

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

CRIMINAL APPEAL NO. 221 OF 2014

- 1) Dadarao s/o Shripat Thorat
Age : 38 years, Occ.: Agriculture,
R/o.: Waregaon, Tal. Phulambri,
Dist.: Aurangabad.
- 2) Shripat s/o Vishram Thorat
Age : 87 years, Occ.: Agriculture,
R/o.: Waregaon, Tal. Phulambri,
Dist.: Aurangabad.
- 3) Yamunabai w/o Shripat Thorat
Age : 82 years, Occu.: Agriculture,
R/o.: Waregaon, Tal. Phulambri,
Dist.: Aurangabad. ... APPELLANTS

VERSUS

The State of Maharashtra,
Through Police Station Phulambri,
Tal. Phulambri, Dist. Aurangabad. ... RESPONDENT

Mr. R. S. Deshmukh, Senior Advocate i/b
Mr. G. A. Kulkarni, Advocate for the accused
Mrs. V. S. Choudhari, APP for the respondent/State.

**CORAM : T.V. NALAWADE &
S.M. GAVHANE, JJ.**

RESERVED ON : 03.12.2019

PRONOUNCED ON : 03.03.2020

JUDGMENT (PER :- S.M. GAVHANE, J.)

. By this appeal the appellants, hereinafter referred to as the accused Nos. 1 to 3 have challenged the judgment and order dated 20/03/2014 passed by the Sessions Judge, Aurangabad in Sessions Case No. 82 of 2008 thereby convicting and sentencing each of them to suffer rigorous imprisonment for one year and to pay a fine of Rs. 500/-, in default to suffer rigorous imprisonment for 15 days for the offence punishable under Section 498-A read with Section 34 of the Indian Penal Code (hereinafter referred to as the IPC) and further convicting and sentencing each of them to suffer imprisonment for life and to pay a fine of Rs. 500/-, in default to suffer simple imprisonment for one month for the offence punishable under Section 302 read with Section 34 of the IPC. The sentences of imprisonment were directed to run concurrently. Muddemal property being valueless was ordered to be destroyed after the appeal period is over.

2. Appellant No.2/accused No. 2 Shripat Vishram Thorat died during pendency of this appeal and therefore, appeal stands disposed of as abated against him as per order dated 11/11/2019.

3. Facts leading to this appeal as revealed from the case papers are as under:-

(A) The deceased Vandana was daughter of one Indrabai w/o Baburao Misal resident of Bhakarwadi, Tq. Badnapur, District Jalna who is residing in Milindnagar, Osmanpura, Peer Bazar at Aurangabad since long. Deceased was married to one Balu Gajile of Nipani about 6 years back. She begot a son from said Balu. Said Balu married another woman and deceased continued to live with her mother. Deceased married to accused No. 1 Dadarao about five months before the incident and accused Nos. 2 and 3 are respectively father and mother of accused No.1. All the accused were residing jointly in the house in their agriculture land at village Waregaon. Accused were doing the business brick kiln at the time of incident.

(B) While the deceased was cohabiting with the accused No.1 and residing in the joint family of the accused on 17/11/2007 at about 6.00 a.m. in the above said house of accused she sustained 86% burn injuries. One Sominath Ramchandra Shejwal (husband of the defence witness No.1 Meena) and accused No. 3 immediately admitted the deceased in injured condition in the Ghati hospital at Aurangabad in the ward No. 22/23 of the burnt patients. The information of admitting the deceased in the injured condition in the hospital was given to the Police station, Phulambri, District Aurangabad on the same day i.e. on 17/11/2007 at 8.15 p.m. and accordingly MLC No. 42 of 2007 was registered. Then Police Inspector Alsatwar (PW-8) of the said Police Station directed API Bagul (PW-10) to visit the spot of incident and to prepare panchanama. Accordingly API Bagul visited the spot of incident i.e. house of the accused and prepared panchanama of spot with map as per Exhibit 75 and some articles like burnt pieces of clothes, match stick and drops of kerosene etc. were

seized from the spot of incident under the same panchnama. So also, stick was seized from the house of accused. The PI Alsatwar also directed PHC Pise (PW-3) to record dying declaration of the deceased who was admitted in the hospital and gave letter Exhibit 37 in this respect to Medical Officer, Ghati Hospital, Aurangabad on 17/11/2007.

(C) On the same day i.e. on 17/11/2007 PHC Pise (PW-3) went to Ghati hospital with letter Exhibit 37 addressed to the Medical Officer of the said hospital, informing the Medical Officer that he has to record statement of deceased and requested the Medical Officer to examine the deceased who was admitted in injured condition and to state whether she was in a position to give statement. Thereupon Bhushan Ubhale (PW-9) who was attached to Ghati hospital as a Medical Officer examined the deceased and made necessary endorsement on letter Exhibit 37. Thereupon, PHC Pise recorded dying declaration Exhibit 38 after 1.45 p.m. on 17/11/2007 stating that the deceased performed Gandharva marriage

prior to one and half months of the incident with the accused No. 1 and since the marriage all the accused were harassing her and saying her to bring Rs.10,000/- from her parents for brick kiln. Thereupon the deceased was saying them that her parents are poor and from where they would bring such amount and she was convincing them. But all the accused were harassing her by assaulting her. When she was going to her parents at the time of festival she used to tell them about said harassment to her by the accused. But her parents were sending her to her in-laws house after convincing her. It is stated that on 16/11/2007 in the night all the accused beat her by fist and kick blows and stick saying her that she did not bring money for brick kiln. On 17/11/2007 at about 6.00 a.m. her father-in-law and mother-in-law caught hold her and her husband poured kerosene on her person and set her on fire by lighting the match stick and thus attempted to commit her murder. It is stated that she sustained burns to her hands, stomach and face and her entire body is burnt. It is

stated that her mother-in-law and one Sominath Shejwal have admitted her in the hospital and that action be taken against all the accused. The said dying declaration Exhibit 38 was sent to Police Station, Phulambri and crime No. 148 of 2007 was registered on 17/11/2007 against the accused for the offences punishable under Sections 307, 498-A and 323 read with Section 34 of the IPC and the PHC Pise gave letter Exhibit 39 to Tahasildar, Aurangabad to record dying declaration of the deceased.

(D) After receiving the letter Exhibit 39 Tahasildar, Aurangabad asked Naib Tahasildar Nikam (PW-4) from Phulambri to record dying declaration of the deceased. Naib Tahasildar Nikam accordingly went to Ghati hospital, Aurangabad at about 4.00 p.m. on 17/11/2007 and no doctor was present. He recorded dying declaration Exhibit 43 of the deceased between 4.25 p.m. to 5.20 p.m. stating that she performed second Gandharva marriage with accused No.1 in the fifth month. She had no menstruation and therefore, her husband suspected

her. All the accused said her to bring Rs. 10,000/- from her parental house, she said that her parents could not give that amount as they are doing soil work. Therefore, they started harassing her. On 16/11/2007 she was assaulted in the night. On 17/11/2007 in the morning her mother-in-law and father-in-law caught hold her hands and legs and her husband poured kerosene on her person and then lighted the match stick and therefore, she sustained burns. She made shouts as she was burnt, but nobody came to her help as their house is isolated. However one Sominath who was labour on brick kiln poured water on her person and her mother-in-law admitted her in Ghati hospital at about 8.00 a.m.

