

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

CRIMINAL APPEAL NO. 138 OF 2014

Nagorao s/o. Hari Kamble,
Age : 60 years, Occu : Agril,
R/o. Panbhosi, Tq. Loha,
Dist. Nanded

... Appellant

Versus

The State of Maharashtra

... Respondent

...

Smt Rekha K. Laddha, advocate (appointed) for the appellant
Shri K.S. Patil, APP for the respondent - State

...

**CORAM : RAVINDRA V. GHUGE
AND
B.U. DEBADWAR, JJ.**

**RESERVED ON : 02-09-2020
PRONOUNCED ON : 15-09-2020**

JUDGMENT (Per: B.U. Debadwar, J.) :

1. This appeal is directed against Judgment and order dated 21-05-2010 passed by Ad-hoc Additional Sessions Judge, Kandhar, Dist. Nanded in Sessions Case No.32 of 2008 whereby convicted appellant / accused - Nagorao s/o. Hari Kamble, R/o. village Panbhosi, Tal. Loha, Dist. Nanded under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as the 'I.P.C.') and sentenced him to suffer rigorous imprisonment for life and to pay fine of Rs.5000/-, in default further rigorous imprisonment for two months.

2. Facts giving rise to the appeal, in nutshell, are as under:

. Nilavati, aged 22 years, was daughter-in-law of the appellant – accused. She was married to Maneji son of the appellant – accused in the year 2003. After marriage, Nilavati started residing at village Panbhosi along with her husband and in-laws. Though husband, mother-in-law and sister-in-law were treating Nilavati well, however the appellant – accused used to treat her with cruelty for the reason of her not giving birth to child. Nilavati never disclosed the same to her parents as conduct of husband and other in laws was proper and there was no harassment at their hands. On 03-06-2008 at about 10:00 AM Maneji had left the house and gone to village Tuppa to attend funeral of his deceased relative, whereas at about 11:30 A.M. appellant – accused (father-in-law) left the house and had been to the field of Shri Bhosikar, with whom, he was working as agriculture servant and mother-in-law Kerubai along with her daughter Maina had carried the cows outside the village for grazing. Thus, Nilavati alone was present in the house. While Nilavati was engaged in cooking as she had invited her married sister-in-law for dinner on the occasion of '*Amavasya*', at about 04:30 p.m. to 05:00 p.m. appellant – accused came home in

drunken state started hurling abuses 'तु वांझट आहेस, तु लई माजलीस रांडे तु घराचे बाहेर हो'. Considering overall conduct of the appellant – accused and abuses hurled by him, Nilavati stopped cooking, upon which the appellant – accused pushed her inside the house from the kitchen, which was set up in shed. When Nilavati was resisting for going inside the house, the appellant – accused beat her with stick and pushed her in a room where cot was lying, then he carried yellow colour kerosene plastic can / jar, which was lying in the adjacent room, poured the kerosene oil from the said can / jar over her person and set her ablaze by igniting matchstick. After getting ablaze, Nilavati rushed to the courtyard and shouted loudly for help. On hearing hue and cry being made by Nilavati, Chabubai (married sister-in-law) and other neighbouring people rushed forward and extinguished the fire by pouring water over the person of Nilavati. After setting Nilavati ablaze, the appellant – accused had left the house immediately. He returned back to the house when Chabubai and other neighbouring persons extinguished fire, and gave kick blow to Nilavati. Since Nilavati had suffered extensive burn injuries, one Sanjay (cousin brother-in-law) and Pandhari (cousin nephew) arranged auto rickshaw, carried Nilavati to the Rural Hospital, Kandhar, Dist. Nanded. After first aid, on the advice of Medical Officer of Rural Hospital, Kandhar, Kerubai (mother-in-law) and

Uddhav (brother), who along with mother and others rushed to Rural Hospital, Kandhar immediately on receiving information pertaining to the incident, carried Nilavati to the hospital of Dr Kadam situated at Nanded, in an ambulance and admitted her there. After getting admitted Nilavati, authorities of Kadam hospital informed to Vazirabad Police Station in writing about the state, in which, Nilavati was admitted to the hospital.

