

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

CRIMINAL APPEAL NO.563 OF 2015

Rahul S/o. Limbaji Thorat
Age : 24 years, Occu : Labour,
R/o. Ranjangaon Shenpunji,
Tal. Gangapur, Dist. Aurangabad. .. Appellant

Versus

The State of Maharashtra
through Police Station Officer,
MIDC Waluj Police Station,
Tal. Gangapur, Dist. Aurangabad. .. Respondent

...
Advocate for the Appellant : Shri Satish A. Gaikwad
APP for the Respondent / State : Shri S.G.Sangle
...

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

Reserved on : 05-10-2020
Pronounced on : 20-10-2020
...

JUDGMENT (Per : B. U. DEBADWAR, J.) :-

1. This Criminal Appeal has been directed against Judgment and order dated 16-06-2015 passed by learned Additional Sessions Judge, Vaijapur, Dist. Aurangabad in Sessions Case No.49 of 2013 whereby convicted appellant / accused for the offences punishable under Sections 302 and 506 of the 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.2,000/-, in

default of payment of fine further imprisonment for 6 months and to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/-, in default further imprisonment for 3 months, respectively.

2. Heard Shri S.A. Gaikwad, learned advocate appointed to represent the appellant through the High Court Legal Services Authority, Sub-Committee, Aurangabad and Shri S.G. Sangle, learned Additional Public Prosecutor on behalf of the respondent / State.

3. The facts of the case, in short, are as under :

. Vandana, aged 22 years, was the daughter of Bhimrao Chandu Wathore (PW-1) and Indubai Bhimrao Wathore (PW-2), both resident of Bramhemangaon, Tal. Omerkhed, Dist. Yevatmal and wife of the appellant - Rahul Limbaji Thorat, aged 23 years, resident of village Degaon (Telyache), Tal. Purna, Dist. Parbhani. Marriage of Vandana with the appellant was solemnized about 10 months prior to the fateful incident. After the marriage, Vandana came to Aurangabad to reside and cohabit with the appellant/accused. Initially they used to reside in a rented house situated at Chattrapati Nagar, Bajaj Nagar, MIDC, Waluj, Aurangabad. Thereafter, they shifted to rented house situated at Ramnagar, Ranjangaon

(Shenpunji), Tal. Gangapur, Dist. Aurangabad. Since beginning the appellant used to harass Vandana suspecting her character. Vandana, to save the marriage, did not lodge the complaint against the appellant in respect of his aforesaid conduct. Meanwhile, due to constant harassment and ill-treatment meted out by the appellant, Vandana had been to her parental house at village Bramhemangaon, Tal. Omerkhed, Dist. Yavatmal and stayed there for some days. After returning back to the Aurangabad from Bramhemangaon, for few days the appellant treated her properly, however, thereafter again he continued to harass and beat her by suspecting character. Vandana did not disclose or inform her parents about the conduct of the appellant harassing and ill-treating her constantly by suspecting character.

4. On 01-02-2013 there was a holiday. On that day the appellant left the house at about 10:00 a.m. and returned back to the house at about 06:30 p.m. Soon after entering into the house he picked up damaged heater rod, made it straight and started assaulting Vandana with the said heater rod, by asking her as to whom she has affair. Thereafter he closed and chained the door of the house from inside, continued to beat her by the heater rod on her shoulders. Then the appellant compelled her to pour on herself the

diesel from the diesel Can kept under cot. She poured the same since the appellant was beating and threatening her. On pouring diesel on herself, the appellant ignited the matchstick and thrown the same towards her. Because of burning match stick, her sari caught fire and she suffered extensive burn injuries. When she was burning, for some time, the appellant looked at her and then thrown quilt on her person and carried her to the Ghati Hospital, Aurangabad in an auto rickshaw driven by one Sayyed Aalam Chaus. Since the appellant had given threats of dire consequences, Vandana earlier stated to the Police Officer and Tahsildar that her sari caught fire due to flaring of stove.

5. On the basis of the aforesaid statement made by Vandana before Shri Shaikh Nisar Ahmed Mohammad Sharif, PSI, on 04-02-2013 Crime bearing No.41 of 2013 for the offences punishable under Sections 307 and 506 of the I.P.C. registered against the appellant at MIDC, Waluja Police Station, Aurangabad.

6. Investigation of the said crime was carried by Smt Vijaymala Laxman Rithe / P.S.I. (PW-13) attached to Police Station M.I.D.C. Waluj. During the course of investigation, on 05-02-2013 services of Executive Magistrate requisitioned for

recording dying declaration of Vandana and got it recorded. Shortly after recording of dying declaration of Vandana by Executive Magistrate, she succumbed to the burns. Therefore, Inquest Panchanama was drawn. Her dead body was shifted to mortuary for post-mortem. Post-mortem was conducted. The appellant was arrested. Statement of material witnesses including parents of Vandana were recorded. The spot panchanama, which was already drawn during the course of enquiry of MLC No.80 of 2013, was collected with other papers. Articles seized from the spot and the clothes of the appellant were sent to Regional Forensic Science Laboratory at Aurangabad for examination and report. After completion of investigation, the appellant / accused was charge - sheeted under Sections 302, 307, 324 and 506 of the I.P.C. before learned Judicial Magistrate First Class, Gangapur and learned Magistrate, in turn, committed the case to the Additional Sessions Court at Vaijapur, Dist. Aurangabad as offence under Section 302 of the I.P.C. is exclusively triable by the Court of Sessions.

7. Having heard the Additional Public Prosecutor for the State and Advocate for the accused, learned Additional Sessions Judge, Vaijapur framed charge for aforesaid offences on 20-07-2013 vide Exh.5, conducted the trial and held the appellant / accused guilty

vide impugned judgment and order, referred above, *inter alia* observing that since beginning the appellant used to harass and ill-treat wife Vandana by suspecting her character and it was the appellant, who set his wife on fire, after pouring diesel on her person, then out of fear, tried to save her and in that process the appellant / accused suffered some burn injuries. The variance between two dying declarations is not material. Dying declaration (Exh.29) recorded by Executive Magistrate is worthy of reliance. The oral and documentary evidence adduced by the prosecution supports to the said dying declaration. Defence of the accused that, Vandana burnt accidentally is not probable and acceptable.

8. Mr S.A. Gaikwad, learned Advocate for the appellant while taking us through the record of the case vehemently argued that learned Additional Sessions Judge, Vaijapur totally erred in appreciating the evidence on record in proper perspective and arrived at wrong conclusion. Learned Additional Sessions Judge, Vaijapur ought to have considered MLC report and as many as three dying declarations of deceased Vandana recorded by the Police Officer, Member of Women Welfare Committee and Executive Magistrate on 01-02-2013 and 02-02-2013. The observations made by learned Additional Sessions Judge, Vaijapur in para no.54 of the Judgment to

the effect that, the aforesaid dying declarations cannot be considered as they are not duly proved, are *per se* wrong. All these dying declarations fully probabilise the defence of the appellant that deceased Vandana died of accidental death. When two sets of dying declarations are contrary to each other, the subsequent dying declaration (Exh.29) implicating the appellant could not have been believed and accepted and on the basis of the said dying declaration the appellant could not have been held guilty for a serious offence of murder.

9. Mr Gaikwad, learned Advocate for the appellant relying on Section 80 of the Indian Evidence Act, 1872 (hereinafter in short 'Evidence Act') submitted that, the aforesaid dying declarations made by Vandana, which are brought on record by the prosecution along with charge-sheet, could not have been kept out of consideration only for the reason that the prosecution has not relied on the same and defence has not proved the same. No doubt, under Section 106 of the Evidence Act burden of proving fact especially within the knowledge of any person lies upon him, but that section not at all exempts the prosecution from establishing *prima facie* case against the accused. As Section 106 is an exception to Section 101 of the Evidence Act, it is not attracted unless the initial burden of

prosecution is proved. Herein this case the prosecution cannot give go bye to the aforesaid dying declarations which have been brought on record by it along with charge - sheet and claim conviction of the appellant only relying on subsequent one out of two dying declaration of Vandana, recorded by Executive Magistrate (Exh.29). Dying declarations at Exh.53 and Exh.29 came to be recorded on 04-02-2013 and 05-02-2013 respectively at the instance of Bhimrao Chandu Wathore (PW-1), who happens to be the father of Vandana. Both these dying declarations were not made by Vandana voluntarily, but they are involuntary and tutored dying declarations. Though learned Additional Sessions Judge, Vaijapur rightly rejected dying declaration (Exh.53), but wrongly accepted dying declaration (Exh.29).