(E) While the deceased was admitted in Ghati hospital on 17/11/2007 her brother Charandas (PW-1), her sister Tulsabai Gautam Shejwal (PW-2) and Gautam Sampat Shejwal (PW-5) husband of PW-2 went in the Ghati hospital after knowing that the deceased suffered burns and that she is admitted in the hospital, they met her and the deceased disclosed to them about involvement of

the accused in sustaining burns to her as alleged by the prosecution. Their statements were recorded during investigation by PI Alsatwar (PW-8). While the deceased was taking treatment in the hospital she scummed to injuries on 23/11/2007 in the night. Accordingly, PI Alsatwar prepared inquest panchanama. After her death offence under Section 302 of the IPC was added in the crime registered against the accused. All accused were arrested on 17/11/2007 immediately after the crime was registered against them and they were released on bail. The investigating officer recorded statements of other witnesses. He also sent articles seized from the spot of incident to the Chemical Analyzer and collected report of the Chemical Analyzer. After completion of the investigation charge-sheet was submitted in the Court of JMFC, Phulambri, who committed the case to the Sessions Court at Aurangabad for trial.

(F) The learned Additional Sessions Judge, Aurangabad framed charge against the accused for the offences punishable under Section 302 and 498-A read

with Section 34 of the IPC. Accused pleaded not guilty to the charge and claimed to be tried. Their defence is that death of the deceased is accidental. The prosecution has examined in all 10 witnesses. Accused have examined one witness Meena Shejul (DW-1) in defence. After considering the evidence adduced by the prosecution and the defence the learned Sessions Judge held all the accused guilty for the offences punishable under Sections 302 and 498-A read with Section 34 of the IPC and accordingly sentenced them for the said offences as said earlier by the impugned judgment and order and therefore this appeal.

(G) Accused No. 1 is in jail and accused No. 3 and deceased accused No. 2 were released on bail.

4. Mr. Kulkarni, learned advocate for the appellants/accused Nos. 1 and 3 submitted that to support the conviction of the accused the prosecution has relied upon two written dying declarations i.e. Exhibit 38 recorded by PHC Pise (PW-3) in presence of

the Medical Officer Bhushan Ubhale (PW-9) on 17/11/2007 and Exhibit 43 recorded by Naib Tahasildar Subhash Nikam (PW-4) on the same day between 4.25 p.m. to 5.20 p.m. There was no endorsement on both the dying declarations that the deceased was in a fit state of mind to make the statement at the time of recording both the dying declarations. Admittedly Exhibit 43 dying declaration was not recorded in presence of any doctor. Therefore, according to learned advocate when both these dying declarations were recorded the deceased was not in a position to make statement due to 86% burns suffered by her as admitted by Dr. Sharad Kuchewar (PW-7) and 90% burns as stated by Medical officer Bhushan Ubhale (PW-9). Therefore, according to learned advocate both the written dying declarations are not voluntary and trustworthy.

5. Mr. Kulkarni, learned advocate for the accused further submitted that both PWs-3 and 4 have not stated about the contents of dying declarations Exhibits 38 and 43 respectively recorded by them and they have simply

stated that the contents of respective dying declarations are correct. Therefore, according to learned advocate when the contents of both the dying declarations are not proved, both the dying declarations cannot be considered. To support this submission learned advocate has relied upon decision of this Court in *Deorao s/o Sonbaji Bhalerao and another Vs. State of Maharashtra, 2008(4), Mh.L.J. (Cri.)474*, in the said case as observed in paragraph No. 7 following two questions arose for determination and they are as under:

"(i) Whether presumption under section 80 of Indian Evidence Act can be drawn in respect of a dying declaration recorded by a Magistrate *without proof* as to the cause of death of the dying person or as to in all the circumstances of the transaction which resulted in his death and particularly in respect of the name or description of/and act of the accused/offender in committing the offence of murder?

(ii) Whether it is necessary for the Magistrate who recorded the dying declaration to depose before the trial Court about the name and act of the accused which resulted into the murder, in the words spoken up by the dying man?"

. In paragraph No. 22 of the said decision it was observed as under:

"22. Having gone through the evidence on record, we find that the prosecution has relied upon only one piece of evidence to prove the charge against the appellants and the same is dying declaration (Exh.23) of deceased Sunita Bhanse. There is no other evidence relied on by the prosecution in support of its case. Insofar the dying declaration (Exh.23) is concerned, the same was recorded by Wasudeo Mahore (P.W.4)- the Special Judicial Magistrate on 6-7-2001. In his substantive evidence before the Court, Wasudeo (P.W.4) deposed that after getting deceased Sunita examined from the medical officer he was satisfied that she was physically and mentally fit to give the statement, he recorded her dying declaration. Thereafter he read over the said dying declaration to the patient who admitted the same to be correctly written as per her say. Accordingly he made an endorsement and again requested the medical officer to examine the patient about her mental and physical condition. It is noteworthy that in his substantive evidence before the Court he did not depose a single word as to who were the offenders who had poured kerosene on her person and set her on fire and in what manner. The witness is blissfully silent about the same and the prosecution preferred to rely upon the document of dying declaration which was exhibited. We have held by answering both the questions in this judgment, that the document of

dying declaration cannot be presumed to be correct under section 80 of Evidence Act, unless proved according to law. This is particularly so because no presumption under section 80 is available in respect of the dying declaration. Since Wasudeo (P.W.4) did not depose a word about the name and the role of the appellants as told to him by the deceased Sunita, in view of the statement of law recorded by us in the foregoing part of the judgment, we hold that the prosecution failed to prove its case and did not discharge the initial burden of proof required to be discharged in a criminal case. For this reason therefore we reject the sole piece of evidence in the form of dying declaration (Ex.23) relied upon by the prosecution. There is no other evidence and consequently the finding of the trial Court about conviction on the basis of dying declaration will have to be reversed. Thus Criminal Appeal No. 103/03 will have to be allowed."

. The above said decision dated 30/06/2008 was challenged before the Apex Court in Criminal Appeal No. (s) 126 of 2011 and said appeal was dismissed on 01/09/2015.

6. Mr. Kulkarni, learned advocate for the accused further submitted that there is no endorsement on dying declaration Exhibit 43 that the said dying declaration

was read over to the deceased by PW-4 and that she admitted the same to be correct and therefore, according to learned advocate the said dying declaration cannot be said to be voluntary statement of the deceased. To support said submission the learned advocate has relied upon decision of this Court in the case of ***Manohar Dadarao Landge Vs. State of Maharashtra, 2002(2) Mh.L.J. 3***, wherein it was held that prosecution has to bring on record that the deceased had heard the statement recorded by the Executive Magistrate and she admitted it to be correct. This is not a mere formality but an essential part while recording the dying declaration. Learned advocate has also relied upon decision of full bench of this Court in ***Ganpat Bakaramji Lad Vs. State of Maharashtra, 2018(2) Mh.L.J.(Cri.) (F.B.)148***, wherein it was held that requirement of reading over contents of dying declaration to declarant is not mandatory. A dying declaration cannot be rejected merely because same is not read over to declarant who admitted that same has been correctly recorded. However, it can be one of the

factors if it assumes significance in facts and circumstances of case.

