

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.444 OF 2013

Shaikh Babar Shaikh Noor,
Age-23 years, Occu:Private Service,
R/o-Garkheda, Aurangabad,
At Present R/o-Sajapur,
Tq. & Dist-Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra,
Through Police Station,
M.I.D.C. Waluj Police Station,
Aurangabad.

...RESPONDENT

...

Mr.S.S. Ladda Advocate h/f. Mr. S.G. Ladda
Advocate for Appellant.
Mrs.V.N. Patil-Jadhav, A.P.P. for Respondent-
State.

...

**CORAM: S.S. SHINDE AND
V.K. JADHAV, JJ.**

DATE OF RESERVING JUDGMENT : 1ST AUGUST, 2018

DATE OF PRONOUNCING JUDGMENT: 6TH AUGUST, 2018

JUDGMENT [PER S.S. SHINDE, J.] :

1. This Appeal is directed against the
Judgment and order dated 30th September, 2013,

passed by the Sessions Judge, Aurangabad in Sessions Case No.2 of 2013, thereby convicting accused/Appellant - Shaikh Babar Shaikh Noor for the offence punishable under Section 498-A of the Indian Penal Code (for short "I.P. Code") and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/-, and in default of payment of fine, to suffer rigorous imprisonment for Fifteen days. The trial Court also convicted the accused for the offence punishable under Section 302 of the I.P. Code and sentenced him to suffer imprisonment for life and to pay a fine of Rs.500/-, and in default of payment of fine, to suffer simple imprisonment for one month. The trial Court directed that both the sentences shall run concurrently.

2. The prosecution case, in nut-shell, is as under:-

A) Accused Shaikh Babar was residing with his wife Asma in a rented room of PW-4 Shaikh Yunus at

Sajapur. Accused married with Asma about two years prior to the incident. A female baby aged about eight months was born out of the said wed-lock. Accused subjected his wife to cruelty after the birth of female baby by raising doubt about her chastity. Accused used to harass his wife Asma for the demand of motorcycle or an amount of Rs.50,000/- from her parents and she informed the said demand of the accused to her parents.

B) Incident took place on 21st September, 2012, at about 12.00 noon in the rented room of the accused at Sajapur. Accused quarreled with his wife Asma as he had doubt about her character and also his demand of motorcycle or money was not fulfilled. The accused poured kerosene on the person of Asma and set her on fire. Asma sustained burn injuries. She came out of her room crying for help. PW-11 Asefa Yunus is the wife of PW-4 Shaikh Yusuf, who is the owner of the rented room of the accused. PW-11 Asefa came out of her house after hearing the shouts of Asma and she saw that Asma

had caught fire and she extinguished the fire. PW-9 Hussain Salim Pathan resides at a distance of 1000 feet from the rented room of the accused. He also came to the spot of incident after hearing shouts of Asma. He saw that Asma had sustained burn injuries. He was working as a driver on the auto-rickshaw of one Abdul Razzak. Accused placed injured Asma in his auto-rickshaw and PW-9 Hussain Salim Pathan and the accused took injured Asma to GHATI Hospital. Injured Asma was admitted in Ward No.22 of GHATI Hospital, Aurangabad. M.L.C. report in respect of burnt patient Asma was prepared in Police Outpost of GHATI hospital and it was referred to M.I.D.C. Waluj Police Station. PW-6 Police Head Constable (for short "P.H.C.") Vitthal Javkhede registered M.L.C. No.553 of 2012 as per the said report in M.I.D.C. Waluj Police Station. He made inquiry in respect of the said matter.

C) P.H.C. Javkhede went to GHATI Hospital at about 3.15 p.m. on the same day. He recorded statement of the burnt patient Asma. He himself

satisfied that Asma was in a fit state of mind and conscious to give statement. He obtained opinion from medical officer of GHATI Hospital before recording and as well as after recording the statement of burnt patient Asma that she was in a fit state of mind and conscious to give such statement. Asma stated in her statement that the accused poured kerosene on her person and set her on fire as the accused was suspecting her character and also his demand of money was not satisfied. On the basis of the statement of Asma, P.H.C. Javkhede registered Crime No.222 of 2012 under Sections 498-A, 307 and 504 of the I.P. Code against the accused at about 6.50 p.m. on the same day. P.H.C. Javkhede issued letter to Special Judicial Magistrate to record the statement of burnt patient Asma. The investigation was handed over to PW-12 A.P.I. Narhari Pandharinath Shinde of M.I.D.C., Waluj Police Station.