10. Mr Gaikwad, Advocate further argued that, there is a material inconsistency between dying declaration (Exh.53) and dying declaration (Exh.29). In dying declaration (Exh.53) recorded by the Police Officer, it is alleged that, the appellant forced wife Vandana to pour diesel on her person and out of fear of the appellant, she poured the same on herself and thereafter the appellant thrown burning match-stick on her person which caught fire to the sari worn by her, whereas in dying declaration (Exh.29) recorded by the Executive

Magistrate / Naib Tahsildar, it is alleged that, the appellant poured diesel from diesel Can on the person of wife Vandana and set her ablaze. This glaring inconsistency makes both the dying declarations doubtful.

11. According to Mr Gaikwad, Advocate the evidence on record is clear enough to show that in pursuance of the information received from police official attached to Ghati Hospital Police Chowky and Vandana on phone, Bhimrao Chandu Wathore (PW-1) along with others left village Bramhemangaon immediately and reached to Ghati Hospital, Aurangabad at about 05:00 a.m. on 02-02-2013, met and talked with Vandana.

12. On asking Vandana disclosed him that the appellant has poured diesel on her person and set her ablaze, however due to threats given by the appellant / husband out of fear she disclosed earlier that, she suffered burn injuries accidentally. Had it been the fact, then Bhimrao Wathore (PW-1) could have either lodged the complaint against the appellant or would have taken effective steps to get recorded one more dying declaration by Magistrate by following due procedure, but in vain. After about more than two days first time he moved application (Exh.18) requesting the police

authorities Waluj, M.I.D.C. Police Station, Aurangabad for arranging to record fresh statement of Vandana. Mr Gaikwad, learned Advocate forcefully submitted that, the application (Exh.18) was false and afterthought. When Bhimrao (PW-1) and his family members realized that, there are no chances of survival of Vandana, decided to implicate the appellant and in pursuance of their decision took further steps. Thus, the investigation made by the Investigating Officer after moving the application (Exh.18) by Bhimrao (PW-1) is false investigation. In view of the fact that, Bhimrao (PW-1) kept mum for about 58 hours and then moved the application (Exh.18), it was incumbent on the part of the Investigating Officer to investigate as to why immediately after making declaration about act done by the appellant, Bhimrao Wathore (PW-1) did not make complaint against the appellant. Without considering fact of delay, blindly Investigating Officer has got recorded statement and dying declaration of Vandana on 04-02-2013 and 05-02-2013 mechanically registered crime on the basis of the statement (Exh.53) and thereafter relying on those two dying declarations and the spot panchanama, charge-sheeted the appellant.

13. Mr Gaikwad, learned Advocate submitted that dying declaration-cum-FIR (Exh.53) is a suspicious document. Timings,

during which, it was recorded do not find place therein. The Fitness Certificate appearing on requisition (Exh.52) to Medical Officer has also not been proved in the evidence of Dr. Kabra (PW-8). There is no consistency in the evidence of Shaikh Nisar Ahmed Mohammad Sharif, PSI (PW-9), Lata Kanade, Social Worker (PW-10) and Investigating Officer Vijaymala Ritthe (PW-13) as to who actually recorded the same. In such circumstances, no reliance can be placed on FIR / Dying declaration / statement (Exh.53). Learned Additional Sessions Judge, Vaijapur rightly discarded the same, but wrongly convicted the appellant solely relying on dying declaration (Exh.29) recorded by Executive Magistrate without appreciating the same on the touch stone of law pertaining to dying declaration.

14. Mr Gaikwad, learned Advocate for the appellant after diverting our attention on dying declaration (Exh.29) and evidence of Abdul R. Siddiqui, Executive Magistrate (PW-3), who recorded the same at Exh.28, argued that, it bears only one Fitness Certificate and not two Fitness Certificates viz. Fitness Certificate issued prior to commencement of recording dying declaration and Fitness Certificate issued after completion of recording of dying declaration. Fitness Certificate, referred above, makes it clear that, after recording dying declaration Vandana was not examined and certificate to the effect

that she was conscious and well oriented during the course of recording of dying declaration (Exh.29) was not issued. Mr Gaikwad, learned Advocate for the appellant, while taking us through cross-examination of Abdul Rab Siddiki (PW-3) stated that, Medical Officer / Dr Kabra who alleged to have issued Fitness Certificate was not present when dying declaration (Exh.29) of Vandana alleged to have been recorded and aforesaid Fitness Certificate was issued by Medical Officer / Dr Kabra on asking for the same by Abdul Rab Siddiki (PW-3). According to Mr Gaikwad, this glaring fact makes FIR/dying declaration (Exh.53) suspicious.

15. Besides, learned Advocate, Mr Gaikwad pointed out that, dying declaration (Exh.29) does not bear endorsement to the effect that, it was read over to Vandana and Vandana admitted it to be true and correct. Last printed portion of clause-6 of the said dying declaration (Exh.29) cannot be considered as inapplicable portion, has not been scored. Thus, in any angle, dying declaration (Exh.29) cannot be relied upon. Spot panchanama (Exh.41) shows that stove was lying in the house, when incident took place. This supports to the earlier dying declaration of Vandana that she sustained burns accidentally. Photographs marked at Article 'A' cannot be considered as they have not been duly proved. Thus, merely for the reason that

muddemal stove found not damaged, earlier version of Vandana about her sustaining burns accidentally cannot said to be outcome of threats given by the appellant.

16. When both the dying declarations relied upon by the prosecution viz. Exhs.53 and 29 become suspicious for various reasons discussed above, then only on the basis of spot panchanama and C.A. reports the appellant cannot be held guilty. Learned Additional Sessions Judge, Vaijapur without considering glaring inconsistencies and defects, held the accused guilty, therefore, the impugned judgment and order is liable to be set aside.

17. In support of his aforesaid submissions, Mr Gaikwad, learned Advocate has placed his reliance on the following various judgments of the Hon'ble Supreme Court :-

- (i) **Sarnadhan Dhudaka Koli Vs. State of Maharashtra, AIR 2009 SC 1059**
- (ii) **Prabhakar s/o Kaduba Shejul Vs. The State of Maharashtra, 2015 ALL MR (Cri) 135**
- (iii) **Bapu (Nandu) Prabhu Koli @ Raut Vs. The State of Maharashtra, 2019 ALL MR (Cri) 242**
- (iv) **Ajay s/o. Digamber Deogade Vs. The State of Maharashtra, 2018 ALL MR (Cri) 1652**
- (v) **Vithal Kondiba Padghane Vs. The State of Maharashtra 2016 ALL MR (Cri) 2072**

- (vi) **State of Punjab Vs. Parveen Kumar, AIR 2005 SC 1277**
- (vii) **Amol Singh Vs. State of M.P. 2008 DGLS (SC) 779**
- (viii) **Ramesh s/o. Gyanoba Kamble Vs. The State of Maharashtra, 2011 ALL MR (Cri) 3536 (F.B.)**
- (ix) **Suresh S/o. Arjun Dodorkar (Sonar) Vs. State of Maharashtra, 2005 ALL MR (Cri) 1599**

18. Per contra, Mr S.G. Sangle, learned APP vehemently argued that Vandana died an unnatural death only after 10 months of her marriage with the appellant. Ocular evidence of parents of Vandana and recitals of dying declaration (Exh.53), which is treated as FIR and dying declaration (Exh.29) clearly evidences that the appellant constantly used to harass and ill-treat Vandana either for trifle household reasons or by suspecting her character. The reason for not lodging the complaint against the appellant for his aforesaid conduct stated in dying declaration / FIR/ statement Exh.53 is worthy of acceptance. On the background of conduct of the appellant with Vandana since beginning, if we considered the prosecution case, it can be gathered very well that how MLC report and three dying declarations recorded on 01-02-2013 and 02-02-2013 by Police Officer, Social Worker and Executive Magistrate, respectively, cannot be said to be genuine and voluntary dying declarations of Vandana,

as they were outcome of threats given by the appellant. So also, none of these dying declarations can be considered as appellant has not proved the same, though opportunity was given to the appellant during the course of statements recorded under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') by leading evidence. Therefore, they cannot be used for contradicting dying declaration/FIR (Exh.53) and dying declaration (Exh.29) recorded by Police Officer and Executive Magistrate, respectively.