3. On receiving information from Kadam Hospital and also wireless message received from Kandhar Police Station, Police Station Officer of Vazirabad Police Station Nanded, took entry of the said intimation in the Station Diary and directed Mr Sayyed Khalil Sayyed Ismail, Head Constable on duty (Buckle No.252) for proceeding to Kadam Hospital and recording dying declaration. Accordingly, Mr Sayyed Khalil Sayyed Ismail (PW-10) rushed to the Kadam Hospital, saw Nilavati who was under treatment there, recorded her dying declaration in presence of Dr Sanjay Kadam. Thereafter, on next day i.e. 04-06-2008 on receiving the requisition, Shri Bhagwan Dhondiram Pandit, Judicial Magistrate First Class, Nanded (PW-6) visited the Kadam Hospital and after following due procedure and after satisfying himself that Nilavati was conscious and oriented, recorded her dying declaration as per her version. Then,

Mr Sayyed Khalil Sayyed Ismail (PW-10) forwarded the dying declaration of Nilavati recorded by him along with MLC letter received from Kadam Hospital, to Police Station Loha, Tal. Kandhar, in the jurisdiction of which, incident took place. After going through the papers so received, Mr G.D. Kolekar, Police Inspector, Police Station, Loha took the entry of the same in the Police Station Diary vide Station Diary Entry No.36 dated 05-06-2008 at about 04:00 p.m. and registered crime bearing No.58/2008 for the offences punishable under Sections 498-A and 307 of I.P.C. against the appellant – accused and carried the investigation.

4. During the course of investigation, on 09-06-2008 he visited the house of the appellant – accused where the incident took place, inspected the same in presence of the panchas, prepared spot panchanama with hand sketch map (Exh.10), collected and seized articles found lying on the spot, then arrested appellant – accused under the arrest panchanama (Exh.12). Thereafter at the instance of the appellant – accused discovered and recovered stick used by him for assaulting Nilavati under Memorandum panchanama dated 13-06-2008 and recovery panchanama (Exh.56). Thereafter on 16-06-2008 visited to the Kadam Hospital where Nilavati was being treated,

met Dr. Kadam, who was treating Nilavati, enquired with him about the condition of Nilavati and after satisfying that, she was conscious and oriented, he (Mr G.D. Kolekar) proceeded to record the statement of Nilavati and recorded the same as per her version vide Exh.54. During the further investigation, Mr G.D. Kolekar (PW-9) recorded statements of material witnesses including Godavaribai Pandilwad (PW-1), Uddhav Waghmare (PW-4) and Keshav Waghmare (PW-8).

5. Meanwhile, on 16-06-2008 Nilavati while under treatment succumbed to the extensive burns, sustained all over the body at the hospital of Dr Deglurkar, where she was shifted two days prior to her death from the hospital of Doctor Kadam.

6. Upon receiving the intimation about the death of Nilavati, Police Officers of Vazirabad Police Station, Nanded rushed to the Ganesh Hospital run by Dr Deglurkar, prepared inquest panchanama of the dead body of Nilavati, then forwarded the same to the SGGM Hospital, Nanded with requisition for post-mortem, thereafter handed over the dead body of Nilavati to her relatives from parental side and forwarded inquest panchanama, post mortem report and other papers to Mr G.D. Kolekar, Police Inspector, Police Station, Loha. On receiving the same, Mr Kolekar added Section 302 in FIR after

seeking permission from Judicial Magistrate First Class, Kandhar, then recorded statement of some more material witnesses including family members of Nilavati from parental side, forwarded muddemal seized from the spot to the Forensic Lab, Aurangabad along with requisition for examination and report and after completion of investigation, charge-sheeted the accused before Judicial Magistrate First Class, Kandhar as sufficient evidence found against him.

7. On 17-11-2008 learned Judicial Magistrate First Class, Kandhar committed the case to the Additional Sessions Court at Kandhar, as offence under Section 302 of I.P.C. is exclusively triable by Court of Sessions.

8. On 27-01-2009 learned Ad-hoc Additional Sessions Judge, Kandhar after hearing the learned APP and learned advocate for the accused, framed charge under Section 302 of I.P.C. only, against the appellant – accused vide Exh.5. When so framed charge was read over and explained to him in vernacular, the appellant – accused pleaded not guilty and claimed to be tried.

9. After conducting full-fledged trial i.e. recording

evidence, recording statement of appellant - accused under Section 313 (1)(b) of Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') and hearing arguments of learned APP and learned defence counsel, learned Ad-hoc Additional Sessions Judge, Kandhar, held the accused guilty for the offence under Section 302 of I.P.C. and punished him as stated above.

10. Being aggrieved by the impugned judgment and order, the appellant - accused preferred present appeal under Section 374 of Cr.P.C.

11. We have heard Smt Rekha Laddha, learned counsel for the appellant and Shri K.S. Patil, Additional Public Prosecutor for the respondent - State.