D) After receiving the letter, Special Judicial Magistrate Sakharam Mukundlal Gokhle went

to GHATI Hospital at about 5.00 p.m. He also satisfied himself that the burnt patient Asma was in a fit state of mind and conscious to give statement. He recorded dying declaration of Asma as per her say. Asma again stated in the said statement that the accused poured kerosene on her person and set her on fire as the accused was suspecting about her character. Special Judicial Magistrate Gokhle obtained opinion in writing from medical officer before as well as after recording dying declaration of the burnt patient Asma.

E) PW-12, investigating officer A.P.I. Shinde went to the spot of an incident on the next day i.e. 22nd September, 2012. He prepared panchnama of scene of offence in presence of two panchas. He seized plastic can containing one liter kerosene, burnt pieces of petticoat and match-box from the spot under the said panchnama. He sealed the said articles and sent them to Chemical Analyst. He arrested the accused under arrest panchnama. He recorded statements of the

parents of deceased Asma and also some other witnesses. On 24th September, 2012, Asma succumbed to the burn injuries in GHATI Hospital at Aurangabad. On 25th September, 2012, PW-12 investigating officer Shinde prepared inquest panchnama of the dead body of Asma. He referred the dead body for postmortem. PW-7 Medical Officer Dr. Vikas Madan Rathod along with Dr. V.G. Kamble conducted postmortem on 24th September, 2012. He found 67% burn injuries on the body of Asma. Investigating officer Shinde sent viscera to Chemical Analyst. He issued letter to Special Judicial Magistrate to record the statement of some witnesses under Section 164 of the Code of Criminal Procedure and accordingly the statements were recorded. He made postal correspondence with Special Judicial Magistrate in respect of incorrect date which was mentioned in dying declaration of Asma. He collected postmortem notes and C.A. reports. It was transpired in his investigation that the accused subjected his wife Asma to cruelty by demanding motorcycle and by

raising doubt about her chastity and committed murder by pouring kerosene and setting her on fire. Accordingly, after collecting the necessary evidence and papers, investigating officer sent charge-sheet against the accused.

F) After receipt of the charge-sheet, learned Judicial Magistrate, First Class, Aurangabad noticed that the offence punishable under Section 302 of the I.P. Code is exclusively triable by the Court of Session. Hence, the case was committed to the Court of Session.

G) The charge for the offence punishable under Sections 302, 498-A of the I.P. Code was framed against the accused. The contents of the charge were read over and explained to the accused in vernacular. The accused pleaded not guilty and claimed to be tried. The defence of the accused is that death of Asma was accidental and she caught fire due to flaring of burning stove.

3. After recording the evidence and conducting full fledged trial, the trial Court convicted the accused for the offence punishable under Sections 498-A, 302 of the I.P. Code and sentenced him to suffer imprisonment as afore-stated and to pay fine, and in default of payment of fine, to suffer further imprisonment as afore-stated.

4. Learned counsel appearing for the Appellant submitted that PW-11 Asefa has specifically stated that deceased was alone in her house. He further submits there is absolutely no evidence on record showing that anyone has actually seen the incident of accused setting on fire his wife Asma. It is further submitted that the dying declarations as recorded, were not reliable. The dying declaration recorded by the Special Executive Magistrate and the dying declaration recorded by police head constable are contrary to each other. Both the dying declarations are not recorded in mother tongue of

Asma. There is over-writing in dying declaration recorded by the Special Executive Magistrate about surname of deceased and the date of incident is also not correct. The deceased was not in a fit state of mind to answer the questions of Special Executive Magistrate. There is no endorsement of doctor about the condition of deceased before and after recording the dying declaration by the Special Executive Magistrate. The record shows that prior to recording dying declaration by the Special Executive Magistrate, the mother of deceased was with her and therefore the possibility of tutoring cannot be ruled out. Both the dying declarations appear to have been recorded after arrival of parents and relatives of deceased. The dying declarations are not truthful and trustworthy.