19. Mr S.G. Sangle, learned APP also argued that dying declaration of victim does not fall within the ambit of Section 80 of the Evidence Act, therefore also, the aforesaid dying declaration relied upon by the appellant to substantiate his defence cannot be accepted.

20. According to Mr Sangle, learned APP spot panchanama and photographs of the scene of occurrence clearly show that lid of the stove lying there was intact. This circumstance rules out the possibility of Vandana sustaining burns while filling diesel. Another possibility of Vandana's sustaining burns due to flaring up of stove while cooking also does not bear force as spot panchanama completely rules out the same. In such circumstances, statement /

dying declaration / FIR (Exh.53) and dying declaration (Exh.29) assumes much importance. The prosecution has proved both these documents in all respects. Ocular evidence of Shri Shaikh Nisar Ahmed Mohammad Sharif, PSI (PW-9), Smt Lata Kanade, Social Worker (PW-10) and Investigating Officer Smt Vijaymala Ritthe (PW-13) pertaining to due execution and contents of dying declaration / FIR (Exh.53) is consistent on material aspects and only for some minor inconsistencies, it cannot be discarded. The endorsement of fitness made on Exh.52 made by Medical Officer Dr. Ramanuj Kabra (PW-8) establishes that Vandana was conscious and well oriented when her dying declaration / FIR was recorded and it was her voluntary statement. There is clear endorsement in dying declaration / FIR (Exh.53) that it was read over to Vandana and she admitted it to be as per her say and correct.

21. After recording dying declaration / FIR (Exh.53), on 05-02-2013 one more dying declaration (Exh.29) of Vandana came to be recorded by Executive Magistrate. The evidence of Shri Abdul Rab Siddiki, Executive Magistrate (PW-3), who recorded the same, establishes that, it has been recorded by following due procedure. Endorsement of fitness of Vandana to make the said dying declaration proved in the evidence of Dr. Kabra (PW-8), makes it

clear that she was conscious and well oriented when dying declaration (Exh.29) was recorded. Merely for the reason that dying declaration (Exh.29) bears only one endorsement of fitness and the separate endorsement of reading over the same to Vandana and she admitted it to be true and correct, has not been made by Abdul Rab Siddiki (PW-3), its genuineness and truthfulness cannot be doubted. Once dying declaration (Exh.29), which is corroborated by the FIR / dying declaration (Exh.53), is accepted to be true and correct, earlier alleged dying declarations and defence of appellant that Vandana sustained burns accidentally, goes away. Learned Additional Sessions Judge, Vaijapur rightly held the appellant guilty for the offence under Section 302 of the IPC. Therefore, the appeal is liable to be dismissed.

22. To substantiate his submissions referred above, Mr S.G. Sangle, learned Additional Public Prosecutor has placed his reliance on the following judgments of the Hon'ble Supreme Court:-

- (i) **Ram Bihari Yadav V/s. State of Bihar and others, AIR 1998 SC 1850**
- (ii) **Laxman V/s. State of Maharashtra, AIR 2002 SC 2973**
- (iii) **Trimukh Maroti Kirkan v/s. State of Maharashtra, 2006 (10) SCC 681**
- (iv) **Tulshiram Sahadu Suryawanshi & Anr Vs. State of**

Maharashtra, 2012 (10) SCC 373

- (v) **State of Rajasthan Vs. Thakur Singh, 2014 DGLS (SC) 541**
- (vi) **Kalu alias Laxminarayan vs. State of Madhya Pradesh, Criminal Appeal No.1677 of 2010, dtd.07-11-2019**

23. In light of the aforesaid submissions made by Mr S.A. Gaikwad, learned Advocate for the appellant and Mr S.G. Sangle, learned Additional Public Prosecutor representing the respondent / State, we have carefully gone through the evidence on record in its entirety.

24. It is admitted fact that deceased Vandana was the daughter of Bhimrao Wathore (PW-1) and Induabai Wathore (PW-2) and wife of the appellant.

25. It is also admitted fact that, marriage of Vandana with the appellant was solemnized on 01-04-2012 i.e. about 10 months prior to the incident.

26. It is not in dispute that, on 01-02-2013 at about 06:30 p.m. Vandana sustained burn injuries at the house where she used to reside with the appellant, situated at Ranjangaon Shenpunji, Tal. Gangapur, Dist. Aurangabad and she succumbed to the said burn

injuries on 05-02-2013 at Ghati Hospital, Aurangabad while under treatment there.

27. It is evident from the record that soon after admitting Vandana in Ghati Hospital, Aurangabad on 01-02-2013 at about 07:45 p.m. Police Head Constable who was on duty at Ghati Hospital Police Chowky informed the same to the Police Station Officer, M.I.D.C. Police Station, Waluj and on the basis of the said information, Police Station Officer registered Medico Legal Case No.80/13, after taking its entry in Station Diary bearing No.32 of 2013 vide Entry No.62 at about 09:35 p.m., on 01-02-2013. It is also evident from the record that, during the course of enquiry of the said Medico Legal Case, on 01-02-2013 itself one dying declaration of Vandana came to be recorded by Sau Nutan Ramesh Adsare, a member of Woman Social Welfare Committee, Bajaj Nagar, Aurangabad. Then on 02-02-2013 spot panchanama (Exh.41) was drawn during 11:00 a.m. to 12:00 p.m. and two more dying declarations of Vandana came to be recorded. Out of the two, one was recorded by Police Officer Mr Gawade and another was recorded by Executive Magistrate Mr G.M. Aaynalwar.

28. Inquest Panchanama (Exh.44) proved in the evidence of

Smt Vandana Prabhakar Dawane (PW-7) demonstrates that, Vandana succumbed to the burns on 05-02-2013 at about 07:45 p.m. and inquest panchanama of her dead body was carried during 07:50 a.m. to 08:30 a.m. on 06-02-2013. Nothing is brought on record through the cross-examination of Smt Vandana Dawane (PW-7) on the basis of which genuineness of inquest panchanama (Exh.44) can be doubted.

29. Post Mortem Report (Exh.31) proved in the evidence of Dr Vikas Rathod, Autopsy Surgeon (PW-4) states that, Vandana had suffered superficial to deep burn injuries on various parts of her body.

“Wounds and Injuries mentioned in column no.17 are as under :

Part of body involved	Normal Distribution	Percentage	Area Spared
Head neck & face	9	1	Except upper lip
Chest	9	5	Part of upper & middle chest
Abdomen	9	8	Middle
Back	18	4	Upper and middle and part of lower back
Right upper limb	9	2	Except upper lateral part of arm
Left upper limb	9	7	Upper lateral part of arm. Palm
Right lower limb	18	16	Upper lateral part of thigh
Left lower limb	18	16	Upper posterior aspect of thigh
Perineum	1	00	All
Total	100	59%	

Deep burns present on – chest, abdomen, arms and thighs.
Superficial burns present over rest areas.

The Burns are soft and pulpy and are covered by yelklowish foul smelling slough.”

30. As per Post Mortem Report (Exh.31), septicemia due to 55 - 60% Dermo Epidermal Thermal Burns was the probable cause of death of Vandana. Dr Vikas Rathod, Autopsy Surgeon (PW-4) in his testimony at Exh.30 not only recorded aforesaid burn injuries suffered by Vandana, but also mentioned her cause of death in Post Mortem Report (Exh.31). It is pertinent to note that, post mortem on the dead body of Vandana was carried by as many as four doctors (three Medical Officers / Autopsy Surgeons and one Assistant Professor) all attached to Department of Forensic Medical and Toxicology, Government Medical College, Aurangabad including Dr. Vikas Rathod (PW-4).

31. It is true that on last page of Post Mortem Report (Exh.31) date 16-01-2013 is mentioned. However, Dr Vikas Rathod (PW-4) during his cross-examination made it clear that it was a typographical mistake. In fact, the post mortem was conducted on 06-02-2013. Column No.4 of the Post Mortem Report clearly reveals that dead body of Vandana was shifted to mortuary at about 09:15 am on 06-02-2013 and post mortem on her dead body was conducted on 09:20 hrs (a.m.) to 10:20 hrs (a.m.) on 06-02-2013. Thus, only on

the basis of typographical mistake occurred in mentioning the date on last page of Post Mortem Report at two places, evidence of Dr Vikram Rathod, Autopsy Surgeon and Post Mortem Report (Exh.31) which proves that on 05-02-2013 while under treatment Vandana succumbed to 55 to 60% superficial to deep burns, cannot be discarded.