12. Smt Rekha Laddha, learned counsel representing the appellant - accused vehemently argued that, the multiple dying declarations relied upon by the prosecution are unreliable. They are inconsistent *inter se* on material aspects. Learned Ad-hoc Additional Sessions Judge, Kandhar failed to appreciate written and oral dying declarations properly and held the accused guilty relying on such inconsistent and unreliable dying declarations. Learned advocate Smt Laddha also submitted that, Nilavati was

not mentally and physically fit to make various declarations and statements as she had suffered 90% burn injuries. Thus, the evidence adduced by the prosecution that Nilavati was conscious and well oriented at every time when her alleged dying declarations / statements came to be recorded, is against the medical jurisprudence. Two dying declarations recorded by the Police Officials do not bear initial and concluding endorsement of fitness of Nilavati. Learned Ad-hoc Additional Sessions Judge, Kandhar has conveniently given go bye to this material aspect. Smt. Godavaribai Pandilwad (PW-1), independent witness, not supported to the case of prosecution. In the Court, she testified that, Nilavati sustained burn injuries accidentally while she was engaged in cooking. There was no reason for Ad-hoc Additional Sessions Judge, Kandhar to discard the evidence of Godavaribai (PW-1), which supports to the defence of accused and creates doubt about case of prosecution.

13. Smt Laddha, learned defence counsel further argued that, panch witnesses of spot panchanama (Exh.10) were not supported to the case of prosecution. In such circumstances, merely relying on evidence of Shri G.D. Kolekar, Investigating Officer, contents of spot panchanama cannot be said to be proved. When prosecution failed to prove spot panchanama

(Exh.10), no importance can be given to the inconsistent written and oral dying declarations and CA reports.

14. According to Smt Laddha, learned defence counsel the case of prosecution about alleged beating to Nilavati by the appellant – accused by stick is not worthy of credence as panch witnesses of alleged discovery and recovery of the stick at the instance of appellant - accused have not supported to the prosecution.

15. The prosecution failed to examine independent witness - Bharatbai Kamble, who too rushed forward for extinguishing the fire. Non-examination of independent material witness, though available, goes to the root and creates every doubt about alleged dying declarations, on which, the case of the prosecution is based. After highlighting the inconsistencies in multiple dying declarations relied upon by the prosecution, Smt Laddha, advocate representing the appellant – accused force fully submitted, as to how the defence taken by the accused about Nilavati's sustaining burns accidentally bears force and substance. Lastly, Smt Laddha, learned defence counsel submitted that, evidence adduced by the prosecution is doubtful on many material aspects, therefore, impugned judgment

holding the appellant – accused guilty and convicting him under Section 302 of I.P.C. is liable to be set aside.

16. In support of her submissions, Smt Laddha, learned defence counsel placed her reliance on some of the following decisions of this Court:

- (i) **Suresh S/o. Arjun Dodorkar (Sonar) Vs. State of Maharashtra, 2005 ALL MR (Cri) 1599**
- (ii) **Dipak s/o Chandrasing Kolhekar Vs. The State of Maharashtra, 2017 ALL MR (Cri) 1804**
- (iii) **Ashok Vitthalrao Chahande Vs. State of Maharashtra, 2017 ALL MR (Cri) 1949**
- (iv) **Sonu @ Khushal @ Tushar s/o. Ashok Paswan Vs. State of Maharashtra, 2018 ALL MR (Cri) 3997**

17. *Per contra*, Mr K.S. Patil, learned Additional Public Prosecutor vehemently argued that, the prosecution has proved all the dying declarations made by Smt Nilavati on different occasions are clear, cogent and sufficient to connect the appellant – accused to her homicidal death. Dying declaration (Exh.35) proved in the evidence of Shri Bhagwan Pandit (PW-6), Judicial Magistrate First Class satisfies all the conditions require to be followed while recording the dying declaration, therefore, there is no reason to discard the same. Nothing is brought on

record through cross-examination of Shri Bhagwan Pandit (PW-6), Judicial Magistrate First Class, on the basis of which, his evidence vis-à-vis dying declaration recorded by him, can be said to be unreliable. Dying declaration (Exh.35) recorded by Shri Bhagwan Pandit (PW-6), Judicial Magistrate First Class, gets full corroboration from other two dying declarations recorded by two Police Officers viz. Exhs.71 and 54, respectively.

18. Besides, evidence of Dr Sanjay Kadam (PW-7) makes the fact free from doubt that, Nilavati was conscious and well oriented at the time of recording of the aforesaid three written dying declarations. There was no reason for Judicial Magistrate First Class, Police Officers and Doctor to speak lie. Aforesaid three dying declarations also get support from two oral dying declarations made by Nilavati before Mr Uddhav Waghmare (PW-4) and Mr Keshav Waghmare (PW-8). According to Mr Patil, learned Additional Public Prosecutor, contents of aforesaid dying declarations made by Nilavati throws light on conduct of the appellant – accused and brutality of his act. Spot panchanama (Exh.10) proved in the evidence of Shri G.D. Kolekar (PW-9), Investigating Officer, corroborates to the case made out in the dying declaration as to the appellant – accused pushing Nilavati inside the house and after setting her

on fire by appellant – accused, her coming out in the courtyard.