5. Learned counsel further submitted that perusal of endorsements of medical officer does not state that deceased was in a fit state of mind to give valid statement. The dying declaration

Exhibit-28 recorded by the police is not corroborated by the oral evidence of the prosecution witnesses and there is variance on material particulars. The medical officer who admitted the deceased, is not examined by the prosecution. The history given by the patient at the time of admission in the hospital is not brought on record by the prosecution. Even the investigating officer has not recorded the statement of the doctor who has given treatment to the deceased. Learned counsel further submits that post-mortem notes shows that Asma received 67% burn injuries. Column No.13 of the post-mortem notes shows that she received burn injuries to her tongue and throat, therefore in this circumstances it is difficult to accept that she was able to give dying declarations. In support of his submissions learned counsel referred to the text in Modi's Medical Jurisprudence.

6. Learned counsel further submitted that the trial Court has not taken into consideration

the defence taken by the accused that Asma sustained burn injuries while cooking the food due to flaring of burn stove and therefore it was the case of accidental death. Spot panch PW-1 Shaikh Hasan has admitted in cross-examination that there was a stove inside the room near the door and there were food articles lying in one of the corners of room. PW-8 Shaikh Sardar deposed in his examination-in-chief that deceased received burn injuries due to bursting of stove, but the trial Court has wrongly discarded the evidence of PW-8. Though the investigating officer has admitted in his cross-examination that on the spot of incident there was a stove and match-stick lying near the door, the stove and match-stick is not seized by the investigating officer. The prosecution has examined only interested witnesses and no independent witness has been examined. It is further submitted that the prosecution has not led any concrete evidence on the point of cruelty. Father and mother of the accused specifically admitted in the evidence that they did not inform

anybody about the demand by the accused for money. PW-4 Shaikh Yunus, PW-8 Shaikh Sardar and PW-9 Hussain Salim have not supported the prosecution case. The findings recorded by the trial Court are perverse as the prosecution failed to prove the case beyond reasonable doubt. The trial Court failed to appreciate that there are so many contradictions and omissions in the evidence of prosecution witnesses.

7. Learned counsel submitted that the dying declarations are not consistent and there are infirmities in both the dying declarations, therefore the conviction on the basis of such dying declarations is unsustainable. In support of his submissions, learned counsel appearing for the Appellant has placed reliance upon the exposition of law in the case of Shaikh Bakshu and others vs. State of Maharashtra¹, the State of Maharashtra vs. Vishnu Ziparu Aagavane², Abdul Riyaz Abdul Bashir

¹ (2007) 11 S.C.C. 269

² 2017 S.C.C. Online Bom 7371

vs. State of Maharashtra³, Madhukar s/o Shrimant Mhaske and another vs. the State of Maharashtra⁴, Anantram @ Moru s/o Babulal Bawankar vs. State of Maharashtra⁵. Learned counsel also placed reliance upon the exposition of law by the Supreme Court in the unreported Judgment dated 16th December, 2015 passed in Criminal Appeal Nos.1828-1829 of 2013 (State of Maharashtra vs. Hemant Kawadu Chauriwal etc.). Learned counsel also placed reliance upon the exposition of law by the Division Bench of this Court, in the recent Judgment dated 23rd July, 2018, in Criminal Appeal No.429 of 2013 (Bapu (Nandu) Prabhu Koli @ Raut vs. the State of Maharashtra).

8. On the other hand, learned A.P.P. appearing for the State submitted that both the dying declarations are consistent and the same are reliable and the oral evidence is rightly accepted by the trial Court. Asma was in a fit, well

3 2012 Cri. L.J. 3277

4 1998 ALL M.R.(Cri.) 1508

5 2015 ALL M.R. (Cri.) 975

oriented and conscious condition to give the dying declarations and immediately after the incident in the hospital the dying declarations were recorded and the same were supported by the oral dying declarations. The medical officers endorsed that Asma was in a fit condition to give dying declarations. Relying upon the findings recorded by the trial Court, learned A.P.P. submits that those are in consonance with the evidence brought on record. She further submitted that the prosecution has proved the motive of causing harassment to Asma by demanding money and also suspicion about her character. In respect of appreciation of evidence in the form of dying declaration, the learned A.P.P. placed reliance upon the exposition of law in the case of Laxman vs. State of Maharashtra⁶, and P.V. Radhakrishna vs. State of Karnataka⁷.