7. Mr. Kulkarni, learned advocate for the accused submitted that the contents of both written dying declarations Exhibit 38 and 43 were not put to the accused in their statements under Section 313 of the Criminal Procedure Code and therefore, as the incriminating material/circumstances in both the written dying declarations were not put to the accused in the examination under Section 313 of Criminal Procedure Code a serious prejudice has been caused to the accused and no opportunity was given to them to explain the incriminating circumstances appearing against them in these two written dying declarations and hence both the dying declarations cannot be taken into consideration to convict the accused. To support this submission the learned advocate has relied upon the decision of this court in *Kamalabai Haribhau Lastane Vs. State of Maharashtra, 2019(5)Mh.L.J. (Cri.)360* and the decision of the Apex Court in the case of *Raj Kumar Singh alias*

Raju Alias Batya Vs. State of Rajasthan, AIR 2013 Supreme Court 3150 wherein it was held that the circumstances which are not put to the accused in his examination under Section 313 of the Criminal Procedure Code cannot be used against him and have to be excluded from consideration. Further relying upon decision full bench of this Court in the case of ***Ramesh s/o Gyanoba Kamble Vs. The State of Maharashtra, 2011 ALL MR (Cri) 3536 (F.B.)*** the learned advocate submitted that if the accused succeeds in showing prejudice caused to him due to omission to put any particular circumstances to accused under Section 313, the appellate Court can afford an opportunity to the prosecution to make up the lapse and avoid miscarriage of justice.

8. Mr. Kulkarni, learned advocate for the accused submitted that dying declarations Exhibit 38 and 43 are not consistent. Therefore, in all the above circumstances they are not voluntary statements of the deceased and they are not truthful and therefore they

cannot be considered to convict the accused and they have to be excluded from consideration.

9. Mr. Kulkarni, learned advocate submitted that allegedly while the deceased was admitted in injured condition in the Ghati hospital on 17/11/2007 she made oral dying declarations to her brother (PW-1), her sister (PW-2) and PW-5 her brother-in-law and husband of PW-2 regarding involvement of all the accused. According to learned advocate there is no material to show that when the deceased made oral dying declaration to these witnesses and there is no material to show that at the relevant time deceased was in a fit state of mind to make statement to these witnesses. Therefore and as there is no consistency in the evidence of these three witnesses regarding oral dying declaration made to them by the deceased, according to learned advocate the evidence of these interested witnesses is not believable and therefore, oral dying declarations made to these three witnesses who are close relatives of the deceased cannot be made basis to convict the accused when there

is no evidence to show presence of the accused at the spot of incident and when the prosecution has not examined Sominath Shejwal who had put off the fire of deceased by pouring water on her person and admitted her in the hospital. It is submitted that the accused have brought on record the possibility of accidental death of the deceased through the evidence of DW-1 Meena who is wife of Sominath Shejwal. Thus, according to learned advocate the evidence adduced by the prosecution in the form of written dying declarations, oral dying declarations and the circumstantial evidence is not sufficient to hold that the prosecution has proved offences under Section 498-A and 302 read with Section 34 of the IPC against the accused and particularly accused Nos. 1 and 3, as the appeal is abated against accused No. 2. Thus, learned advocate has prayed to set aside the impugned conviction and sentence recorded against the appellants/accused Nos. 1 and 3 by allowing the appeal.

10. Mrs. Choudhary, learned APP, on the other hand submitted that prosecution case is based on two written dying declarations Exhibits 38 and 43 and oral dying declarations made to PWs-1, 2 and 5 and there is no reason to reject written as well as oral dying declarations. The evidence of witnesses who recorded dying declarations and to whom oral dying declarations were made is sufficient to show that the deceased was conscious when she made dying declarations and therefore, merely because there is no certificate of doctor about the consciousness of deceased the dying declarations Exhibit 43 cannot be rejected, this submission was made relying upon the decision in the case of *Laxman Vs. State of Maharashtra, 2002 AIR (SC) 2973*. It is submitted that as regards dying declaration Exhibit 38 there is endorsement of the doctor about condition of the deceased and that endorsement was made on letter Exhibit 37 given to Medical officer by the Police to record dying declaration. Relying upon the decision in the case of *Muthu Kutty Vs. State by*

Inspector of Police, Tamil Nadu, 2005 AIR(SC) 1473,
learned APP submitted that there is no material to show that dying declarations are result of product of imagination, tutoring or prompting.

11. Learned APP further submitted that question Nos. 14, 15, 24, 25, 26, 39, 40, 41 were put to the accused about oral dying declarations made to PWs 1, 2 and 5, question Nos.43 to 48 about written dying declaration Exhibit 38 and question Nos. 57 to 62 regarding dying declaration Exhibit 43 were put to the accused at the time of their examination under Section 313 of the Criminal Procedure Code and therefore, no prejudice has been caused to the accused as submitted by the learned advocate appearing for the accused. It is submitted that therefore, decisions relied upon by the learned advocate appearing for the accused are not applicable to the present case. Learned APP thus submitting that conviction and sentence recorded against the accused is proper claimed to dismiss the appeal.

12. We have carefully considered the submissions made by the learned advocate appearing for the appellants/accused and learned APP for the respondent/State. With their assistance we have perused the evidence adduced by the prosecution and the accused and we have gone through the impugned judgment and order.

13. There is no dispute that the deceased Vandana performed Gandharva marriage with accused No.1 five months before the incident on 17/11/2007 and on the said date at 6.00 a.m. in the house of accused she sustained 86% burn injuries. Thereafter, Sominath Shejwal and accused No. 3 admitted her in Ghati hospital at Aurangabad at about 8.15 a.m. and while taking treatment she succumbed to injuries on 23/11/007 at 14.45 hours in the hospital. As per evidence of Dr. Sharad Kuchewar (PW-7) who conducted postmortem examination and issued postmortem report Exhibit 63 cause of the death of the deceased was, "Septicemic Shock due to Burns". Thus, it

is clear that death of the deceased is not natural. Therefore, looking to the defence of the accused and case of the prosecution it is to be seen whether death of the deceased is homicidal, suicidal or accidental and if the death of the deceased is homicidal whether the accused are responsible for causing burns to the deceased and to her death.

14. For proving that death of the deceased is homicidal, the accused are responsible to cause burns to her and responsible to her death the prosecution has relied upon the following circumstances/ evidence:

(i) Written dying declaration Exhibit 38 recorded by PHC Pise (PW-3) in presence of Medical Officer Bhushan Ubhale (PW-9).

(ii) Written dying declaration Exhibit 43 recorded by Naib Tahasildar- Subhash Nikam (PW-4).

(iii) Oral dying declarations made by deceased to PWs 1, 2 and 5 and,

(iv) Spot of panchanama Exhibit 75 and Chemical Analyzer's report Exhibit 68.