32. Thus, on the basis of ocular evidence of Dr Vikram Rathod, Autopsy Surgeon (PW-4), inquest panchanama (Exh.44) and Post Mortem Report (Exh.31), it is clear enough that Vandana died due to 55 - 60% superficial to deep burn injuries sustained by her on 01-02-2013 at about 06:30 p.m. at her house situated at village Ranjangaon (Shenpunji).

33. Once it is proved that Vandana died on 05-02-2013 due to 55 - 60% superficial to deep burns sustained by her on 01-02-2013 at the house where she used to reside with appellant, situated at Ramnagar, Ranjangaon (Shenpunji), the next question arises whether Vandana burnt accidentally or she was burnt by the appellant.

34. Bhimrao Wathore (PW-1) deposed at Exh.17 that on 01-02-2013 he received phone call from one Constable informing that Vandana had received burns and she was admitted in Ghati

Hospital, Aurangabad. Thereafter, he also received phone call of Vandana and on phone Vandana asked him to come immediately, after informing that she had received the burns. Accordingly he along with cousin brother and some villagers reached to Ghati Hospital, Aurangabad at about 05:00 a.m. of 02-02-2013 and met Vandana, who was under treatment in Ward No.22-23. She had sustained burn injuries on her entire body. On asking, Vandana told him that, quarrel took place between herself and the appellant and the appellant set her on fire after pouring the diesel on her person (in english version of deposition, it is written that on enquiry Vandana, told him that the accused quarreled with her on account that he suspects about her character and then set her on fire). He has further deposed that, previously also, Vandana had told him on phone that the appellant picked up quarrel and beat her suspecting her character.

35. As far as incident in question is concerned Bhimrao Wathore (PW-1) deposed that, Vandana told him that on 01-02-2013 throughout the day the appellant was in the house as there was holiday. Appellant beat her by heater rod, poured diesel from the Can on her body and set her on fire. Since door of the house was closed from inside, she shouted then the appellant ran away.

Vandana also told him that, the appellant carried her to the hospital. Bhimrao Wathore (PW-1) further deposed that, Vandana was frightened, therefore, she was not telling / disclosing him anything willingly, the appellant had threatened to kill her father, if she discloses about the incident. Vandana further disclosed that, the appellant had also given threat of killing her brother. According to Bhimrao Wathore (PW-1) on 05-02-2013 at evening time, Vandana died.

36. In cross-examination, Bhimrao Wathore (PW-1) has admitted that, after marriage for about 5-6 months the appellant and Vandana had resided in Shivajinagar. During that period, he had visited their house to see Vandana. At that time, Vandana had told him that, she is cohabiting well. After couple's shifting to Ranjangaon Shenpunji, he did not make enquiry about their neighbours. He or his son did not visit to the house of the appellant at Ranjangaon.

37. From his further cross-examination, it has come on record that, on 02-02-2013 at about 05:00 a.m. when he met and talked with Vandana in the hospital, her speech was clear. On 02-02-2013 he did not meet police. His daughter Vandana had told him that accused had also received burns on his hands and also told him that

the appellant carried her to the hospital from the house. It has also come on record through his further cross-examination that, Vandana told him that police recorded her statement in Ghati Hospital on the day on which she was admitted there. He has further stated that, on 02-02-2013 statement of Vandana was recorded in the hospital, at that time, he was present in the premises of Ghati Hospital. It has also come on record through his cross-examination that, Vandana was oriented till her death. In further cross-examination Bhimrao Wathore (PW-1) has stated that, Vandana told him that **police have recorded her statement as per her say**. He has also stated in last paragraph of his cross-examination that the appellant was present in the hospital when he reached there. Appellant used to make enquiry and talk with Vandana. Parents of appellant used to visit the hospital during first three days. On 02-02-2013 mental condition of Vandana was good.

38. From the aforesaid testimony of Bhimrao Wathore (PW-1), it can be gathered very well that, Vandana was conscious and oriented till her death. Vandana was leading normal marital life for about 5-6 months when she along with the appellant used to reside at Shivajinagar, Aurangabad. After their shifting to Ramnagar, Ranjangaon Shenpunji, he did not come to Aurangabad to see

daughter Vandana. After the gap of 4-5 months, he met Vandana first time on 02-02-2013 at about 05:00 a.m. in Ghati Hospital. He was well aware of the fact that, statements of Vandana came to be recorded by the authorities on 01-02-2013 and 02-02-2013 and Vandana had told him that, her statements were recorded as per her say.

39. In his entire testimony, nowhere he has explained as to why he did not lodge the complaint or move the application like application at Exh.18 to police station, immediately, after knowing the fact that the appellant burnt Vandana. This conduct on the part of Bhimrao Wathore (PW-1) creates doubt about his version pertaining to oral dying declaration of Vandana made before him.

40. Indubai Wathore (PW-2) is the mother of Vandana and wife of Bhimrao Wathore (PW-1). Indubai Wathore (PW-2) vide her testimony at Exh.19 testified almost all in the line of her husband Bhimrao on the aspect of disclosure made by Vandana implicating the appellant before them, when they met her in the hospital first time i.e. on 02-02-2013 at about 05:00 a.m. She too, during her cross-examination admitted that on 02-02-2013 during afternoon police came and recorded statement of Vandana. After recording the

statement of Vandana by police she talked with Vandana. This statement came on record through the cross-examination confirms that parents of Vandana were aware about the statement / dying declaration of Vandana recorded by authorities on 01-02-2013 and 02-02-2013 and Vandana did not show her displeasure to them about the said statement.

41. From the further cross-examination of Indubai Wathore (PW-2) it reveals that on 02-02-2013 and 03-02-2013 police met them in the hospital on number of occasions, but neither she herself nor her husband Bhimrao told to the police either on 02-02-2013 or 03-03-2013 about whatever told to them by Vandana, immediately after their meeting to her in the hospital.

42. The conduct of Bhimrao Wathore (PW-1) and Indubai Wathore (PW-2) not informing police as to what Vandana told to them or not lodging the complaint on the basis of disclosure made by Vandana immediately on their meeting to Vandana in the hospital, cannot said to be a normal conduct. Thus, after considering the evidence of Bhimrao (PW-1) and Indubai (PW-2) in totality as discussed above, we are of the considered view that, their coevidence on material aspect of oral dying declaration made by

Vandana before them connecting the appellant with the incident of her burning is doubtful and not worthy of acceptance.

43. Shri Shaikh Nisar Ahmed Mohammad Sharif, PSI (PW-9) vide his deposition at Exh.50 testified that after receiving application (Exh.18) dated 04-02-2013 moved by Shri Bhimrao Wathore (PW-1) for recording fresh dying declaration of Vandana, he issued letter (Exh.51) to Tahsildar for recording fresh dying declaration of Vandana. Then he rushed to Ghati Hospital, Aurangabad, issued letter (Exh.52) to Medical Officer seeking opinion as to fitness of Vandana to record dying declaration. Medical Officer when opined that Vandana is able to give the statement, he proceeded to Ward No.22/23 where Vandana was under treatment. After reaching there, he called Smt Vijaymala Laxman Ritthe / P.S.I. (PW-13) and Smt Lata Kanade, Social Worker (PW-10) and recorded the statement (Exh.53) of Vandana and obtained her thumb impression on the same. On the basis of the said statement of Vandana at Exh.53, crime came to be registered against the accused. During the course of investigation of the said crime, his statement was recorded. In his further concluding examination-in-chief he has stated that Shri Gawande, Head Constable proceeded to hospital for conducting enquiry of MLC No.80 of 2013, he was accompanied with him and

before Shri Gawade, Head Constable, Vandana had stated that she suffered burns due to bursting of stove, at that time she was seen frightened.

44. Through his cross-examination, it has come on record that, on 01-02-2013 using his mobile Vandana intimated her father that she sustained burns. Shri Gawade, Head Constable recorded statement of Vandana after getting confirmed that she is able to give statement. In further cross-examination, he has also admitted that, on 02-02-2013 one more statement of Vandana was recorded and in the said statement, Vandana did not make any complaint against the appellant. He has also stated clearly in cross-examination that on 04-02-2013 till noon Vandana had not made any complaint and first time, Bhimrao, father of Vandana made complaint (Exh.18) against the appellant in noon time. He has also admitted in next part of the cross-examination that, dying declaration / FIR (Exh.53) bears two thumb impressions of Vandana and he recorded dying declaration / FIR (Exh.53) of Vandana in presence of Smt Vijaymala Ritthe / P.S.I. (PW-13) and Smt Lata Kanade, Social Worker (PW-10).