19. CA report confirms the fact that, the liquid poured on the person of Nilavati, by the appellant – accused, was kerosene oil available in the plastic can / jar found at spot. When Nilavati clearly stated that husband and other in-laws (except father-in-law) were treating her well, there was no reason for her to falsely implicate the appellant - accused.

20. Learned Additional Public Prosecutor, Mr Patil also argued that, since, at the time of incident, except deceased Nilavati and appellant – accused, nobody was present inside the house, under Section 106 of the Indian Evidence Act, 1872 burden was on appellant – accused to explain how the incident took place and whatever explanation by way of defence given by the appellant – accused is not at all probable. Thus, finally learned Additional Public Prosecutor, Mr Patil argued that, merely on the basis of some minor inconsistencies, three written dying declarations and two oral dying declarations clearly implicating the appellant - accuse cannot be discarded. According to learned Additional Public Prosecutor, Mr Patil, impugned judgment being proper and correct in all respects, appeal is liable to be dismissed.

21. In light of the aforesaid submissions made by Smt Laddha, advocate for the appellant – accused and Mr K.S. Patil, learned Additional Public Prosecutor for the respondent – State, now we turn to the record of the case. At the outset, we would like to mention that, the case of the prosecution is based on multiple dying declarations viz. three written dying declarations, two oral dying declarations came on record through the testimonies of Uddhav (PW-4) and Keshav (PW-8) (both are real brothers of Nilavati) and spot panchanama (Exh.10).

22. Before turning to the controversy, we would like to record the facts, which are not at all in dispute, as follows:

- (i) Nilavati was the daughter-in-law of appellant – accused.
- (ii) Marriage of Nilavati with Maneji - son of appellant / accused was solemnized about 5 years prior to the incident.
- (iii) Nilavati used to reside along with husband and in-laws including appellant – accused in their house situated at Nanpeth of village Panbhosi, Tal.Loha, Dist. Nanded.
- (iv) On 03-06-2008 Nilavati suffered extensive burn injuries and succumbed to the said burn injuries while under treatment at Ganesh Hospital run by Dr. Deglurkar at Nanded.
- (v) Initially Nilavati was taken to Rural Hospital at Kandhar, immediately after first aid she was shifted to Kadam Hospital run by Dr. Sanjay Kadam at Nanded and finally to the Ganesh Hospital run by Dr Deglurkar at Nanded.

- (vi) Nilavati was given in marriage to the son of her parental aunt. Thus, Nilavati's parental family and matrimonial family were closely related with each other.

23. In reply to the notice under Section 294 of Cr.P.C., the appellant - accused has admitted execution and contents of three documents viz. inquest panchanama dated 16-06-2008 (Exh.11), arrest panchanama dated 09-06-2008 (Exh.12) and Post Mortem report dated 16-06-2008 (Exh.13). Therefore, they can be read in evidence and relied upon without any obstruction.

24. Inquest Panchanama (Exh.11) demonstrates that, Nilavati had burnt extensively. The details of the parts of the body of Nilavati which sustained burn injuries have been clearly mentioned in Inquest Panchanama (Exh.11). Column no.17 of post-mortem report (Ex.13) gives in detail about superficial deep burn injuries suffered by Nilavati. Percentage of burn injuries suffered by Nilavati on different parts of the body have also been given specifically and separately. According to the post-mortem report (Exh.13), the death of Nilavati had caused due to 90% burn injuries. Post-mortem report (Exh.13) makes it clear that, Nilavati had not suffered any injury under the scalp, brain covering found to be congested, brain tissues found to be normal in size and shape and slightly congested and burn injuries

suffered by Nilavati were ante-mortem burns. Thus, Inquest Panchanama (Exh.11) and Post-mortem Report (Exh.13) both, prove that, Nilavati died due to 90% superficial deep burn injuries. Therefore, the question which arises is, whether Nilavati suffered 90% burns accidentally or appellant – accused caused the said burns to Nilavati after pouring kerosene on her person and setting her ablaze and that question can be answered by scrutinizing evidence on record.

25. Out of the three dying declarations, dying declaration at Exh.71 has been proved in the evidence of Mr Sayyed Khalil Sayyed Ismail (PW-10), Police Head Constable, who recorded the same.

26. Dr Sanjay Kadam (PW-7) vide his deposition at Exh.37 deposed that, after arrival of police official to the hospital in pursuance of the intimation (Exh.38), he examined patient Nilavati and told to the said police official that, she is in condition to give the statement. Dying declaration (Exh.71) bears the endorsement of Dr Sanjay Kadam with signature, date and time certifying that, patient was in a conscious state to give statement.