15. The first dying declaration Exhibit 38 was recorded by PHC Pise (PW-3) who was attached to Phulambri Police Station, in presence of Bhushan Ubhale (PW-9), on 17/11/2007 after 12 noon. According to PHC Pise on the said date MLC report about deceased Vandana was received in police station. Entry of that report was taken and he was asked to enquire into that matter. He stated that he went to Ghati Hospital at Aurangabad on that day and gave letter Exhibit 37 to the Medical Officer to opine whether injured Vandana was in a position to give statement. The Medical Officer examined her and gave endorsement on Exhibit 37-letter that she was in a fit condition to give statement. Thereafter, he also enquired with her and she was able to speak. Further he deposed that he asked her as to how she got

burnt. She gave the details of the incident in which she was burnt. He reduced the same into writing. He read over the contents thereof to her. She admitted the contents of that statement, he then obtained her right hand thumb mark on the said statement Exhibit 38. In the cross-examination he denied that Vandana was not in a position to speak as she was given medicines through IV. He also denied that Medical Officer gave endorsement about condition of deceased on letter Exhibit 37 in his cabin without examining the deceased. Further he denied that he prepared dying declaration/statement Exhibit 38 as per narration of sister of deceased and that he is deposing false.

16. Bhushan Ubhale (PW-9) in whose presence dying declaration Exhibit 38 was allegedly recorded has stated that PHC Pise (PW-3) had given him letter Exhibit 37 while he was attached to Ghati Hospital as a Medical Officer on 17/11/2007. He went to burnt patient Vandana at 1.15 to 1.45 p.m. He checked pulse, blood pressure

and consciousness level of burnt patient Vandana and found that she was in a fit state of mind to give statement and accordingly he gave endorsement Exhibit 73 on letter Exhibit 37 addressed to the Medical Officer of the hospital. He also stated that he was present till the completion of recording of statement of Vandana. In the cross-examination he has denied that deceased Vandana was not in a fit state of mind to give statement as she had 90% burns and that he is deposing false. He admitted that there is no endorsement on dying declaration Exhibit 38 that he was present at the time of recording the said dying declaration. Thus, nothing is found in favour of the accused in the cross-examination of Medical Officer Bhushan Ubhale.

17. On the basis of evidence of PHC Pise (PW 3) and Bhushan Ubhale (PW 9) an inference can be drawn that when PHC Pise recorded dying declaration Exhibit 38 deceased was in a position to make statement. This fact is also clear from Exhibit 73 endorsement made on Exhibit 37 letter addressed to the Medical Officer,

Ghati Hospital. Of course, there is no endorsement made on dying declaration Exhibit 38 that deceased Vananda was in a fit state of mind to give statement, but when such endorsement is made on letter Exhibit 37 and when both Pws-3 and 9 have stated that the deceased was in a fit state of mind to make statement at the time of dying declaration Exhibit 38 mere absence of endorsement on dying declaration Exhibit 38 of the Medical Officer about the condition of the deceased is not sufficient to state that she was not in a fit condition to make statement.

18. The second dying declaration is Exhibit 43 recorded by Naib Tahasildar Subhash Nikam (PW-4) on 17/11/2007 between 4.25 p.m. to 5.20 p.m. He has stated that on 17/11/2007 he was working as a Naib Tahasildar in Tahasil office of Phulambri. Police had given letter Exhibit 42 to the Tahasildar, Phulambri on 17/11/2007 to record dying declaration of deceased who was admitted in Ghati Hospital at Aurangabad. After receiving said

letter he went to said government hospital on the same day at about 4.00 p.m. and went to the ward of burnt patient where deceased Vandana was admitted. The doctor was not present there. He waited for doctor for about 10 to 15 minutes, however doctor did not come. He asked questions to deceased Vandana with reference to her name and address. She gave answers to those questions. He ensured himself that she was in a condition to give statement. Then he asked her how she was burnt and she gave details of incident in which she was burnt. He reduced that narration into writing. He read over contents thereof to her. She admitted correctness thereof. He obtained her right hand thumb impression on the statement and he also counter signed the said statement. Said statement/dying declaration Exhibit 43 is as per her narration. In the cross-examination though he has stated that 3 to 4 relatives of deceased were in the hospital and near the deceased, he has denied that said relatives and the nurses were present when he recorded dying declaration Exhibit 43. He stated that

deceased Vandana was extensionally burnt, but denied that she was not in a position to speak. He also denied that he prepared dying declaration Exhibit 43 as per the narration of relatives of deceased and that he is deposing false.

19. There appears no dispute that dying declaration Exhibit 43 as per the case of the prosecution was recorded between 4.25 p.m. to 5.20 p.m. on 17/11/2007. From the above referred evidence of PW-4 Naib Tahasildar Nikam it is clear that when he recorded dying declaration the deceased was not examined by the Medical officer to know about the condition of the deceased to make statement. According to Naib Tahasildar Nikam to ensure that deceased was in a condition to give statement. He asked some questions to deceased with reference to her name and address and she answered to those questions. But he has not stated about the exact questions asked by him to the deceased and about the answers given by the deceased to those questions. In

fact, he should have stated about all those questions and the answers given by the deceased. There is no dispute that the deceased sustained 86% burns in the morning on 17/11/2007 at about 6.00 a.m. at the house of accused and then she was admitted in the Ghati Hospital at Aurangabad which is about 25 k.m. from Phulambri. Considering the percentage and nature of burns sustained by the deceased in the morning on 17/11/2007 and the fact that the second dying declaration was recorded between 4.25 to 5.20 p.m. on that day it was necessary for Naib Tahasildar Nikam to seek opinion of doctor about the condition of the deceased at the time of recording said dying declaration. So also, the prosecution should have produced on record the case papers showing the nature of treatment which was being given to the deceased on that day and her condition at the time of recording second dying declaration, but the prosecution has not produced case papers about the treatment of the deceased. It is true that as referred earlier Naib Tahasildar Nikam asked some questions to

ensure that the deceased was in a condition to give statement, but as mentioned earlier he has not stated about the questions asked to her and the answers given by her. Therefore, when he has not specifically stated the basis on which he was satisfied that the deceased was in a condition to give statement, his evidence referred to above is not sufficient to state that the deceased was in a condition to give statement at the time of recording second dying declaration. Another reason to arrive at this conclusion is that the Medical Officer Bhushan Ubhale has admitted in the cross-examination that vital parts of the body of burnt patient Vandana were burnt. The process of blood poisoning may start within five minutes or within one hour once the patient sustained 90% burn injuries. So also, he stated that blood poisoning may start within one hour in case of 90% burns and normal understanding of 90% burnt patient may disappear. So also, he has stated that within 1 or 2 hours mental condition of 90% burnt patient may change. For the above reasons we are

of the opinion that it is doubtful whether the deceased who sustained 86% burn injuries was in a position to make statement at the time of recording second dying declaration after 10 hours of the incident of sustaining burns on 17/11/2007.