45. Aforesaid material came on record through cross-examination of Shaikh Nisar, Head Constable (PW-9) makes it

clear that on 01-02-2013 and 02-02-2013 statements of Vandana were recorded and during recording the said statements Vandana had disclosed that she sustained burns accidentally and till moving application (Exh.18) on 04-02-2013 at about 03:00 p.m. by Bhimrao Wathore (PW-1), Vandana had not stated to the police officials that the appellant burnt her. Statement of Shaikh Nisar, Head Constable (PW-9) to the extent that, Vandana was frightened while disclosing to Shri Gawade that she suffered burns due to bursting of the stove is improved version.

46. Admittedly, dying declaration / FIR (Exh.53) bears two thumb impressions. Though Shri Shaikh Nisar, Head Constable (PW-9) stated that both the thumb impressions are of Vandana, but has not assigned any reason as to why instead of one, two thumb impressions of Vandana were obtained at Exh.53. Admittedly, timing during which dying declaration / FIR (Exh.53) came to be recorded, have not been mentioned therein. Endorsement of fitness of Vandana to give the statement appearing on requisition (Exh.52) has not been proved. There is no whisper in this respect in the evidence of Dr Kabra (PW-8) at Exh.47. He has only deposed about endorsement of fitness of Vandana to make the statement made on requisition (Exh.48) dated 05-02-2013. In his statement at Exh.50,

Shri Shaikh Nisar (PW-9) has not stated anywhere that before recording dying declaration / FIR (Exh.53), he confirmed and satisfied that at the time of recording FIR / dying declaration (Exh.53), Vandana was conscious, oriented and in fit state of mind to make the statement.

47. Since Shri Shaikh Nisar, Head Constable (PW-9) testified that at the time of recording dying declaration / FIR (Exh.53), Lata Kanade, Social Worker (PW-10) and Smt Vijaymala Ritthe / P.S.I. (PW-13) were present, their testimonies assume importance. Smt Lata Kanade (PW-10) vide her deposition at Exh.55 deposed that on 04-02-2013 she along with Smt Vijaymala Ritthe / P.S.I. (PW-13), Shri Shaikh Nisar, Head Constable (PW-9) and one Shri Modi, police personnel had been to Ward No.22/23 of Ghati Hospital, where Vandana was under treatment. Smt Vijaymala Ritthe / P.S.I. (PW-13) enquired with Vandana about the incident and she narrated the same. Smt Lata kanade (PW-10) has also stated that, Shaikh Nisar, Head Constable (PW-9) reduced the said statement into writing and obtained a thumb impression of Vandana.

48. During cross-examination, she has stated that, she too, asked the questions to Vandana and Vandana answered the said

questions. Admittedly, the questions put by Smt Lata Kanade (PW-10) to Vandana and answers given by Vandana are not on record and reference of the same does not find place in dying declaration / FIR (Exh.53).

49. Smt Vijaymala Ritthe (PW-13) was the Investigating Officer, who investigated the matter and charge-sheeted the accused. As far as dying declaration / FIR (Exh.53) is concerned, in her deposition at Exh.60 she deposed that, on 04-02-2013 Police Inspector directed her to record the statement of Vandana. Accordingly she had gone go Ghati Hospital for recording the statement of Vandana. On reaching to Ghati Hospital, she enquired with Medical Officer about fitness of Vandana to record the statement by giving a letter and recorded the statement (Exh.53) of Vandana, after informing by Medical Officer that Vandana is able to give the statement. She has identified thumb impression of Vandana and her signature appearing on dying declaration / FIR (Exh.53).

50. Requisition (Exh.52) given to Medical Officer dated 04-02-2013 on which endorsement about fitness of Vandana to record the dying declaration bears signature of Shri Shaikh Nisar, Head Constable (PW-9) and not the signature of Smt Vijaymala

Ritthe (PW-13). The requisition, which, Smt Vijaymala Ritthe, (PW-13) referred in her testimony does not find place in record anywhere. Smt Vijaymala Ritthe, (PW-13) nowhere states that, on 04-02-2013 when she visited Ghati Hospital for recording statement of Vandana (Exh.53), Head Constable Shaikh Nisar (PW-9) and Lata Kanade, Social Worker (PW-10) were accompanied with her. Besides, nowhere in her evidence she states that she dictated the statement of Vandana to Head Constable Shaikh Nisar (PW-9) and Shaikh Nisar reduced the same into writing. Shaikh Nisar, Head Constable (PW-9) clearly states in his evidence that he recorded dying declaration / FIR (Exh.53). In such circumstances, it is very difficult to decide who enquired with Vandana about incident and who recorded the same. Neither Shri Shaikh Nisar, Head Constable nor Smt Vijaymala Ritthe, PSI (PW-13) explained in their evidence as to why Smt Lata Kanade, Social Worker (PW-10) was called while recording dying declaration (Exh.53) and her signature obtained thereon.

51. Thus, in view of the facts that timings during which dying declaration / FIR (Exh.53) is recorded, does not find place therein. Endorsement of fitness of Vandana to record dying declaration appearing on requisition (Exh.52) has not been proved in the

evidence of Medical Officer Dr Kabra (PW-8). Inconsistency about exactly who enquired with Vandana about incident and as to who reduced Vandana's statement (Exh.53) into writing, reason for availing services of Lata Kanade, Social Worker while recording dying declaration (Exh.53) and the fact that, neither Head Constable Shaikh Nisar (PW-9) nor Smt Vijaymala Ritthe / P.S.I. (PW-13) got satisfied themselves that Vandana was conscious, oriented and fit to give the statement, it would not be safe to hold that at the time of recording dying declaration / FIR (Exh.53) Vandana was conscious, oriented and fit to give the statement (Exh.53) and it was recorded as per her version.

52. On this backdrop we turn to the dying declaration (Exh.29), on the basis of which learned Additional Sessions Judge, Vaijapur convicted the accused for the charge of murder of Vandana. Abdul Rab Siddiki, Executive Magistrate (PW-3) is the author of dying declaration (Exh.29). Therefore, his testimony at Exh.28 assumes importance. Abdul Rab Siddiki, Executive Magistrate/ Naib Tahsildar (PW-3) vide his deposition at Exh.28 deposed that, on 04-02-2013 Tahsil office, Aurangabad received a letter from police officials for recording dying declaration of Vandana. In pursuance of that letter on 05-02-2013 Tahsildar directed him to record the dying

declaration of Vandana. Accordingly, on same day (on 05-02-2013) he went to Ghtai Hospital, Aurangabad where Vandana was under treatment in Ward No.22. After reaching there he enquired with Medical Officer as to fitness and ability of Vandana to record the dying declaration, by issuing requisition. He has identified that letter-cum-requisition and his signature appearing on the same annexed to dying declaration (Exh.29). On tendering the requisition, Medical Officer told him that Vandana was conscious and I can record her statement then he entered into the Ward No.22 and introduced herself to Vandana first. Thereafter, he asked Vandana about her name, age and village. At that time she was conscious and then he asked about the incident and Vandana narrated the said incident. He recorded the statement of Vandana in question-answer form. After completion of recording of dying declaration, he read over the same to the Vandana and obtained her thumb impression on it. He has identified thumb impression of Vandana and his signature appearing on dying declaration (Exh.29). According to him, he started recording dying declaration of Vandana (Exh.29) at 05:25 p.m. and completed the same at 05:45 p.m.

53. During cross-examination Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3) very clearly stated that,

Doctor / Medical Officer had not examined Vandana in his presence and on his asking Doctor / Medical Officer made endorsement of fitness of Vandana to record dying declaration on requisition issued by him, annexed to the dying declaration (Exh.29). Before recording dying declaration (Exh.29), he had not enquired as to whether statement / dying declaration of Vandana was recorded by police. So also, he had not verified whether Vandana was under influence of any medicine. Nowhere in his entire testimony he has stated that he recorded dying declaration (Exh.29) after satisfying that Vandana was conscious, oriented and able to make dying declaration.

54. Aforesaid material came on record through the cross-examination of Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3), it is clear enough that, when he recorded dying declaration (Exh.29) of Vandana, Doctor / Medical Officer was not present and endorsement of fitness of Vandana to record dying declaration appearing on requisition, annexed to the dying declaration, was made by the Doctor / Medical Officer on his asking the same. This glaring defect goes to the root of dying declaration (Exh.29).

