of no help. Both of them deposed that, once the accused had pushed Lilawati into well in the year 2009 or thereabout but there is no complaint lodged about the said incident. There is even no evidence that Lilawati thereafter started residing at her maternal house and was persuaded to resume cohabitation. There is no evidence that PW4 & PW6 were worried about the life of Lilawati and made efforts to save her from ill-treatment at the hands of the accused. PW4 had stated that, Lilawati was residing along with her husband Sugriv and mother-in-law Narmada, while her brother Babarao and his wife were residing separately. There is similar evidence of PW6 Limbaji. PW1 Ganpat has stated that Narmadabai (accused No. 2) was residing with Babarao. This is material to consider the truthfulness of the statements given by Lilawati in the dying declaration. There is also vague allegation that the appellant compelled Lilawati to undergo one or two abortions against her wish. There is no reliable evidence to accept their allegations. The subsequent conduct of PW4 & PW6 does not support these allegations. There are no details whatsoever about these incidents. Hence, the evidence of PW4 & PW6 with regard to ill-treatment, forced abortions and attempt by the accused

to kill Lilawati by pushing her into well cannot be believed.

11. PW4 Ashok had stated that he had visited Manubai Jawala and had persuaded accused to behave well with Lilawati and the accused No. 1 had agreed to do so. But, later on he had given admission that after Lilawati's marriage he never visited Manubai Jawala till death of Lilawati. PW1 Ganpat has stated that, Lilawati was residing with her husband and her mother-in-law was residing in the house of Babarao, brother of accused No. 1, which is abutting to the house of accused No. 1-Sugriv. Accused No. 1 Sugriv was having 4-5 acres of irrigated land. The evidence on record shows that, from the date of marriage till the date of incident no complaint of ill-treatment was reported to the police. There is no evidence that, Lilawati was constrained to leave her matrimonial house and reside at her maternal house at any point of time. There is no evidence that, her brothers were required to visit the house of accused No. 1 and to persuade the appellant to behave properly with Lilawati. The evidence on record shows that, in the night intervening 19.04.2010 & 20.04.2010 Lilawati sustained burn injuries inside her house when she and her husband were inside the house. It is not clear whether Narmada was also inside the house. PW4 has admitted that his sister told him that she was brought by her husband first to Hospital at

Georai and then to Civil Hospital at Beed. PW6 has admitted that Narmadabi was more than 100 years old. Her election card shows that she was aged 110 years in the year 2006. It is claimed that she was 114 years old at the time of the incident. Accused No. 1 was aged 47 years at the time of the incident. It is difficult to believe that she would have given birth to accused No. 1 at the age of 67 years. The evidence regarding age of accused No.2 - Narmadabai is exaggerated, still she must be pretty old. PW1 -Ganpat who is a panch has supported the defence story. He stated that accused No. 2 was residing in the house of brother of accused No. 1 -Sugriv by name Babarao. She was sick and bedridden and was unable to talk. She was unable to move without help.

12. The Sessions Judge had framed charge and that time plea of Narmadabai was recorded but her statement u/s 313 could not be recorded. He has recorded in para 8 of the impugned judgment that "accused no. 2 could not be produced and, therefore, her statement u/s 313 could not be recorded as she was bedridden".

13. The Medical certificate admitted by the defence at Exh. 81 shows that, the patient was admitted at 9:10 am in Sub-Divisional Hospital, Georai with history of accidental burns. When Lilawati was

admitted in Hospital, her dying declaration seems to be recorded by a police attending the Police Chowki at Civil Hospital, Beed after taking medical certificate that the patient was conscious and oriented to give statement. It was recorded at 11:30 am. It was filed by the prosecution and the defence has admitted it and same has been exhibited.

14. In our opinion, this dying declaration could not have been exhibited on admission. It was not produced with application under 294 of the Cr.P.C. in the prescribed format for admission of document. It means the prosecution was not relying upon it. Therefore, mere admission of such document cannot prove the contents of the document.

15. This dying-declaration discloses that, Lilawati sustained burns due to accident. She and her husband were sleeping in the house. One kerosene lamp was kept on a plank fitted on the wall. Due to dash of a cat, it fell on her back and her saree caught fire. When she raised shouts, her husband woke up. Her saree was removed and she was drenched in water and the fire was extinguished. Her husband and nephew took her in a rickshaw at hospital in Talwada and thereafter to Civil Hospital at Beed. Thus

this dying declaration totally supports the defence case. In **Nallam Veera Stayanandam & Ors vs The Public Prosecutor, High Court of Andhra Pradesh (AIR 2004 SC 1708)**, it is held “In the 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. In **Sanjay vs The State Of Maharashtra (AIR 2007 SC 1368)**, it is held that “in case of inconsistency, the accused would be entitled to benefit of doubt and acquitted”. In **Amol Singh vs State of M.P (2008 (5) SCC 468)**, it is held “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. 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. Where there were several discrepancies in two dying declarations, one recorded by

Executive Magistrate and another by A.S.I. and said dying declarations were discarded and the conviction under Section 302 of the Indian Penal Code was found not proper". Since there is no evidence of the person who recorded this dying declaration, mere marking it as exhibit on admission cannot prove the contents. But, PW4 & PW6 have stated that this dying declaration was given by Lilawati due to pressure and threats by accused No. 1. The prosecution did not examine any witness to bring on record the fact of recording first dying declaration and that it was given under fear or pressure.