20. Now it is to be seen whether the prosecution has proved the contents of written dying declarations Exhibits 38 and 43 and that these dying declarations are voluntary, truthful and reliable. As referred earlier PHC Pise (PW-3) who recorded dying declaration Exhibit 38 and Naib Tahasildar Nikam (PW-4) who recorded dying declaration Exhibit 43 have simply stated that the deceased had given the details of incident in which she was burnt and they had reduced those details into writing. They have further stated that these dying declarations were read over to the deceased and she admitted that the contents thereof were correct. But both PWs-3 and 4 have not stated about the contents of dying declarations Exhibits 38 and 43 respectively recorded by them. In fact, they should have stated about

the contents of respective dying declarations recorded by them. In the case of *Deorao s/o Sonbaji Bhalerao and another (Supra)*, the Division Bench of this Court has held that mere production of dying declaration and the statement that its contents are correct, would not prove dying declaration and the witness who has recorded the dying declaration has to depose as to the contents of dying declaration. Admittedly this has not been done in the present case. Therefore, both the dying declarations Exhibits 38 and 43 have not been proved in accordance with the law laid down by this Court in *Deorao's* case (Supra) which decision has been confirmed by the Hon'ble Apex Court as per order dated 01/09/2015 in Criminal Appeal No(s). 126/2011 as the appeal against decision in Deorao's case was dismissed, and therefore, dying declarations Exhibits 38 and 43 have to be excluded from consideration.

21. Another aspect to be considered is that as referred earlier Mr.Kulkarni, learned advocate appearing for the accused has submitted that the contents of the

dying declarations Exhibits 38 and 43 were not put to the accused in their statements under Section 313 of the Criminal Procedure Code to seek explanation of the accused about the circumstances appearing in the dying declarations against the accused and therefore also both these dying declarations cannot be made basis to convict the accused. On perusal of the statements under Section 313 of the Criminal Procedure Code of all the accused it appears that question Nos. 46, 47 and 48 who were asked to the accused on the dying declaration Exhibit 38 recorded by PHC Pise (PW-3) and question No. 62 was asked to the accused on dying declaration Exhibit 43 recorded by Naib Tahasildar Nikam (PW-4). So also, question No. 79 was asked to the accused on the evidence of PW-8 PI Alsatwar on dying declaration Exhibit 43. The question Nos. 46, 47, 48, 62 and 79 with answers are as under:-

"Q.46 It has further come in his evidence that he made inquiry with Vandana and she was able to speak and he recorded statement of Vandana. What you have to say about it?

Ans. It is false.

Q.47 It has further come in his evidence that he asked Vandana about burn injuries and she gave details of incident as to how she sustained burn injuries. What you have to say about it?

Ans. It is false.

Q.48 It has further come in his evidence that he reduced the said information of Vandana into writing and thereafter read over the contents thereof to Vandana and she admitted correctness of the said statement and thereafter he obtained her right hand thumb mark on the said statement and also put his own signature on the said statement and said statement is at Exh. 38 and contents of the said statement are true and correct as stated by Vandana. What you have to say about it?

Ans. It is false.

Q.62 It has further come in his evidence that he asked Vandana as to how she sustained burn injuries and she gave details of the incident in which she sustained burn injuries and said information was reduced into writing and it was read over to Vandana and she admitted correctness thereof and thereafter he obtained right hand thumb mark of Vandana on the said statement and also his own signature and the said statement is at Exh. 43 and it was recorded correctly as per the say of Vandana. What you have to say about it?

Ans. It is false.

Q.79 It has further come in his evidence that Executive Magistrate recorded statement of Vandana and it is at Exh. 43. What you have to say about it?

Ans. It is false."

22. From the perusal of the above referred question Nos. 46, 47, 48, 62 and 79 and answers given by the accused to the said questions it is clear that the accused have stated that the dying declarations Exhibits 38 and 43 are false. So also, accused have denied that dying declarations were recorded by PWs-3 and 4. Thus, it is clear from question Nos. 48 and 62 referred to above that contents of dying declarations Exhibits 38 and 43 were not specifically put to the accused in the statement under Section 313 of the Criminal Procedure Code and as such no opportunity was given to the accused to explain the circumstances appearing against them in both these dying declarations. However, the learned Sessions Judge has used the contents of both the dying declarations Exhibits 38 and 43 against the accused for holding the accused guilty for the offences alleged

against them as observed in paragraph Nos. 21, 22, 23 and 24 of the judgment. But when the contents of dying declarations Exhibits 38 and 43 and the circumstances appearing in the said dying declarations against the accused were not put to them to give explanation both these dying declarations cannot be taken into consideration in view of the law laid down by the Apex Court in the case of ***Raj Kumar Singh alias Raju Alias Batya*** (Supra). Therefore, we hold that both the dying declarations cannot be used against the accused and they have to be excluded from consideration. As a result, we hold that the prosecution has not proved that both the dying declarations are voluntary, reliable and trustworthy statements of the deceased. Therefore, the dying declarations Exhibits 38 and 43 are of no help to the prosecution to connect the accused with the offences alleged against them.

23. Now coming to the oral dying declarations, allegedly made by the deceased to PW-1, PW-2 and PW-5, the evidence of Charandas Baburao Misal (PW-1) brother

of the deceased about oral dying declaration is that on the day of incident he was on his work at Chhawani, Aurangabad. He was informed at about 9.00 a.m. by a boy from their lane that deceased got burnt. Therefore, he went to Ghati Hospital at Aurangabad. He reached in the burns ward at about 10.00 a.m. He saw that Vandana had got burnt. He asked her how she got burnt. She informed him that accused Nos. 2 and 3 tied her hands and legs, while accused No.1 poured kerosene on her person and set her on fire. Vandana was pregnant at that time. She also informed that accused No. 1 was denying that she was pregnant from him as she had no menstruation. She further informed that the amount of Rs.10,000/- was demanded by the accused for brick kiln. In the cross-examination he had denied that he was not allowed to go inside the burns ward after he went to Ghati Hospital at 10.00 a.m. He also denied that deceased Vandana was not in a position to talk at all. He denied that deceased Vandana did not at all inform him that on the day of incident accused Nos. 2 and 3 tied her hands and legs

and accused No.1 poured kerosene on her person and set her on fire. So also, he denied that Vandana did not tell him that the accused were demanding Rs.10,000/- and that accused No. 1 was denying the paternity of the featus in her womb. So also, he deposed that, he stated before police that deceased had told him that accused Nos. 2 and 3 tied her hands and legs and that she was pregnant on the day of incident and accused No. 1 denied said pregnancy from him. These omissions in his statement before police have been proved by PW-8 PI Alsatwar the Investigating Officer. Therefore, these omissions being material omissions in the statement before police of PW-1 and as PW-1 is brother of the deceased his evidence that the deceased informed him that accused Nos. 2 and 3 tied her hands and legs, the deceased told him that she was pregnant at the time of incident and accused No. 1 denied that said pregnancy from him is not believable and therefore, it is doubtful whether accused Nos. 2 and 3 were really involved in the incident and they had played role as deposed by this

witness in causing burns to the deceased. However, considering the evidence of PW-1 that he went to hospital at 10.00 a.m. and denial of the suggestion by him that the deceased was not in a position to talk at all an inference can be drawn on the basis of evidence of PW-1 that the deceased was in a position to talk when he met her and she disclosed to him in the hospital that accused No. 1 poured kerosene on her person and set her on fire.