9. We have heard learned counsel appearing for the Appellant and learned A.P.P. appearing for

⁶ 2002 A.I.R.(S.C.) 2973

⁷ 2003 A.I.R.(S.C.) 2859

the State at length, with their able assistance perused the grounds taken in the Appeal memo, annexures thereto and also the entire evidence so as to find out the correctness of the findings recorded by the trial Court.

10. The prosecution examined Dr. Vikas Madan Rathod as PW-7. In his examination-in-chief, he deposed that PSI Shinde of MIDC Waluj police station referred the dead body of one Asma Shaikh Babar for post-mortem examination on 24th September, 2012. Accordingly, Dr. V.G. Kamble and the witness himself conducted post-mortem of that body on that day between 9.00 a.m. to 10.00 a.m. On external examination, the medical officers noticed the following burns on the said body:

Part of the body	Percentage of Burns	Area spread
Head, Neck and face	3.00%	Upper part of face, scalp were partly involved
Chest	9.00%	Nil

Abdomen	9.00%	Nil
Back	16.00%	Lower part of back
Right Upper Limb	9.00%	Nil
Left Upper Limb	9.00%	Nil
Right Lower Limb	6.00%	Lateral part of thigh partly, legs, foot and sole

11. PW-7 Dr. Vikas Madan Rathod further deposed that the total area of burnt portion was 67% of the body. There were superficial to deep burns present on the above mentioned area. There were deep burns over back, buttock, abdomen and chest. On rest of the parts of the body there were superficial burns. PW-7 Dr. Vikas Madan Rathod further opined that the deceased Asma died of "Septicemia due to burns". PW-7 has proved the post-mortem report Exhibit-31.

12. Now, We will examine the written dying declarations recorded at Exhibit-28 and Exhibit-19, recorded by the police head constable PW-6 Vitthal Shenphad Javkhede and PW-5 Special Judicial Magistrate, respectively. PW-6 Vitthal

Shenphad Javkhede deposed that he is attached to police station, MIDC, Waluj as Police Head Constable. He further deposed that on 21st September, 2012 M.L.C. report was received from police outpost, GHATI Hospital, Aurangabad about admission of one Shaikh Asma Shaikh Jamil in that hospital. On receiving that report M.L.C. No.553 of 2012 came to be registered in police station, MIDC, Waluj. The inquiry was assigned to him. The M.L.C. report Exhibit-26 was shown to him and he identified the same. He further deposed that after receiving the inquiry into above numbered M.L.C., he went to GHATI Hospital at about 3.15 p.m. on 21st September, 2012. He gave a letter (Exhibit-27) to the Medical Officer and requested to opine whether Shaikh Asma was in a fit condition to give statement. The medical officer examined Asma and gave his opinion in writing on his letter that she was in a fit condition to give statement.

. PW-6 Vitthal Javkhede further deposed that he also asked certain questions to Asma to

get it confirmed that she was in a fit condition to give statement. He asked her name and address. She gave correct answers. Shaikh Asma had sustained burns. He asked Asma as to how the incident took place. Accordingly, she narrated the details of the incident of her burning. He reduced it into writing as per her narration. He read over the contents of her statement to her. She admitted the contents to be correct. Thereafter she signed and put her right hand thumb mark on the statement. He countersigned it. The dying declaration of Asma (Exhibit-28) shown to him was the same. Exhibit-28 bears signature and right hand thumb mark of Shaikh Asma. It also bears his countersignature. He further deposed that after recording dying declaration (Exhibit-28), he again requested the medical officer to opine whether Shaikh Asma was in a fit condition to give statement. Accordingly, the medical officer examined her and opined in writing on the dying declaration itself that she was in a fit condition. He recorded the dying declaration

(Exhibit-28) during the period from 3.15 p.m. to 5.15 p.m. He had given a letter (Exhibit-17) to the Special Judicial Magistrate for recording statement of Asma.