27. Mr Sayyed Khalil Sayyed Ismail (PW-10), Police Head

Constable in his evidence at Exh.70 made it clear that, after certifying by Dr Sanjay Kadam about fitness of Nilavati to make statement, he too verified whether Nilavati is conscious and able to speak properly and after satisfying the same, he recorded her statement / dying declaration (Exh.71). Nothing is brought on record through cross-examination of Mr Sayyed Khalil Sayyed Ismail (PW-10) and Dr Sanjay Kadam (PW-7) on the aspect of state of mind of Nilavati at the time of recording dying declaration on the basis of which dying declaration (Exh.71) can be viewed with suspicion. Therefore, there is no reason to discard the statement / dying declaration at Exh.71 of Nilavati recorded by Mr Sayyed Khalil Sayyed Ismail (PW-10), which clearly states as under :

“On 03-06-2008 my husband had gone out of station for attending funeral. Mother-in-law and father-in-law had gone to field. During 04:30 pm to 05:00 pm when I alone was present in the house, my father-in-law were returned back to the home from field and started hurling abuses (तु वांझोटी आहेस, रांड लई माजलीस). Thereafter, he brought the kerosene can, poured kerosene from the said can on my person and set me ablaze by striking matchstick, because of that clothes worn by me caught the fire and I suffered burns to both upper limbs and lower limbs, chest, back and abdomen. On my making hue and cry neighbours rushed forward and extinguished the fire by pouring water on my person. Thereafter my relatives carried me to government hospital at Kandhar. After first aid, I was shifted to Nanded and at present I am under treatment at

Nanded.”

. Aforesaid, recitals in statement / dying declaration (Exh.71) clearly connects the appellant – accused, in the incident of burning of Nilavati.

28. It is evident from the record that, after recording dying declaration (Exh.71), police officials of Vazirabad Police Station, Nanded, requisitioned services of Judicial Magistrate First Class for recording dying declaration of Nilavati under requisition (Exh.32). Dying declaration (Exh.35) recorded by Shri Bhagwan Pandit (PW-6), Judicial Magistrate First Class, Nanded on 04-06-2008 corroborates to the statement / dying declaration (Exh.71) recorded by Shri Sayyed Khalil Sayyed Ismail (PW-10) on material particulars.

29. After going through evidence of Shri Bhagwan Pandit (PW-6) and Dr Sanjay Kadam (PW-7), it becomes clear that, in pursuance of the requisition (Exh.32) Shri Bhagwan Pandit (PW-6) visited the Kadam Hospital on 04-06-2008 during morning hours, requested Dr Sanjay Kadam to take him to the woman whose dying declaration was to be record, accordingly Dr Sanjay Kadam carried him to ICU where Nilavati was under treatment and identified her. Thereafter, in his presence,

Dr Sanjay Kadam examined Nilavati and certified that, she is conscious and fit to give statement. Accordingly, he, after his verifying and satisfying whether Nilavati is really conscious and oriented, started recording dying declaration of Nilavati at about 08:56 A.M. and completed the recording of the same at about 09:07 A.M. After completion of recording of dying declaration, again in his presence, Dr Sanjay Kadam examined Nilavati and certified that, she was conscious throughout the statement. Dying declaration (Exh.35) bears initial and final endorsements of fitness of Nilavati to give a statement made by Dr Sanjay Kadam (PW-7) with date, time and signature.

30. Nothing could be brought on record through the cross-examination of Shri Bhagwan Pandit (PW-6), JMFC and Dr Sanjay Kadam (PW-7) on the basis of which, their testimonies on the aforesaid aspects can be discarded.

31. Like dying declaration (Exh.71), dying declaration (Exh.35) also clearly states that, the appellant – accused burnt Nilavati after pouring kerosene on her person. Absolutely there is no fault in recording dying declaration (Exh.35). It has been recorded by Shri Bhagwan Pandit (PW-6), JMFC, after following requisite procedure and personally satisfying himself that Nilavati

was conscious and well oriented to make the statement. Thus, there is no reason to discard the same on some technical aspects, which, we would like to discuss later on.

32. Third written dying declaration Exh.54 was recorded by Mr G.D. Kolekar (PW-9), Police Inspector of Loha Police Station and Investigating Officer of the present case on 06-06-2008 in the form of supplementary statement after obtaining fitness certificate from Dr Sanjay Kadam and satisfying himself that, Nilavati was conscious and able to make statement.