24. The second witness to whom oral dying declaration was made by the deceased is Tulsabai Gautam Shejwal (PW-2) married sister of the deceased. Her evidence on oral dying declaration is that after about 3 days of the departure of Vandana from her house, her brother-in-law informed on phone that Vandana was admitted in Ghati hospital at Aurangabad. She therefore went to Ghati hospital at Aurangabad. Vandana was admitted there. She had sustained burns. On being asked by her Vandana told that accused Nos. 2 and 3 caught hold of her hands and legs, while accused No. 1 poured

kerosene on her person and set her on fire. According to her Vandana informed that accused were taking suspicion against her. In the cross-examination she denied she was not allowed to go to meet Vandana in the ward in which she was admitted. She denied that the deceased Vandana was not in a position to talk. She admitted that it was not possible to understand as to what she was talking. She has denied that Vandana did not tell her that accused Nos. 2 and 3 caught hold of her hands and legs, while accused No. 1 poured kerosene on her person and set her on fire. She denied that deceased Vandana caught fire accidentally when she was cooking and that she is deposing false to harass the accused on the say of her brother. This witness has not specifically stated as to when she went to Ghati hospital i.e. either in the morning or in the evening. It has come in the evidence of PW-1 brother of this witness that this witness (PW-2) and her husband (PW-5) had come to the Ghati hospital on the day of incident in the evening. Thus, it appears that this witness went to Ghati hospital in the evening.

As observed earlier she denied that deceased Vandana was not in a position to talk. However, she admitted that it was not possible to understand as to what she was talking. As mentioned earlier case papers regarding treatment of the deceased on 17/11/2007 and showing her condition in the evening are not produced by prosecution. In fact, the said papers were required to be produced by the prosecution to show that the deceased was in a position to talk. In the absence of said papers when this witness (PW-2) had admitted that it was not possible to understand as to what she (deceased) was talking, shows that the deceased was not in a position to talk. So also, as referred earlier it has come in the evidence of PW-4 Naib Tahasildar who recorded dying declaration Exhibit 43 on 17/11/2007 between 4.25 to 5.20 p.m. that there was no doctor in the hospital. Therefore and when PW-2 has not specifically stated that deceased was in a condition to speak and stated that it was difficult to understand what deceased was talking it is doubtful whether deceased was in a position to make

statement to this witness. Therefore, and as there is inconsistency in the evidence of oral dying declaration made to this witness and her brother (PW-1) as regards the role played by accused Nos. 2 and 3 because PW-1 states that deceased had informed him that accused Nos. 2 and 3 tied her hands and legs whereas this witness says that accused Nos. 2 and 3 had caught hold her hands and legs the evidence of this witness is not sufficient to infer that really deceased made oral dying declaration to this witness about the role played by the accused referred to above.

25. The next oral dying declaration was made to PW-5 Gautam Shejwal husband of PW-2. According to him deceased was his sister-in-law. As regards the oral dying declaration in paragraph No. 3 of his deposition he deposed that the mother of deceased Vandana, his father, his wife and he went to Ghati hospital, Aurangabad to see Vandana. She was admitted in the burns ward. On being asked by them, Vandana informed them that accused Nos. 2 and 3 caught hold of her person while

accused No.1 set her on fire. She further informed that the accused were raising suspicion against her as she did not get menstruation. In the cross-examination he has denied that deceased Vanadna did not inform them that she was caught hold by accused Nos. 2 and 3 and was set on fire by accused No.1 and further denied that she did not inform them that the accused were raising suspicion against her as she had no menstruation. He denied that he is deposing false on the say of PW-1. He has denied that deceased Vandana was not able to speak due to burn injuries. As referred earlier PW-2 wife of this witness with whom this witness had gone in the Civil Hospital admitted that it was not possible to understand as to what she (deceased) was talking. So also, as observed earlier this witness and his wife had gone together in the evening on 17/11/2007. When there was no doctor as deposed by PW-4 Naib Tahasildar and when admittedly no papers regarding treatment of the deceased at the relevant time are produced and when the evidence of this witness regarding role attributed to

accused Nos. 2 and 3 is not consistent with the evidence of PWs-1 and 2 and when he has not stated consistently with the evidence of PWs-1 and 2 that the deceased told him that the accused No.1 poured kerosene and then set her on fire his evidence about oral dying declaration made to him by the deceased is not sufficient to state that really at the relevant time deceased was in a position to make statement and she disclosed to him that accused Nos. 2 and 3 caught hold the deceased and accused No. 1 set her on fire.

26. In paragraph Nos. 18 and 19 of the judgment learned Sessions Judge has referred oral dying declarations made by the deceased to PWs-1, 2 and 5. It has referred the inconsistencies referred earlier between the oral dying declarations made to PWs-1, 2 and 5. So also, the learned Sessions Judge has referred omissions the statement before police of PWs 1, 2 and 5. But according to learned Sessions Judge due to said inconsistencies at the most it can be said that the above witnesses have deposed for the first time before

the Court about the omissions and their evidence cannot be totally discarded and disbelieved only for the reasons that they have deposed in the Court some facts which they did not state to the police. The learned Sessions Judge further observed that they are the most natural witnesses who reached in the hospital at the earliest and immediately after incident and thus the involvement of all the accused in pouring kerosene and setting deceased on fire who was disclosed by deceased to near relatives PWs 1, 2 and 5. The learned Sessions Judge has not considered the aspect as to when the deceased made oral dying declarations to these witnesses and whether the deceased was in a fit condition to make statement them, and in fact the said aspect was required to be considered. It appears that PW-1 brother of the deceased went in the hospital in the morning at about 10 a.m. and PWs 2 and 5 went in the hospital in the evening to meet the deceased and as referred earlier PW-2 admitted in her cross-examination that it was not possible to understand as to what she (deceased) was

talking. Another aspect to be noted is that the learned Sessions Judge has not considered the aspect that PWs 1,2 and 5 being close relatives of the deceased are interested witnesses and therefore their evidence needs to be closely scrutinized and further he has not considered the inconsistencies noted earlier in their evidence particularly that PW-1 stated that the deceased disclosed to them that accused Nos. 2 and 3 tied her hands and legs, PW-2 stated that deceased disclosed to her that accused Nos. 2 and 3 caught hold her hands and legs while PW-5 has stated that the deceased disclosed to him that accused Nos. 2 and 3 caught hold person of deceased and accused No. 1 set her on fire. So also, the learned Sessions Judge did not consider the aspect that PW-5 has not claimed that the deceased disclosed to him that accused No. 1 poured kerosene on her person as deposed by PWs 1 and 2. All these inconsistencies in the evidence of PWs 1, 2 and 5 assume importance as they are close relatives of the deceased. Therefore, on considering all these inconsistencies in their evidence

it is doubtful whether the deceased made oral dying declaration to these three witnesses implicating all the accused and that the oral dying declarations made to these witnesses are truthful and reliable. At the most as observed earlier oral dying declaration made by the deceased to her brother PW-1 attributing role to accused No. 1 that he poured kerosene on her person and set her on fire is believable.