. PW-6 Vitthal Javkhede further deposed that after recording dying declaration (Exhibit-28), he produced it in police station, MIDC, Waluj. On the basis of that dying declaration, the police station officer registered Crime No.I-222 of 2012 for the offences punishable under Sections 307, 498-A and 504 of the I.P. Code. The investigation was assigned to PSI Shinde. He further deposed that two women were sitting near Asma when he had gone to record her statement. He asked them to go outside the ward. Accordingly, they went out of the ward.

13. During the course of cross-examination, PW-6 Vitthal Javkhede stated that the medical officer checked blood pressure and examined Asma before giving his opinion about her condition.

PW-6 Vitthal further stated that after he recorded statement of Asma also the medical officer checked her blood pressure and examined her body. He did not note in writing anywhere as to what was done by him to get himself confirmed that Asma was in a fit condition to give statement. He denied the suggestions that he recorded dying declaration as per the say of parents of Asma and that Asma was not at all conscious.

14. Thus, upon careful perusal of the entire evidence of PW-6 Vitthal Javkhede, it is clear that on 21st September, 2012, he went to GHATI Hospital at about 3.15 p.m and as per his letter, the medical officer examined Asma and gave his opinion in writing that she was in a fit condition to give statement. His oral evidence further discloses that he asked certain questions to Asma to get it confirmed that she was in a fit condition to give statement. Thereafter he asked Asma how the incident took place and she narrated the details of the incident. Thereafter he read

over the contents of the statement to Asma which she admitted to be correct. His evidence further discloses that Asma signed and also put her right hand thumb mark on the said statement. His evidence further discloses that after recording dying declaration (Exhibit-28) he again requested the medical officer to opine whether Asma was in a fit condition to give statement and medical officer, after examining Asma, opined in writing on the dying declaration Exhibit-28 itself, that she was in a fit condition.

15. PW-10 Dr. Vipul Vilasrao Pathak in examination-in-chief deposed that on 21st September 2012 he was attached to GHATI Hospital as a medical officer. Asma was admitted as a patient of burn injuries. Police had come to record statement of burnt patient Asma. In pursuance of letter issued by the police, he examined the patient Asma and on the same letter he had given endorsement that the patient was conscious, oriented and able to give valid

statement. He further deposed that thereafter police recorded her statement. After completion of recording of the statement of Asma, he again examined the patient and found that the patient was conscious, oriented and in a fit state of mind to give statement.

16. Thus, upon conjoint reading of the evidence of PW-6 Vitthal Javkhede, police head constable and PW-10 Dr. Vipul Pathak, it is clear that before recording the statement of Asma, the opinion of medical officer was sought regarding her consciousness and thereafter the dying declaration Exhibit-28 was recorded. After completion of recording of dying declaration again medical officer has examined Asma and opined in writing that patient was conscious, oriented and in a fit state of mind to give statement. Thereafter signature and thumb impression of Asma was obtained on the dying declaration. Thus, it is clear that after completing all the formalities and after taking every precaution, the dying

declaration Exhibit-28 has been recorded by police head constable PW-6 Vitthal Javkhede.

17. We have carefully perused the dying declaration Exhibit-28. About the main incident, Asma has stated that on the day of incident as there was weekly off, his husband was at home. At about 12.00 noon her husband picked up quarrel with her by taking suspicion upon her chastity. Her husband abused her in filthy language and started beating her and he poured the kerosene on her person from the plastic can and by stating that Asma has not right to live, her husband by igniting the match-stick, set her on fire. Due to which Punjabi dress on her person caught fire and she received burn injuries, to her abdomen, chest and both the hands and in such condition she came out of the house while shouting. Her landlord Asefa Shaikh has extinguished the fire. Thus, prosecution has proved the dying declaration Exhibit-28. The same is trustworthy and reliable.