55. Dr Ramanuj Kabra (PW-8), Medical Officer, vide his

deposition at Exh.47 deposed that, on 05-02-2013 while he was on duty Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3) handed over him requisition intimating that, he intends to record statement / dying declaration of Vandana. On receiving the said requisition, he examined Vandana and asked her some questions. After examination and asking questions, he found that Vandana was conscious, oriented and able to give a statement. Thereafter, Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3) recorded dying declaration / statement of Vandana. After completion of recording of statement / dying declaration, again he examined Vandana and made endorsement to this effect on requisition issued by Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3). He has identified endorsement (Exh.48) and his signature below the same.

56. During cross - examination Dr Ramanuj Kabra (PW-8) has admitted that, there is no written record showing that after completing of recording of dying declaration (Exh.29), again he examined Vandana. It is pertinent to note that, in his entire testimony, Dr Ramanuj Kabra (PW-8) nowhere states that Vandana was conscious, oriented throughout during the recording of dying declaration (Exh.29). Upon perusing endorsement / Certificate of

Fitness to Vandana to record dying declaration (Exh.48) appearing on requisition issued for same annexed to the dying declaration (Exh.29), it cannot be gathered that, Dr Ramanuj Kabra, Medical Officer had examined Vandana twice i.e. prior to recording and after recording dying declaration (Exh.29). From the date and time he written on the endorsement (Exh.48), it becomes clear that, the same was made at 05:20 p.m. on 05-02-2013 i.e. only prior to commencement of recording of dying declaration and not after completion of recording of dying declaration. In such circumstances, it would not be safe to accept the improved version of Dr Ramanuj Kabra, Medical Officer that, he had examined Vandana twice i.e. prior to commencement of recording and after completion of recording of dying declaration (Exh.29).

57. There is no hand-written endorsement of Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3) on dying declaration (Exh.29) to the effect that after completion of recording of dying declaration, he had read over the same to Vandana and she had admitted the same to be correct. We have already stated in para supra that, though Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3) in his examination-in-chief stated about reading over dying declaration (Exh.29) to Vandana before obtaining her

thumb impression on the same, but not at all stated that Vandana admitted the same to be correct. It is true that, there is a printed clause in this regard on dying declaration (Exh.29). That clause covers the statement of declarant 'I read my dying declaration / dying declaration is read over to me and it is true'. The inapplicable portion of that printed clause has not been scored. In such circumstances, it is difficult to gather that, dying declaration (Exh.29) was read over to Vandana and she admitted it to be correct.

58. Having considered aforesaid evidence of Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3) and Dr Ramanuj Kabra, Medical Officer (PW-8), it can be gathered very well that, at the time of recording of dying declaration (Exh.29) Dr Ramanuj Kabra (PW-8) was not present. Dr Ramanuj Kabra, Medical Officer (PW-8) issued endorsement of fitness of Vandana to record dying declaration at Exh.48 made on requisition after asking for the same by Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3). Printed endorsement appearing on dying declaration about reading over the same to Vandana and her admitting it to be true and correct, cannot be considered for the reason that inapplicable portion therein has not been scored. Shri Abdul Rab Siddiki, Naib Tahsildar / Executive Magistrate (PW-3)

nowhere stated in his evidence that, after his reading over the dying declaration (Exh.29), Vandana admitted it to be correct. Evidence of Dr Ramanuj Kabra, Medical Officer (PW-8) that he examined Vandana prior and after recording dying declaration being contrary to the endorsement at Exh.48 cannot be believed and accepted. All these defects and irregularities do not inspire confidence about genuineness of dying declaration (Exh.29).

59. There is a variance between dying declaration / FIR (Exh.53) and dying declaration (Exh.29). In dying declaration / FIR (Exh.53), it is contended that, the accused forced Vandana to pour diesel from the diesel Can on her person and out of fear of appellant, she poured the diesel on her person, whereas in dying declaration (Exh.29) it is contended that the appellant poured the diesel from diesel Can on her person (the version of setting her on fire by the accused is consistent). This material inconsistency and aforesaid defects and irregularities make both the dying declarations i.e. dying declaration (Exh.53) and dying declaration (Exh.29) doubtful.

60. It is a matter of record that, prior to recording of dying declaration / FIR (Exh.53) and dying declaration (Exh.29), three more dying declarations of Vandana were recorded. Out of three, one

was recorded by Sau. Nutan Ramesh Adsare, a member of Woman Social Welfare Committee and remaining two were recorded by Head Constable Mr Gawade and Mr G.M. Aaynalwar, Naib Tahsildar / Executive Magistrate on 01-02-2013 and 02-02-2013, respectively. All the three dying declarations have been brought on record by the prosecution. In all these three dying declarations, Vandana disclosed about her sustaining the burns accidentally. Admittedly, the appellant has not proved the same by examining their respective authors, referred above, after recording the statement under Section 313 of Cr.P.C. In such circumstances, two questions arise; first, whether they can be read in evidence and consider, since not proved?, and whether they were outcome of threats of killing to father and brother given by the appellant? As far as second question is concerned, we have discussed in para supra that, ocular and documentary evidence i.e. testimony of Shri Bhimrao Wathore (PW-1) and Smt Indubai Wathore (PW-2) and dying declaration/ FIR (Exh.53) and dying declaration (Exh.29) do not inspire confidence, therefore, not worthy of acceptance. Therefore, only first question pertaining to admissibility of aforesaid three dying declarations remains.

61. In the case of **Suraj Bali Vs. Emperor, AIR 1934 Allahabad 340**, Allahabad High Court while interpreting scope and ambit of

Section 80 of the Evidence Act held that,

"when a dying declaration is made before a Magistrate, who records it, it is 'evidence' and can be admitted without proof under Section 80 of the Evidence Act."

62. In paragraph nos.2 to 4 of the judgment while rejecting argument that dying declaration does not fall within the ambit of Section 80 of the Evidence Act, Allahabad High Court held as under:

"2. Now, of these three reasons given not one reason would be altered if the Magistrate who recorded the dying deposition were called. That Magistrate would not become the committing Magistrate by being called as a witness, nor would the defect of the accused having been absent and not having had an opportunity of cross-examination be in any way removed by the calling of the Magistrate who recorded the dying deposition. Further on the Court observed:

The law does not provide that the mere signature of a Magistrate shall be a sufficient authentication of such a document.

3. The only question before the Court was whether Section 80 does or does not make that provision. The mere declaration that it does not is no reason. Learned Counsel also referred to two rulings of the Calcutta High Court, one of which is *Gouridas Namasudra v. Emperor* (1909) 36 Cal. 659 and the other is MANU/WB/0067/1929 : A.I.R. 1930 Cal. 228, *Tafiz Pramanik v. Emperor*, In neither of these cases was there any reference to Section 80, Evidence Act, and therefore the rulings cannot be taken as decisions on that section. There are two rulings of this High Court in which this section has been considered and those rulings assume that the section does apply to depositions and similar statements which may be proved by the production of the document without any witness being called to prove it. The first of these rulings is *Queen-Empress v. Pokh Singh* (1888) 10 All. 174. In that case there was the deposition of a medical witness which was merely signed by the Magistrate and the certificate required by Section 509, Criminal P.C., that the deposition was taken and attested by

a Magistrate in the presence of the accused was wanting. The prosecution argued that Section 80, Evidence Act, might be held to cover this defect. The Court held that the section could not be used for this purpose. The language used on p. 178 indicates that the Court considered that the section could be used for the purpose of tendering a document without calling evidence to prove it. The next ruling is in *Queen-Empress v. Sundar Singh* (1890) 12 All. 595. That was a case where the prosecution tendered a document purporting to be the record of a confession recorded by a Magistrate in Gwalior State. It was held that under Section 80 this record was admissible to prove that the confession had been duly made and that it was not necessary to call the Magistrate who recorded the confession. In *Maqbulan v. Ahmad Husain* (1904) 26 All. 108 their Lordships of the Privy Council had a case in which a certified copy of the statement of a witness in a previous case was tendered as evidence and their Lordships held on pp. 117 and 119 that that statement was admissible to prove the previous statement of the witness without calling any further evidence. Apparently it was held admissible under Section 80, Evidence Act, as on p. 117 it is shown that that was a section to which a reference was made by the counsel desiring the document to be accepted. It was held however that the description of the witness given in the heading was not part of the {deposition and therefore could not be admitted as proved by the mere production of the document. Having regard to these three rulings I am of opinion that it is not shown that the tahsildar was wrong in accepting the dying declaration of Mahabir as evidence. Another argument which was advanced by learned Counsel for the defence was based on the word "evidence" appearing in Section 80, Evidence Act. He argued that a dying deposition could not come under Section 80 because it was not evidence and the time at which it was recorded. For this purpose he referred to the definition of "evidence" in Section 3 which is stated to be Sub-section (1):

All statements which the Court permits or requires to be made before it by witnesses, in volition to matters of fact under inquiry, such statements are called oral evidence.