27. Now coming to the circumstantial evidence, as regards the spot panchnama Exhibit 75 PW-10 API Bagul has proved this panchanama. As per his evidence the house of the accused consists of four rooms, ota and chapper. Chapper is admeasuring $26\frac{1}{2}$ x 8', one of the rooms is admeasuring 13 x 14', two rooms are admeasuring 13 x 9' each and they are adjacent to each other. Seen of offence is inside the chapper which is to the southern side. His evidence further shows that there are two rooms between chapper and western side room. There were two fire places (chool) in the said chapper. He

also admitted that plastic can was in the western side first room of the farm house. It has come in his evidence that they found kerosene spots in the eastern side room. Exhibit 75 spot panchnama with map shows the situation and location of house of the accused, ota and chapper as mentioned above and deposed by PW-10. Thus, on considering the evidence of the Investigating Officer API Bagul and the contents of panchnama with map Exhibit 75 it is clear that behind the four rooms of house of accused there was a chapper of size mentioned earlier and in the said chapper the incident took place. The panchnama shows that at the time of panchnama the Investigating Officer and panchas found red and pink colour designs saree in burnt condition and they were stucked to each other. So also, they found nylon saree in burnt condition in the chapper and said sarees were smelling of kerosene. They also found that faint pink colour, petticoat stucked to the said sarees. They had also seen burnt pieces of red colour blouse and broken neckless of black beads and said articles were seized

under said panchnama. All these circumstances noticed by the Investigating Officer and the panchas in the chapper show that the incident took place in the chapper and kerosene was found on the above mentioned clothes of the deceased. These circumstances thus corroborate the evidence of PW-1 that the deceased disclosed to him when she was admitted in the hospital, that on the date of incident accused No. 1 poured kerosene on her person and set her on fire.

28. The above referred clothes found on the spot of incident i.e. in the chapper where the incident took place were seized by API Bagul (PW-10) and they were sent to the Chemical Analyzer with letter Exhibit 67 to the Chemical Analyzer for analysis as deposed by PW-8 PI Alsatwar, for analysis and report. This letter Exhibit 67 shows that above referred seized burnt clothes were on the person of the complainant/deceased. Exhibit 68 report of the Chemical Analyzer shows that the Chemical Analyzer in his analysis of Exhibit 1 partially burnt

pink coloured petticoat, Exhibit 2 partially burnt reddish and pink coloured saree stucked to each other, Exhibit 3 partially burnt reddish clothes pieces stated to be of blouse, Exhibit 4 a stained cotton swab and Exhibit 5 an empty blue coloured plastic can of kerosene the tests for the detection of kerosene residues on the said five Exhibits are positive. Therefore, it can be said on the basis of report of Chemical Analyzer that kerosene residues were found on all above five Exhibits/ articles which were seized from the spot of incident i.e. chapper behind the house of the accused where the incident had taken place. The finding of the kerosene residues on clothes shows that kerosene was poured on the person of the deceased when said clothes were on her person. Thus, finding of kerosene on the said clothes corroborates dying declaration made by the deceased to PW-1 that kerosene was poured on her person and then she was set on fire by the accused No. 1.

29. As referred earlier learned advocate for the accused has submitted that the prosecution has not examined Sominath Shejwal who had come to the spot of incident immediately and put off the fire of the deceased and admitted her in the hospital and therefore, as the prosecution has suppressed evidence of said material witness the evidence adduced by the prosecution in the form of written and oral dying declarations is not believable. Exhibit 66-MLC report which was given by the hospital to the Phulambri Police Station immediately after the deceased was admitted in injured condition in the hospital on 17/11/2007 shows that Sominath Shejwal and accused No.3 mother-in-law of deceased had admitted the deceased in injured condition in the hospital. In the said MLC the deceased alleged that all the accused caused burn injuries to her by pouring kerosene on her person. So, it is not the case in the MLC that no allegation is made against the accused by deceased. Therefore, merely because the prosecution has not examined Sominath Shejwal it cannot be said that the

entire prosecution case is false or that it is not believable as argued by the learned advocate for the accused.

30. Defence of the accused is that death of the deceased is accidental. They have examined Meena Sominath Shejul. Her evidence is that since 7 years prior to the incident she and her husband were working in the brick kiln of the accused. They were residing at some distance from the house of accused. Deceased was staying at Jategaon. She had come to house of accused 6 days prior to the incident. About the incident she deposed that incident took place at 6.00 a.m. Deceased was cooking food on fire place. She caught fire and came to her. She proceeded alongwith her children to her husband. Her husband poured water on the person of deceased. They removed saree on the person of the deceased and put blanket on her person and she was brought in the hospital by auto rickshaw. She was in the hospital upto 6.00 p.m. Relatives of deceased came.

Deceased did not talk to anybody. She then went to her house at 6.00 p.m. In the cross-examination she admitted that once she came outside the house after hearing hue and cry, all the accused were present there and she further admitted that her husband took the injured in the hospital. She further admitted that father-in-law and husband of the injured had not come to the hospital with them. She denied that she deposed false as per the say of accused. There is nothing on record to show that this witness accompanied the deceased when the deceased was brought in hospital. MLC Exhibit 66 also shows that only husband of this witness and accused No. 3 mother-in-law the deceased had brought the deceased in the hospital. There is no suggestion to the witnesses examined on behalf of the prosecution that they had seen this witness in the hospital on 17/11/2007 with the deceased. As observed earlier kerosene residues were found on the burnt clothes of the deceased. So also, this witness was not in the house or chapper of the accused when the incident took place and this witness

claims that after the deceased caught fire deceased came to her. Therefore, it is clear that this witness has not seen how the deceased caught fire in chapper. If the deceased would have caught fire accidentally no kerosene would have found on the clothes on her person. So also, the husband and father-in-law of the deceased who were present when allegedly this witness had gone to the house of the accused, would have accompanied the deceased to admit her in the hospital, but they did not come to the hospital with the deceased and only accused No. 3 and husband of the defence witness had brought the deceased in the hospital. Therefore, the evidence of the defence witness is not believable and sufficient to state that the deceased sustained burns accidentally. From the evidence of this witness presence of accused at the house at the material time is proved. The trial Court has rightly not accepted the evidence of defence witness. Thus, we do not accept the defence of the accused.

31. For the reasons discussed above on the basis of evidence of PW-1 brother of the deceased to whom the deceased made oral dying declaration on 17/11/2007 at 10 a.m. in the Ghati Hospital immediately after the incident and circumstantial evidence i.e. panchnama of spot Exhibit 75 and report of the Chemical Analyzer Exhibit 68 an inference can be drawn that the accused No.1 husband of the deceased poured kerosene on her person and set her on fire and therefore, she sustained 86% burns and as a result she died on 23/11/2007 at 14.45 hours. Therefore, accused No.1 is responsible for causing burn injuries to the deceased and ultimately to cause her death and his act of pouring kerosene on the person of the deceased and setting her on fire amounts to culpable homicide amounting to murder. But the evidence adduced by the prosecution and referred to above is not sufficient to state that accused in-laws of the deceased participated in the incident of sustaining burns to the deceased as alleged by the prosecution. Thus, we hold that death of the deceased is homicidal

and accused No. 1 is responsible for her death. Therefore, the finding of the trial Court that the prosecution has proved offence under Section 302 of the IPC against accused Nos. 2 and 3 father-in-law and mother-in-law of deceased is not correct and sustainable.