18. Another dying declaration Exhibit-19 is recorded by PW-5 Sakharam Mukundlal Ghokhle. He deposed that he was working as a Special Judicial Magistrate. On 21st September, 2012, after receipt of letter given by the police official with a request to record dying declaration of Asma, he went to GHATI Hospital, Aurangabad at about 5.00 p.m. He further deposed that he gave a letter to the medical officer and requested him to opine whether the above named patient was in a fit condition to give statement. The medical officer examined Asma and opined in writing, on letter Exhibit-18 that Asma was in a fit condition to give a statement. PW-5 Sakharam Ghokhle further deposed that he asked the relatives of Asma to go outside the ward. He asked the name of that woman and got himself confirmed that she was Shaikh Asma. He asked Asma the names of her parents and Asma stated names of her parents. He further deposed that from the answers given by Asma, he realized that she was in a condition to give statement. He asked Asma about the incident and

she gave the details of the incident in which she received burn injuries. He reduced those details into writing as per her narration. He read over the contents of her statement to Shaikh Asma and she admitted the same to be true. Thereafter Asma put her left hand thumb mark on the statement. He further deposed that he signed the dying declaration Exhibit-19. He further deposed that he recorded the dying declaration during the period from 5.10 p.m. to 5.40 p.m. on 21st September, 2012. He further deposed that after recording dying declaration, as per his written request, the medical officer again examined Asma and opined that she was in a fit condition to give statement. Thus, PW-5 Sakharam Ghokhle proved dying declaration Exhibit-19.

19. Upon reading the evidence of Special Judicial Magistrate PW-5 Sakharam Gokhle along with the evidence of PW-10 Dr. Vipul Pathak, it is clear that before and after recording the statement of Asma, the opinion of the medical

officer was sought regarding her consciousness and the medical officer opined in writing that patient was conscious, oriented and in a fit state of mind to give statement. Thereafter thumb impression of left hand of Asma was obtained on the dying declaration. The contents of the dying declaration were read over to Asma and she admitted the same to be true. Thus, it is clear that after completing all the formalities and after taking every precaution, the dying declaration Exhibit-19 has been recorded by Special Judicial Magistrate PW-5 Sakharam Gokhle.

20. We have carefully perused the dying declaration Exhibit-19. After giving her name and other details, about the main incident Asma has stated that on the day of incident at about 12.00 noon, her husband was at home as it was holiday. She further stated that her husband was suspecting about her chastity. Her husband abused her and in the heat of anger, poured the kerosene on her person from the plastic can and by igniting the

match-stick, set her on fire and thus she received burn injuries.

21. Learned counsel appearing for the Appellant has argued that no reliance can be placed on this dying declaration Exhibit-19 because the actual incident occurred on 21st September, 2012, and in this dying declaration the date of incident is mentioned as 12th September, 2012. In this respect, Special Judicial Magistrate PW-5 Sakharam Ghokhle has explained about the said mistake in his oral evidence. The evidence of PW-5 shows that on 17th December, 2012, he received letter from police station, Waluj informing that a mistake has been occurred in mentioning the correct date of the incident in dying declaration of Asma. His evidence further shows that he gave a letter (Exhibit-22) on the same day to the police station and informed that due to inadvertence on his part, the date of the incident came to be mentioned in the dying declaration of Shaikh Asma as "12.09.2012" instead of "21.09.2012".

Therefore, there is no substance in the objection raised by the learned counsel appearing for the Appellant.

22. It is pertinent to note that the prosecution has proved the dying declaration Exhibit-19. The same is reliable and trustworthy. The said dying declaration is recorded by the Special Judicial Magistrate in question and answer form. In view of the exposition by the Supreme Court in the case of Khushal Rao vs. State of Bombay⁸, the dying declaration 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 the oral testimony which may suffer from all the infirmities of human memory and human character. In the present matter, the dying declaration Exhibit-19 is recorded by PW-5

⁸ 1958 A.I.R. (S.C.) 22

Sakharam Ghokhle, the Special Judicial Magistrate, and therefore the same stands on a much higher footing.