33. It is pertinent to note that, statement / dying declaration (Exh.54) recorded by Investigating Officer after three days of incident, appears to have been recorded anticipating that, Nilavati may survive. The material portion in statement / dying declaration (Exh.54) connecting the appellant – accused with the 90% burns suffered by Nilavati lends full corroboration to the earlier two dying declarations, one was recorded by Shri Sayyed Khalil Sayyed Ismail (PW-10), Head Constable and another recorded by Shri Bhagwan Pandit (PW-6), JMFC, Nanded. Like other two dying declarations at Exhs.71 and 35, Dr Sanjay Kadam has also identified fitness certificate appearing on statement/ dying declaration at Exh.54. Nothing

could be brought on record through the cross-examination of Shri G.D. Kolekar (PW-9) on the basis of which statement / dying declaration (Exh.35) can be viewed with suspicion.

34. Aforesaid three written dying declarations get corroboration from oral dying declarations made before Shri Uddhav (PW-4) and Shri Keshav (PW-8). Admittedly, they are the real brothers of Nilavati. Merely for that reason their evidence about Nilavati's disclosing them about the incident cannot be discarded. Nilavati disclosed about the incident to Shri Uddhav (PW-4) in an ambulance, in which, she was being taken to Nanded, whereas she disclosed about the incident to Keshav (PW-8) in the Kadam Hospital at Nanded where she was under treatment. The conduct of Nilavati disclosing about the incident to real brothers appears to be natural. Shri Uddhav (PW-4) and Shri Keshav (PW-8) both have deposed about the disclosure regarding incident made to them by Nilavati. Thus, the oral dying declarations made before Uddhav (PW-4) and Keshav (PW-8) are also clear enough to connect the appellant – accused to the death of Nilavati.

35. It is worthy to note that, the appellant – accused has not brought on record any material to substantiate his defence

that Nilavati, while preparing food accidentally fell in hearth (चुल) and suffered burn injuries. All the witnesses including Shri G.D. Kolekar (PW-9), Investigating Officer denied the said suggestion. Spot panchanama (Exh.10) proved in the evidence of Shri Kolekar (PW-9) clearly demonstrates that, house of the appellant – accused, where incident took place, was consisting of three rooms, kitchen and sufficient open space. Kitchen and three rooms were situated one after one from east to west. Kitchen room was not the room enclosed with four walls, but it was the tin shed enclosed by *bamboo mat*. Hearth was existing in kitchen room. Admittedly, incident took place not in kitchen room, but last room situated on western side. Details of articles seized from the spot viz. yellow colour kerosene can / jar with some kerosene, burnt earth, plain earth, burnt pieces of sari removed from the person of Nilavati have been given in spot panchanama (Exh.10). Shri G.D. Kolekar (PW-9) made it clear that, he sent those articles to Forensic Lab at Aurangabad for examination vide requisition (Exh.66) in sealed condition. CA report at Exh.67 speaks volumes that, result of the test for detection of kerosene residues at Exhs.2 and 4 i.e. earth collected from place of incident (inside the room) and earth collected from place of incident i.e. house premises, are positive and bluish coloured liquid in a plastic can (Exh.1) is a sample of

kerosene. Nothing is brought on record by the appellant – accused indicating that, the aforesaid articles were tampered with, prior to sending same to the Forensic Lab. On the contrary, Shri G.D. Kolekar (PW-9) testified that all the articles seized from the spot were packed and sealed properly and sent to the Forensic Lab for examination in sealed condition. Thus, there is no reason to discard spot panchanama (Exh.10) and CA report (Exh.67), which speaks volumes that, prior to setting ablaze kerosene was poured on the person of Nilavati.

36. It is true that, Vishwambhar (PW-2), one of the panch witness of the spot panchanama (Exh.10), has not supported the case of the prosecution. Upon considering his statement, it becomes clear that, the appellant – accused had won him over. That was the reason by exceeding his limit he tried to state that, Nilavati suffered burn injuries while cooking.

37. At the cost of repetition, we may say that, there is no iota of evidence indicating that while cooking Nilavati accidentally fell over the hearth and sustained burns. Had it been the fact, then certainly some traces of burns or incriminating articles would have been found in kitchen room. No such traces of burns or incriminating articles find place there. This rules out the defence of the appellant – accused.

38. It does appear that there are minor discrepancies in three written dying declarations (Exhs.35, 54 & 71) proved by the prosecution. They are pertaining to words of abuses and about beating Nilavati by stick. Record shows that, after arrest while in police custody stick used in crime came to be discovered and recovered at the instance of the appellant – accused under memorandum panchanama (Exh.55) and recovery panchanama (Exh.56). Though one of the panch witness of said memorandum and recovery panchanama by name Shivaji Rathod (PW-3) has turned hostile and has not supported to the case of prosecution, however Shri G.D. Kolekar (PW-9), the author of the said panchanama has spoken about execution and contents of the same, therefore, recovery of the stick at the instance of the appellant – accused cannot be discarded merely for the reason that, panch witness turned hostile.