32. As regards the offence under Section 498-A of the IPC the prosecution has to prove that the accused in furtherance of their common intention caused cruelty within the meaning of cruelty given under explanation A and B of Section 498-A of the IPC which is as under:-

"498-A....

Explanation- For the purpose of this section, "cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of

failure by her or any person related to her to meet such demand."

. To prove the alleged cruelty caused by the accused to the deceased the prosecution has relied upon evidence of PWs 1, 2 and 5. The evidence of PW-1 brother of the deceased is that deceased resided at the house of accused for about one month after marriage and then accused No. 1 reached her to their house for Nagpanchami festival. Accused No. 1 did not come back to take the deceased. Therefore, deceased and her mother went to Jategaon to the house of Tulsabai (PW-2) sister of this witness who had arranged marriage of deceased with accused No. 1. Accused No. 2 father-in-law of deceased went to Jategaon and took the deceased with him to his house before two days of the incident. PW-1 has further deposed that on the day of incident when the deceased was admitted in injured condition in the hospital she disclosed to him that accused No.1 was denying that she was pregnant from him as she had no menstruation and that an amount of Rs.10,000/- was demanded by the

accused for brick kiln. In the cross-examination he denied that the deceased did not disclose to him as above.

33. The evidence of PW-2 Tulsabai who is admittedly sister of the deceased is that after marriage deceased resided at her house for about one month. After about three months of marriage of deceased, marriage of her daughter (daughter of witness) was performed at Jategaon and at that time deceased and her mother came to Jategaon to attend said marriage. After 15 days of the said marriage accused No.2 came to her house to take the deceased. Deceased had informed her that accused No.1 used to beat to her. Accused No. 2 informed them that deceased would be treated properly. Therefore, they sent deceased with accused No. 2. She further deposed about oral dying declaration made to her by the deceased. But she did not depose that the deceased told her that the accused demanded Rs.10,000/- for brick kiln as deposed

by PW-1. She has denied that she is deposing false on the say of her brother PW-1.

34. The evidence of PW-5 Gautam Sampat Shejwal who is husband of PW-2 is that deceased resided at the house of accused about one month after marriage. Thereafter, she resided at her maternal home for about 15 days. Thereafter she came to his house as there was marriage of his daughter, namely, Rekha. She resided at his house for about 8 days after the marriage of Rekha. Thereafter, she went to her maternal home. Then after about 2-3 days deceased and her mother came to his house. The mother of the deceased informed him that they should go to the house of accused to reach deceased. Accordingly, he went to the house of accused with deceased and her mother. Accused No. 1 refused to allow deceased to reside at his house. He asked them to perform operation of deceased for appendix and then bring her back to his house. They wanted to go to Police Station, Phulambri to lodge report against accused.

However, on the way the brother of the accused No.1, namely, Bhausahab met them and requested them not to go to the police station. Therefore, they went to their village. He also stated that alongwith his wife and his father he went to hospital where deceased was admitted after the incident and deceased disclosed him that accused were raising suspicion against her as she had no menstruation. In the cross-examination he denied that he is deposing false on the say of PW-1. The omissions in his statement before police in respect of the fact that accused No. 2 had come to his house to take deceased, that the deceased was telling them that accused No. 1 used to beat her and that the accused No.2 assured them that the deceased would not be beaten and therefore, they sent deceased with him are proved by the Investigating Officer PW-8 Police Inspector Alsatwar. Therefore, the evidence of this witness that the accused No.2 had come to his house to take deceased, that the deceased was telling that accused No.1 used to beat her and that the accused No.2 assured that the deceased

would not be beaten is improvement while deposing before the Court and amounts to material omission in his statement before police and therefore said evidence is not believable.

35. On careful consideration of above referred evidence of PWs-1, 2 and 5, PWs 2 and 5 have not stated regarding demand of Rs.10,000/- by the accused from the deceased for brick kiln. Their evidence regarding stay of deceased at her parental house and at the house of PWs 2 and 5 for some days is not at all sufficient to infer that they caused cruelty to the deceased in any manner. As mentioned above there are material omissions in the statements before police of PWs 2 and 5 that the deceased told them that accused No. 1 beat her and that the accused No. 2 had taken the deceased with him at the house of accused on giving assurance that she would not be beaten. Therefore, the above referred evidence of PWs 1, 2 and 5 is not at all sufficient to infer that the accused in furtherance of their common intention caused

cruelty to the deceased punishable under Section 498-A read with Section 34 of the IPC. Thus, we hold that the finding recorded by the trial Court that the prosecution has proved offence under Section 498-A read with Section 34 of the IPC against the accused is not correct and sustainable. We therefore, hold that prosecution has failed to prove said offence against the accused.

36. For the foregoing reasons, we hold that the prosecution has proved offence under Section 302 of the IPC only against accused No. 1 and it has failed to prove said offence against accused No. 3 and offence under Section 498-A read with Section 34 of the IPC against all the accused. Therefore, conviction and sentence recorded against accused No. 3 for the offence under Section 302 read Section 34 of the IPC and against accused Nos. 1 and 3 for offence under Section 498-A read with Section 34 of the IPC are liable to be set aside and they are entitled to be acquitted of the said offences by allowing the appeal partly. Thus, conviction

and sentence recorded against the appellant/accused No.1 for the offence under Section 302 of the IPC needs to be confirmed. Therefore, in the result following order is passed.

ORDER

(i) Appeal is partly allowed.

(ii) The conviction and sentence recorded against the accused No. 1 Dadarao Shripat Thorat for the offence punishable under Section 498-A read with Section 34 of the IPC and against accused No. 3 Yamunabai Shripat Thorat for the offences punishable under Sections 498-A and 302 read with Section 34 of the IPC as per the judgment and order dated 20/03/2014 passed by the Sessions Judge, Aurangabad in Sessions Case No. 82/2008 are hereby quashed and set aside.

(iii) Accused No. 1 Dadaro Thorat is acquitted of the offence under Section 498-A read with Section 34 of the IPC and accused No. 3 Yamunabai is acquitted of the offences punishable under Sections 498-A and 302 read with Section 34 of the IPC.

(iv) Fine, if paid, by accused Nos. 1 and 3 for the aforesaid offences as per the impugned judgment shall be refunded to them.

(v) The impugned conviction and sentence recorded against accused No. 1 Dadarao for the offence under Section 302 of the IPC is confirmed.

(vi) Impugned order of disposal of muddemal property is maintained.

(vii) Appeal is abated against accused No. 2.

(viii) Bail bond of accused No. 3 Yamunabai stands cancelled. Accused No. 3 Yamunabai shall furnish personal bond and surety bond of Rs.15,000/- before the Sessions Judge as per Section 437-A of the Criminal Procedure Code within two weeks from today.

(ix) Record and proceedings with copy of judgment be sent to the trial Court for necessary compliance.

[S.M. GAVHANE, J.]

[T. V. NALAWADE, J.]