16. At the relevant time, PW7-Mhaske was Naib Tahsildar at Beed. On 20.04.2010, he received request letter Exh. 61 from police to record dying declaration. He deposed that, he came to Civil Hospital, Beed and contacted Dr. Gavhane and requested him to examine Lilawati (name of the deceased is shown as Nilawati and at some places it is shown as Lilawati @ Nilawati). Lilawati was in a position to give statement. Then they came to burn ward. PW7 removed all the relatives outside the ward. Doctor PW8 examined the patient and gave certificate that she was conscious and oriented to give statement. He accordingly made written endorsement. He stated that, he himself put one or two questions to patient to confirm

her condition but the same was not recorded in writing. He thereafter recorded dying declaration. He deposed that, Lilawati told him that she was married with one Sugriv about 8 years back. Sugriv had suppressed the factum of his earlier marriage from her. She stated that, she, her mother-in-law, her husband, brother in-law, his wife and their children were residing together. (This statement is factually not correct). Deceased Lilawati further told him that there were constant disputes going on with husband and in-laws. She told him that, her husband and in-laws were not allowing her to deliver a child and she was subjected to undergo abortions 2-3 times. Besides, she was once pushed into a well by her husband and in-laws but her nephew rescued her. She stated that on the day of incident she had a quarrel with her husband. Her husband poured kerosene on her person and set her on fire. At that time, her mother-in-law had abetted the crime by telling accused No. 1 Sugriv, to set her on fire and nothing would happen. Lilawati raised shouts and the neighbours gathered there. Her saree was removed and fire was extinguished by pouring water on her person. Then she was brought to hospital at Georai. She had suffered 59% burns. She told him that she did not disclose the names of accused earlier as she was threatened by the accused. She stated that her husband and mother in law were responsible for the same. She had given statement

without any pressure. It was read over to her and she admitted it to be correct and thereafter her thumb impression was obtained.

17. Mr Joydeep Chatterji, has relied on Thurukanni Pompiah. Vs State of Mysore AIR 1965 SC 939 wherein it is held that, if the court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the court may, in the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration. In that case, the Hon'ble Apex Court found integral portion of the deceased's version of the entire occurrence as unreliable, hence it was held that truthfulness of the dying declaration as a whole was not free from doubt.

18. Mr Joydeep Chatterji relied on Gaffar Badshaha Pathan. Versus State of Maharashtra (2004) 10 SCC 589 (on the point of burden on the accused) it is held that, it is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability.

The High Court erred in holding that the recording of the dying declaration and story stated therein apparently appears to be false and concocted. In the instant case, the fact as to whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted. Further, mere presence of the matchbox and the kerosene tin in the kitchen is not a circumstance which by itself will connect the accused with the commission of crime. It is but natural that a kerosene tin with kerosene and matchbox would find place in the kitchen.

. In **Mohd. Hanif Ansari vs. State of Maharashtra** reported in **2008 ALLMR (Cri) 2083**, the Division Bench of this Court held that, the Courts are therefore required to caution themselves that 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 certainly believed if there are no grounds for doubting it at all.

. In **Tukaram Dashrath Padhen Vs. State of Maharashtra** reported in **2012 ALL MR (Cri) 2754**, it is held that, when the court is called upon to appreciate the evidence of written dying declaration, the court has to be extremely cautious and examine with meticulous care the evidence regarding recording of the dying declaration.

Merely because witnesses came forward and depose about the recording of the dying declaration, it should not impel the Court to immediately accept the dying declaration. It has to be remembered that the declarant is not available for cross examination and, therefore, the prosecution must prove apart from the truthfulness of the contents, the factum of the recording of the dying declaration as well as the fact that the declarant was in a fit mental condition to give the statement. Once suspicious circumstances are found in the evidence, the Court should be extremely slow in placing implicit reliance on the dying declaration. It is to be remembered that the conviction can be recorded on the dying declaration alone if the court finds the dying declaration to be wholly reliable.

19. After carefully considering the evidence on record, we find that the dying declaration (Exh 73) recorded by PW7 is not free from doubt for following reasons.

- (i) Deceased-Lilawati had given a dying declaration of accidental burns to a police officer on the same day about two hours earlier. (Exh. 70). The prosecution did not lead evidence to show that it was false.
- (ii) The most material part is that accused No. 2 aged about 100 years has been implicated for abetment of the crime. Evidence of PW1 shows that, she was totally bed ridden, unable to walk and to talk. This evidence of PW1 is not

challenged by Id. Additional Public Prosecutor by cross-examining her. This fact raises a grave doubt about the truthfulness of this dying-declaration.