39. In the case of **State of Uttar Pradesh Vs. Santosh Kumar and Others, (2009) 9 Supreme Court Cases 626**, while discussing provision of Section 32 (1) of Evidence Act, 1872, in paragraph nos.20 to 22, the Hon'ble Supreme Court held as under :

“20. The entire prosecution case hinges on the

three dying declarations made by the deceased. On careful analysis of these dying declarations, it leads to only one conclusion that respondent Santosh Kumar after beating deceased Sunita poured kerosene oil on her and set her on fire and that she died because of burn injuries sustained by her. The High Court unnecessarily gave undue importance to the minor contradictions in the testimony of witnesses and dying declarations. The High Court ought to have examined this case in the proper perspective. The doctor also certified that the deceased was in a fit mental condition to give statement. The Tahsildar / Magistrate, PW-13 also stated the same in his statement.

21. The basic consistency between the three dying declarations given to Dhani Ram, PW 1, the Investigating Officer, PW-8 and the Tahsildar/Magistrate, PW 13 is that the accused Santosh Kumar brought kerosene oil, poured the same on the deceased and set her on fire and she died because of the burn injury. It is the real genesis of all the three dying declarations. It must be properly appreciated that the deceased Sunita gave these dying declarations in a state when she was having acute pain and minor inconsistencies in one dying declaration with another should not render the dying declarations void. Dying declarations must be construed in proper perspective.

22. The veracity of the dying declarations is proved beyond any shadow of doubt because the deceased specifically did not level any allegation against her husband and her other brother-in-law Ram Kishore. If she wanted to implicate other members of the family, she could have also named her brother-in-law Ram Kishore and husband Ram Chandra. But she specifically attributed the act of bringing and pouring kerosene oil on her and setting her on fire only to respondent Santosh Kumar. The High Court ought to have appreciated this fact in proper perspective as to why the dying person in all her three dying declarations named only Santosh Kumar and attributed the act of pouring kerosene oil and setting her on fire to him alone when there were so many members in the family."

40. In case at hand, as discussed above, contradictions came on record through three written dying declarations and two oral dying declarations are minor in nature, therefore, in view of aforesaid ratio laid down by Hon'ble Supreme Court merely for

such minor contradictions pertaining to words of abuses and assault by stick before setting Nilavati ablaze consistent statement connecting the accused with the incident cannot be discarded. There is consistency amongst three written dying declarations (Exhs.35, 54 & 71) given to Shri Sayyed Khalil Sayyed Ismail (PW-10), Head Constable, Shri Bhagwan Pandit (PW-6), JMFC and Shri G.D. Kolekar (PW-9), Investigating Officer, on material aspect of accused's pouring kerosene on the person of Nilavati from the yellow colour plastic can / jar lying at spot setting her on fire and, occurrence of her death due to burn injuries, is the real genesis of all the three dying declarations and Nilavati clearly spoke about the same. Nilavati gave these dying declarations in a state when she was having acute pain. Therefore, minor inconsistencies in one dying declaration with another about words of abuses cannot render the dying declarations void.

41. In case of **Rambai Vs. State of Chhattisgarh, (2002) 8 Supreme Court Cases 83**, the Hon'ble Supreme Court in paragraph no.6 of the Judgment held as under :

"6. So far as the position of law in regard to the admissibility of the dying declaration which is not certified by the doctor, the same is now settled by a Constitution Bench judgment of this Court reported in *Laxman v. State of Maharashtra* wherein overruling the judgment of this Court in *Laxmi v. Om Prakash* it is held

that a dying declaration which does not contain a certificate of the doctor cannot be rejected on that sole ground so long as the person recording the dying declaration was aware of the fact as of the condition of the declarant to make such dying declaration. If the person recording such dying declaration is satisfied that the declarant is in a fit mental condition to make the dying declaration then such dying declaration will not be invalid solely on the ground that the same is not certified by the doctor as to the condition of the declarant to make the dying declaration."

42. In the case at hand dying declarations at Exhs.71 and 54 bear only one fitness certificate with date, time and signature, but, in view of the aforesaid ratio laid down by the Hon'ble Supreme Court, wholly on the sole ground that instead of two fitness certificates only one certificate appears on Exhs.71 and 54 they cannot be thrown away.