23. The written dying declarations at Exhibit-19 and Exhibit-28 are corroborated with the oral dying declarations given to the parents of the deceased. PW-2 Shaikh Jamil Shaikh Omar deposed that deceased Asma was his daughter. Regarding the main incident, he deposed that on the day of the incident at about 12.30 noon he received the phone message from one Raju Bhai, a relative of the accused, that Asma had got burnt and that she was admitted in GHATI Hospital at Aurangabad. His wife and the witness himself then went to GHATI hospital at Aurangabad. They met Asma in GHATI Hospital near the admission cabin. He further deposed that on being asked by them, Asma informed that the accused set her on fire. She informed that the accused was suspecting her character, his demand of money was not fulfilled and therefore he set her on fire. He further

deposed that Asma informed that the accused poured kerosene on her person and set her on fire by means of a match-stick. Asma died in the hospital on 24th September, 2012. PW-2 Shaikh Jamil was extensively cross-examined by the defence but nothing useful to the defence has been elicited.

24. PW-3 Afsanabee w/o Shaikh Jamil is the mother of deceased Asma. She deposed that on the day of the incident at about 12.00 to 12.30 noon one Raju Bhai informed on telephone to her husband that Asma had got burnt and was admitted in GHATI hospital at Aurangabad. She further deposed that she herself and her husband went to GHATI hospital and met Asma in Ward No.20/22 of the hospital. Asma had sustained burns. She further deposed that on being asked by them, Asma informed that the accused used to suspect her character. Accused had beaten Asmah and abused her in filthy language, and thereafter accused poured kerosene on the person of Asma and set her on fire. She further deposed that Asma also stated that the accused was

demanding Rs.50,000/- for purchasing motorcycle. We have perused the entire cross-examination of PW-3 Afsanabee. So far as the oral dying declaration is concerned, the witness has not at all shattered in the cross-examination.

25. The prosecution has examined PW-4 Shaikh Yunus Shaikh Rustam, landlord of the accused, PW-8 Shaikh Sardar Shaikh Noor, brother of the accused, PW-9 Hussain Salim Pathan, a neighbourer of the accused and driver of rickshaw in which Asma was taken to the hospital after the incident, and PW-11 Asefa Shaikh Yusuf, a landlady of the accused. But all these witnesses turned hostile and did not support the prosecution case.

26. As already observed, both the dying declarations are consistent, reliable and trustworthy and inspires confidence of this Court. On the material point of incident, there is no variance in both the dying declarations. In both the dying declarations, Exhibit-19 and Exhibit-28,

deceased Asma has specifically stated that her husband - accused poured kerosene on her person and set her on fire. In both the dying declarations, Asma has specifically stated that her husband was suspecting about her chastity, and therefore the prosecution has established the motive for committing such crime. Both the written dying declarations are fully corroborated by the oral evidence of father and mother of Asma, i.e. PW-2 Shaikh Jamil and PW-3 Afsanabee. Soon after the incident, in the hospital itself both these witnesses met Asma at which time Asma stated to them that accused poured kerosene on her person and set her on fire. Thus, conviction can be based upon such reliable, trustworthy and consistent dying declarations. The prosecution has proved, beyond reasonable doubt that the accused has poured kerosene on the person of Asma and set her on fire. Thus, the prosecution has proved that the accused committed an offence punishable under Section-302 of the I.P. Code.

27. So far as the offence punishable under Section 498-A of the I.P. Code is concerned, PW-2 Shaikh Jamil, father of Asma, specifically deposed that the accused used to ask Asma to bring motorcycle from the witness. His oral evidence further reveals that accused used to suspect the character of Asma. Oral evidence of PW-2 further shows that accused used to demand Rs.50,000/- for purchase of motorcycle. He further deposed that deceased Asma used to tell him about the demand of money made by the accused. In this respect, PW-3 Afsanabee, mother of Asma, deposed that the accused had started suspecting character of Asma since before 5 to 6 months of the incident. She further deposed that accused was making demand of Rs.50,000/- for purchasing the motorcycle since 5 to 6 months before the incident. Asma used to tell them about the same whenever she used to meet them. Further, in the dying declaration, Exhibit-28, recorded by the police head constable PW-6 Vitthal Javkhede, Asma has specifically stated that her husband had asked her to bring

Rs.50,000/- from her father for purchasing motorcycle. Asma has further stated that she told her husband that financial condition of her father was very weak and her father was unable to give such huge amount. Asma further stated that on the said count accused beaten her. Thus, prosecution has established beyond reasonable doubt that the accused had committed an offence punishable under Section 498-A of the Indian Penal Code.