- (iii) Dying declaration shows that her mother in law, brother-in-law Babarao, brother-in-law's wife Raibai and their children were residing together but admitted evidence on record shows that she was residing with her husband only. At the most husband's mother might be residing with them. PW1 stated that accused No. 2 was not residing in said house.
- (iv) Dying declaration shows that, she was subjected to forced abortion twice and once she was tried to be killed by pushing into the well but as earlier stated, these allegations are not substantiated by any evidence or past conduct of PW4 & PW6 or of the deceased.
- (v) Surprisingly, it was put in the mouth of burn patient Lilawati that she had sustained 59% burns. This is not a language of a burnt patient.
- (vi) Dying declaration shows that her neighbours had gathered there and had rescued her but not a single neighbour has been examined. On the contrary the evidence shows that her husband brought her to the hospital at Georai and then at Beed. The dying declaration is silent in this regard.
- (vii) Below the thumb impression, the name Nirmalabai is recorded. It is name of accused No. 2. Deceased Lilawati would not have disclosed her name as Nirmalabai.

(viii) We find that many integral parts of the dying declaration are found to be not trustworthy and therefore the dying declaration as a whole is not trustworthy and reliable.

20. The Ld. Sessions Judge was impressed with the fact that no Chimney (Kerosene Lamp) was found at the time of spot panchanama which was admitted by the defence but, panch witness PW1 has admitted that there was one chimney. Besides this, panchanama was drawn four days after the incident. If PW4 & PW6 could give false evidence against the accused, they could have removed chimney (kerosene lamp) from the spot as well. There is no evidence to show that the spot was well protected from 19.04.2010 to 24.04.2010.

21. PW4 Ashok has stated that he came at 12:00 noon along with PW6. PW6 stated that they came at 3:00 PM. PW4 stated that Lilawati was unconscious when they came and she regained unconsciousness after 4-5 hours. PW6 did not state anything about consciousness. Dying declaration Exh. 73 is recorded by PW7 at about 2:00 pm when according to PW4-Ashok, Lilawati was unconscious.

22. PW6 stated that, his statement was not recorded whereas; PW4 has given admissions that major part of his material evidence is by way of contradictions. He admitted as follows:

“I did not state to police that accused had caused abortion of Lilawati for 2-3 times. I did not state before police that, at the time of incident, Babarao was standing on the spot but he did not try to extinguish the fire. I did not tell the police at the time of statement Lilawati told me that earlier dying declaration was falsely given by her under the pressure of the accused”.

23. Statement of PW4 Asaram was recorded on 29.04.2010 i.e. after 9 days from the incident. PW6 stated that police did not make inquiry with him. PW4 & 6 had stated that, PW4 had lodged complaint before the police on the same day but the said complaint is not produced and proved. The evidence of PW4 & PW6 as well as dying declaration does not disclose the nature of dispute between Lilawati & her husband. When husband and wife are quarreling they are always face to face. If the accused would have poured kerosene on his wife, she would be drenched from front side from top to bottom. But Lilawati has not sustained any burns on the front side and on the upper part on the back side. She had sustained burns only on back and legs. The accused himself had taken his wife

Lilawati to Hospital first at Georai and then at Beed. He attempted to save her life. He immediately reported the incident to the maternal relations of Lilawati. His conduct is consistent with his innocence. As per spot panchanama, Rahibai had first heard the quarrel which led to the incident. She was not examined. Lilawati stated that she was saved by neighbours. Evidence of PW3 shows that, the house of the appellant is surrounded by several houses but no independent neighbour has been examined as witness. Considering this evidence, we find that the dying declaration recorded by PW7 - Naib Tahsildar cannot be relied upon. We find that the oral dying declarations allegedly made by deceased Lilawati before her two brothers PW4 & 6 are also not reliable. Either Lilawati might not have given dying declaration before Executive Magistrate or she might have been tutored.

24. It is a case of custodial death. The accused has given proper explanation which is supported by dying declaration (Exh. 70) recorded by police officer immediately after admission. The prosecution has not shown that it was false. PW1 Ashok has given material admission supporting the defence story. The appellant has made his defence probable. Merely because the spot panchanama does not disclose the presence of kerosene lamp, the defence story

cannot be discarded as totally improbable. PW1 Ashok has orally stated about the presence of kerosene lamp on the spot. We therefore do not agree with the findings recorded by learned trial Judge and hold that the accused has given proper explanation and has probabalized it from the prosecution evidence itself.

25. As the dying declaration is found not reliable and as there is no other evidence, the appellant deserves to be acquitted. We record findings to that effect on points no. 1 & 2 and pass the following order.

ORDER

1. The appeal presented by appellant Sugriv Ashruba @ Asaram Kale is allowed.

2. The order of conviction and sentence recorded in Sessions Case No. 142/2011 on 24th May, 2013, convicting the accused/appellant for offence punishable under section 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs. 5,000/ in default, to suffer rigorous imprisonment for three months stands quashed and set aside. Accused shall be set at liberty forthwith.

[A. M. DHAVALE]
JUDGE

[R. M. BORDE]
JUDGE