4. His argument was that there was no case before the Magistrate recording the dying deposition and therefore there was no fact under enquiry and there could be no evidence taken by him. But this is an argument which ignores the definition of "Court," given in Section 3. Under that section a Court includes all Judges and Magistrates and all persons, except arbitrators, legally authorised to take

evidence. The Magistrate who recorded the dying declaration was legally authorised to do so, and the inquiry which he was making was an inquiry directed for the purpose of recording that particular statement. Consequently, in my opinion, the dying deposition does amount to evidence within the meaning of Section 80. No further point was argued. I consider that under the circumstances of the case the accused have received an extremely light punishment. The applications in revision are therefore dismissed.”

63. Out of three dying declarations recorded on 01-02-2013 and 02-02-2013, even if one dying declaration was recorded by Nutan R. Adsare, Social Worker and another was recorded by Police Head Constable Shri Gawade have not been considered, then also, third dying declaration which is recorded by Shri G.M. Aaynalwar, Naib Tahsildar / Executive Magistrate complying all the necessary requirements including requirement of obtaining fitness certificate from the Medical Officer have been fulfilled. Therefore, the said dying declaration in view of ratio laid down in **Suraj Bali's** case, referred supra, squarely falls within the ambit of Section 80 of the Evidence Act. Thus, there is no obstacle in considering the same and that dying declaration supports the defence of the appellant.

64. Thus, on considering dying declaration of Vandana dated 02-02-2013 recorded by Naib Tahsildar, Executive Magistrate marked as Exh.'X' and aforesaid two dying declarations relied upon and proved by the prosecution viz. Exh.53 and Exh.29 simultaneously, it

can be held without hesitation that, they are contrary to each other. As to the burn injuries sustained by Vandana, one says that Vandana burnt accidentally and another says that appellant burnt Vandana by pouring diesel on her person. In such Circumstances, in any case, dying declaration (Exh.29) on the basis of which learned Additional Sessions Judge, Vaijapur convicted the appellant for serious charge of murder being contrary to the aforesaid dying declaration marked 'X' and for various reasons, discussed in para supra, loses not only its authenticity but its credibility.

65. Spot panchanama (Exh.41) proved in the evidence of Shri Laxman Sonawane (PW-6) was drawn on 02-02-2013 at 11:00 a.m. to 12:00 p.m., in the course of enquiry of Medico Legal Case No.80/2013 i.e. prior to registration of crime against the appellant, according to spot panchanama (Exh.41), stove was lying in the house where incident of burning of Vandana took place and same was seized along with diesel can, heater rod, match stick box and small pieces of burnt clothes. Muddemmal stove on perusal looks intact, but merely for this reason inference cannot be drawn that earlier statement of Vandana about her sustaining burns accidentally was outcome of threats given by accused when evidence to this effect is doubtful and dying declarations relied upon by the prosecution at

Exhs.53 and 29 are full of many defects and inconsistencies, therefore not worthy of consideration.

66. CA report (Exh.63) dated 29-05-2013 reveals, residues of diesel detected on Article – ‘4’, ‘5’, ‘6’ & ‘7’. Another CA report dated 16-07-2013 (not exhibited) reveals that, blood group of Vandana was ‘B’ and blood group ‘B’ was detected on blood stained gauze piece. One more CA Report of the same date i.e. 16-07-2013 (not exhibited) reveals that, tests for detection of residues of diesel on hair in a bottle labelled – Vandana Rahul Thorat are negative. Thus, on the basis of CA reports, it can be gathered that, substance / oil, which was found on the body of Vandana, was diesel and not more than that. Thus, only on the basis of CA reports, inference cannot be drawn that, dying declaration (Exh.29), on the basis of which, the appellant / accused held guilty by learned Additional Sessions Judge, Vaijapur is true and voluntary dying declaration.

67. From the evidence of Dilip Modi, Police Naik (PW-11) it appears that on 04-02-2013 he had accompanied with Shri Shaikh Nisar Ahmed Mohammad Sharif, PSI (PW-9), Smt Lata Kanade, Social Worker (PW-10) and Smt Vijaymala Ritthe, PSI (PW-13). When they visited Ward No.22/23 of Ghati Hospital, Aurangabad and

done video shooting of dying declaration of Vandana recorded by Smt Vijaymala Ritthe, PSI (PW-13) with his video camera, prepared a compact disk and handed over the same to Smt Vijaymala Ritthe, PSI (PW-13). Admittedly, transcript of the version alleged to have taken place between Vandana and Smt Vijaymala Ritthe, PSI (PW-13) recorded in compact disk has not been produced and proved and certificate under Section 65 of the Evidence Act not brought on record and proved. Therefore, merely relying on the evidence of Shri Dilip Modi, Police Naik (PW-11), inference cannot be drawn that dying declaration (Exh.53) of Vandana is true and voluntary dying declaration. Like the evidence of Shri Dilip Modi, Police Naik (PW-11), evidence of Shri Bapurao Gore (PW-12) that he snapped photographs of spot of incident Article 'A' cannot be believed as he has not brought on record memory card of the digital camera by which he snapped the said photographs and proved that, photographs Article - 'A' have been prepared from the same.

68. In **Sarnadhan Dhudaka Koli's** case (supra), the Hon'ble Supreme Court held as under:

“16. Consistency in the dying declaration, therefore, is a very relevant factor. Such a relevant factor cannot be ignored. When a contradictory and inconsistent stand is taken by the deceased herself in different dying declarations, they should not be accepted on their face

value. In any event, as a rule of prudence, corroboration must be sought from other evidence brought on record.”

The case at hand is at higher pedestal. In the case at hand, the prosecution has not suppressed three dying declarations made by Vandana on 01-02-2013 and 02-02-2013, but they have brought the same on record. There are two sets of dying declarations, one set favours the appellant and other set implicates the appellant. As such, in view of the aforesaid ratio laid down by the Hon'ble Supreme Court, the appellant cannot be convicted solely relying on dying declaration (Exh.29) not only for the reason that, it is contrary to dying declaration Exh.'X', but also for the various reasons enumerated in para supra.

69. In the case of **Prabhakar s/o Kaduba Shejul**, the Division Bench of this Court dealt with the aspect of suppression of dying declaration of victim, which favours to the accused by the State. Therefore, according to us, this Judgment is not applicable to the facts of the case at hand, as prosecution (State) has brought on record dying declaration of Vandana, which favours to the Appellant.

70. In the case of **Bapu (Nandu) Prabhu Koli @ Raut**, the Division Bench of this Court held as under:

“13. As already observed, though PW3 Rajesab Fulari stated in his examination that he informed the Special Executive Magistrate by letter (Exhibit-25) to record the dying declaration of said patient, the prosecution has not placed on record the dying declaration recorded by the Special Executive Magistrate. Perusal of the charge sheet shows the names of proposed witnesses to be examined by the prosecution. In the said list of proposed witnesses, at Sr. No.6, name of one P.M. Sontakke, Taluka Executive Magistrate is mentioned, and against his name it is mentioned that he has recorded the dying declaration of the deceased. But the prosecution has not placed on record the said dying declaration recorded by Taluka Executive Magistrate. The dying declaration recorded by the Executive Magistrate stands on much higher footing than the dying declaration recorded by any other person. In view of the exposition of law by the Supreme Court in the case of Khushal Rao vs. State of Bombay (A.I.R. 1958 S.C. 22 : [2008 ALL SCR (O.C.C.) 41] (V 45 C 4), the dying declaration recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon the oral testimony which may suffer from all the infirmities of human memory and human character.”

In the case at hand, dying declaration (Exh.29) though recorded in proper manner, but does not inspire confidence for various reasons discussed in para supra and contrary to the earlier dying declaration recorded by another Executive Magistrate in a proper manner, therefore, principles laid down by the Division Bench of this Court also applies in case at hand.