43. It is evident from the record that, Godavaribai (PW-1) - neighbour has not supported to the case of prosecution. Her testimony (Exh.15) reveals that, she improved her version later on and deposed before Court that, Nilavati had disclosed her that she sustained burn injuries while she was cooking, which she had not stated to the police while recording her statement under Section 161 of Cr.P.C. On the contrary while recording her statement under Section 161 of Cr.P.C., she has stated as to what Nilavati exactly disclosed her. Portion marks Exhs.68 and 69, in her statement under Section 161 of Cr.P.C. proved in the evidence of Mr G.D. Kolekar (PW-9) speaks

volumes that Nilavati had disclosed her about the appellant – accused's setting her ablaze after hurling abuses, beating by stick and pouring kerosene oil on her person. Moreover, during her cross- examination, Godavaribai (PW-1) has admitted most of the facts. Thus, after considering her evidence in its entirety, it can be surely said that, because of winning over by the accused she changed her version before the Court. Therefore, her improved version cannot be accepted for discrediting the consistent case of the prosecution proved by multiple dying declarations.

44. No doubt record reveals that, one Bharatbai Kamble was also amongst the persons who rushed to the spot after hearing hue and cry made by Nilavati and extinguished the fire, but prosecution has not examined her. However, that alone can not be a ground to discard three written and two oral dying declarations of Nilavati, which are consistent on material aspect of setting Nilavati on fire by appellant – accused after pouring kerosene oil on her person, by drawing adverse inference.

45. In the case of **Fattesingh Pancham Ghodke Vs. State of Maharashtra, 2002 (Supp.) Bom.C.R. (Cri.) 832**, the Division Bench of this court held that,

"That a person who is set on fire is bound to suffer serious injuries and is bound to die as a result of those injuries is a part of the knowledge which must necessarily be attributed to the person who indulges in such act. In (B. Venkateswarlu v. State of A.P) 20, A.I.R. 1974 S.C. 2363, it was held that when one of the accused poured kerosene on the boy after which the appellant lighted a match and set fire to his clothes, the intention was necessarily to cause the death of that boy. There was no doubt about that intention."

46. In the case at hand, having regard to the overall conduct of the accused hurling abuses to the daughter-in-law Nilavati, soon after returning back to the house from work place, pouring kerosene on her person, setting her ablaze by igniting match stick, leaving the house though Nilavati was shouting for help while burning, returning back to the house after extinguishing the fire by neighbours and giving kick blow to Nilavati speaks volumes about his intention. Therefore, in any case, it cannot be said that, the appellant – accused was not intending to kill Nilavati. The case squarely falls within Clause 2ndly and 3rdly of Section 300 of I.P.C.

47. We have carefully gone through all the rulings, on which, Smt Laddha, advocate for the appellant – accused placed her reliance. The facts of cases in those rulings are quite different from the facts of the case in hand.

48. In the matter of **Ashok Vitthalrao Chahande Vs.**

State of Maharashtra, referred supra, 'two dying declarations of deceased were quite inconsistent about manner, in which, incident occurred', whereas in the case at hand, as discussed above, inconsistencies are not on material aspects. On the contrary, all the five dying declarations were consistent on material aspect i.e. complicity of the appellant – accused in burning Nilavati after pouring kerosene oil on her person.

49. In the case of **Sonu @ Khushal @ Tushar s/o Ashok Paswan Vs. State of Maharashtra, 2018 ALL MR (Cri) 3997**, the Single Bench of this court at Nagpur held that,

'the statement of deceased implicating accused recorded at the time of her admission in hospital held to be not admissible as same recorded without obtaining fitness certificate from doctor.'

50. In case at hand, before recording all the three dying declarations certificate of fitness was obtained from Dr Sanjay Kadam, who was treating Nilavati at his hospital.

51. In the case of **Suresh S/o Arjun Dodorkar (Sonar) Vs. State of Maharashtra, 2005 ALL MR (Cri) 1599**, it is held that,

"In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be

necessarily rejected. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination.”

52. In the case at hand, none of the dying declaration falsifies the other dying declaration, therefore, the aforesaid ratio in any case would not help the defence for claiming benefit of doubt. Therefore it can safely be concluded that the appellant – accused has committed murder of his daughter-in-law Nilavati by pouring kerosene oil on her person and setting her on fire, as a result of which, she suffered 90% burn injuries and as a consequence of which, she died.

53. To conclude we do not find that the learned Ad-hoc Additional Sessions Judge, Kandhar was in error in arriving at the finding that the appellant – accused is guilty of having committed the murder of his daughter-in-law Nilavati. There is no merit in this appeal and, therefore, the same is dismissed.

54. Smt Rekha K. Laddha, advocate was appointed to represent the appellant – accused, as he had not engaged advocate to represent him. Legal fees payable to Smt Rekha K. Laddha, advocate is quantified at Rs.10,000/- (Rs.Ten Thousand). The High Court Legal Services Sub- Committee, Aurangabad, shall pay the same to Smt Rekha K. Laddha.

[B.U. DEBADWAR]
JUDGE

[RAVINDRA V. GHUGE]
JUDGE