28. Learned counsel appearing for the Appellant has argued that though record shows that on the spot a stove and match-stick were lying, the investigating officer has not seized the said articles. The said argument of the learned counsel deserves no consideration for the simple reason that in the present matter the police machinery has carried out proper investigation and taken immediate steps to record dying declaration of Asma through the police head constable and thereafter through a Special Judicial Magistrate. The prosecution has proved its case beyond

reasonable doubt and therefore, much weightage could not be given to the insignificant loopholes in the investigation, which do not affect the core/substratum of the prosecution case.

29. Learned counsel appearing for the Appellant, referring to the text in Section-9 of Modi's Medical Jurisprudence, has argued that the medical evidence shows that Asma received serious burn injuries to her tongue and throat and therefore she was not in a position to give oral dying declarations, and on this count both the dying declarations are liable to be discarded. This objection raised by the learned counsel also deserves no consideration, as the prosecution has brought on record sufficient evidence to show that before and after recording both the dying declarations at Exhibits-19 and 28, the medical officer has examined the condition of Asma and opined that she was conscious, well oriented and fit to give statement. The police head constable and also the Special Judicial Magistrate, after

satisfying themselves that Asma was well oriented and mentally fit to give statement, her statements were recorded. Further, it is significant to note that when the medical officer PW-9 Dr. Vipul Pathak, who examined Asma before and after recording dying declarations, was cross-examined before the trial Court, he was not confronted by showing the said text in Section 9 of Modi's Medical Jurisprudence.

30. Learned counsel appearing for the Appellant has placed reliance upon the observations made by the Division Bench of this Court (CORAM: S.S. SHINDE AND V.K. JADHAV, JJ.) in the recent Judgment dated 23rd July, 2018 passed in Criminal Appeal No.429 of 2013 (Bapu (Nandu) Prabhu Koli @ Raut vs. the State of Maharashtra). However, it is significant to note that the facts in the present case are totally different from the facts in the case of Bapu (Nandu) Prabhu Koli, cited supra. In the said case there was only one dying declaration and there was variance in the

dying declaration and medical history narrated by the victim about who poured kerosene on the person of victim. There was no corroboration by way of oral or documentary evidence, and therefore the same did not inspire confidence and benefit of doubt has been given to the accused therein. On the other hand, in the present case there are two dying declarations which are consistent, and the same are corroborated by two consistent oral dying declarations.

31. The Supreme Court, in the case of *P. V. Radhakrishna vs. State of Karnataka*⁹, in paragraph Nos. 12 and 13 of the Judgment, has observed as under:

12. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-

⁹ AIR 2003 SC 2859

examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

13. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence....."

32. Thus, it is clear from the exposition of law laid down by the Supreme Court in the case of *P. V. Radhakrishna vs. State of Karnataka*, cited supra that, if the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. In the present case, we are fully satisfied that both the dying declarations at Exhibit-19 and Exhibit-28 are true and voluntary. Further, the said dying declarations are also corroborated by the oral dying declarations given by Asma to her father and mother, and therefore the conviction can be based upon such dying declarations.

33. The defence taken by the Appellant is rightly rejected by the trial Court, as the Appellant and Asma were only present in the house and it was for the Appellant to offer an explanation that, under which circumstances the incident had taken place. We are unable to accept the feeble attempt on the part of the Appellant to suggest that Asma caught fire due to flaring of

burning stove and her death was accidental, and the same is rightly discarded by the trial Court.

34. Therefore, upon considering the evidence in its entirety, we are of the opinion that the findings recorded by the trial Court are in consonance with the evidence brought on record and hence, we do not think it necessary to cause interference in the findings recorded by the trial Court.

35. We do not find that there is any substance in the Appeal. Accordingly, the Criminal Appeal stands dismissed.

[V.K. JADHAV, J.]

asb/AUG18

[S.S. SHINDE, J.]