71. In **Ajay s/o. Digamber Deogade's** case (supra), the Division Bench of Bombay High Court, Nagpur Bench held as under:

“36. Accused has to prove probable defence and burden is not so high as like the prosecution.

Prosecution has to prove the guilt of accused beyond reasonable doubt.”

Herein in this case, in our considered view, the prosecution failed to prove the guilt of the accused beyond reasonable doubt, however defence raised by the appellant probabilises from the dying declaration of Vandana Exh.'X'.

72. In the case of **Vithal Kondiba Padghane** (supra), the Division Bench of this Court held as under:

“22. Thus, in the totality of the facts and circumstances, we are of the considered opinion that prosecution case suffers from glaring infirmities creating mass of doubts and none of the dying declarations, written or oral, can be relied upon as true and voluntary statement of the deceased. If dying declarations are disbelieved in entirety, conclusion must follow that prosecution has miserably failed to prove guilt of the accused beyond reasonable doubt.”

In the case at hand also, none of the dying declarations written or oral do not inspire confidence for various reasons which are discussed at length in para supra. Therefore, it would not be legal to base the conviction only relying on dying declaration (Exh.29) after discarding other 4 to 5 written dying declarations and two oral dying declarations.

73. In the case of **Parveen Kumar** (supra), the Hon'ble Supreme Court held as under:

“10. While appreciating the credibility of the evidence produced before the Court, the Court must view evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but one name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declaration. It may be that if there was any other reliable evidence on record, this Court could have considered such corroborative evidence to test the truthfulness of the dying declarations. The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested. It is well settled that one piece of unreliable evidence cannot be used to corroborate another piece of unreliable evidence. The High Court while considering the evidence on record has rightly applied the principles laid down by this Court in *Thurukanni Pompiah and another Vs. State of Mysore*, AIR 1965 SC 939, and *Khusal Rao Vs. State of Bombay*, 1958 SCR 552.”

In the case at hand also, dying declaration (Exh.29) is not discarded only for the reason that it is contrary with dying declaration ‘X’, but also for various reasons discussed in para supra.

74. In the case of **Amol Singh** (supra), the Hon’ble Supreme Court held as under:

“8. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent

throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. (See: Kundula Bala Subrahmanyam v. State of A.P. [(1993) 2 SCC 684]. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declaration, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.”

We have considered all the dying declarations in the light of the various surrounding facts and circumstances and thereafter formed our opinion.

75. In the case of **Ramesh s/o. Gyanoba Kamble** (supra), the Full Bench of this Court after discussing entire law of dying declaration held as under :

“Thus, it is well settled that the dying declaration, after its careful scrutiny, if the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there is no legal impediment to form such dying declaration the basis of conviction, even if there is no corroboration.”

The Full Bench of this Court further held that,

“In other words, the recorder of a dying declaration need not depose before the Court, in the words spoken by the deceased, about the name/description, and the act of the accused, which resulted in his death. Accordingly, the question referred to this Full Bench is answered in negative.”

76. We have applied all the principles laid down by the Full Bench of this Court in **Ramesh s/o. Gyanoba Kamble** while

appreciating the evidence on record of this case and then formed our opinion.

77. In the case of **Suresh S/o. Arjun Dodorkar (Sonar)** (supra),

Division Bench of this Court held as under:

“It would thus be seen that in respect of the incident there is a major variance though there is a common thread in both the dying declarations that it was the appellant who had set her ablaze. In cases resting on multiple written dying declarations, the Courts cannot pick and choose any one dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect of the names and the number of accused, the prelude to the incident and the incident itself. In these two dying declarations, there is consistency in respect of the name and the number of accused. However, in respect of the prelude to the incident, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declarations and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs. 24 and 27, as acceptance of any one dying declaration necessarily renders the other as false. If in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. Merely because the overt act attributed to the accused is consistent in both the dying declarations would not make the dying declarations a reliable piece of evidence. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. 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. In our opinion, therefore, no reliance can be placed on the dying declarations at Exhs. 24 and 27.”

In the case at hand also, there are multiple dying declarations and acceptance of one dying declaration falsifies the other. In addition to that, dying declaration (Exh.29) on the basis of which learned Additional Sessions Judge, Vaijapur placed its implicit reliance, though not passed all the tests of reliability discussed in para supra, therefore, conviction of the appellant is unsustainable.

78. In the case of **Laxman Vs. State of Maharashtra** (supra), the Hon'ble Supreme Court rule as under:

“It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration.”

In the case at hand, dying declaration (Exh.53) not only discarded for the reason that Fitness Certificate issued by the doctor has not been proved, but for the various reasons including Police Officer, who recorded the same, did not get satisfied himself that Vandana was conscious and oriented and fit to record her statement.

79. We have gone through all the judgments of the

Hon'ble Supreme Court viz. relied upon by the Additional Public Prosecutor, noted down the principles laid down therein and on the touch stone of those principles, appreciated evidence on record for forming our opinion.

80. Thus, having gone through the material available on record and carefully examining reasoning recorded by the learned Additional Sessions Judge, Vaijapur for convicting the appellant – accused, we find ourselves in disagreement with the learned Additional Sessions Judge, Vaijapur. Keeping in view above discussion, we find it would be unsafe to rely on evidence brought on record by the prosecution to convict the appellant – accused, therefore, giving benefit of doubt to the appellant – accused, he needs to be acquitted. Thus, we proceed to pass the following order:-

ORDER

(i) Criminal Appeal No.563 of 2015 is accordingly allowed.

(ii) The Judgment and order dated 16-06-2015 passed by learned Additional Sessions Judge, Vaijapur, Dist. Aurangabad in Sessions Case No.49 of 2013 convicting the appellant / accused namely Rahul S/o. Limbaji Thorat for the

offences punishable under Sections 302 and 506 of the Indian Penal Code, 1860 is set aside and he is acquitted of the said charges.

(iii) He be set at liberty forthwith, if not required in any other crime or case.

(iv) The fine amount, if any, paid, be refunded to the appellant / accused, after appeal period is over.

(v) Mr Satish A. Gaikwad was appointed to represent the appellant / accused as he has not engaged Advocate to represent to him. Legal fees payable to Mr Satish A. Gaikwad, Advocate is quantified at Rs.15,000/- (Rs.Fifteen Thousand Only). The High Court legal Services Sub-Committee, Aurangabad, shall pay the same to Mr Satish A. Gaikwad, Advocate.

(B. U. DEBADWAR)
JUDGE

Per : Ravindra V.Ghuge, J.

81. I have derived the benefit of reading the detailed views and conclusions expressed by my brother Shri B.U.Debadwar, J. I am in complete agreement with the views expressed and the conclusions

drawn. Nevertheless, I felt it appropriate to express my view with regard to the multiple dying declarations, which form a peculiar aspect in this case, and further deal with the contentions of the learned APP as regards the applicability of Section 106 of the Evidence Act.

82. We have come to the conclusion in this case that the death of Vandana is homicidal. In so far as the multiple dying declarations are concerned, I find that the Law has been summarized by the Hon'ble Apex Court in the matter of **Jagbir Singh Vs. State (NCT of Delhi) [(2019)8 SCC 779]**. It has been held that when there are multiple dying declarations and if the accused has not been held responsible for the assault on the person of the deceased and if in a subsequent dying declaration, the deceased has taken a different stand resulting in contradictions, the Court would be obliged to carefully examine the entirety of materials as also the surrounding circumstances. It would be the duty of the Court to assess as to whether the incriminatory dying declaration brings out the truthful position in conjunction with the capacity of the deceased to make such declaration. The view of the Court must be based on an unshakable conclusion that rules out the element of tutoring the person who is rendering the dying declaration. It has also been held

that when there are multiple dying declarations, the Court should not prefer the statement which is incriminatory and reject the other merely because it does not implicate the accused. If 2 dying declarations relevant to the case are found to be completely incompatible with the remaining evidence, such dying declarations need to be rejected.

83. In the case in hand, we have assigned reasons to hold that the dying declaration Exh.53 has been rightly rejected by the Trial Court and while doing so, we have also come to a conclusion, in view of the surrounding circumstances, that the last dying declaration Exh.29 does not inspire confidence.

84. The learned APP has vehemently contended that it was the deceased and the accused husband who were all alone in the house which is the scene of the crime. The deceased has suffered a homicidal death. Section 106 of the Evidence Act therefore casts an obligation on the accused in explaining the circumstances in which the deceased has suffered death.

85. We find that the deceased had consistently stated in her multiple dying declarations that she accidentally caught fire due to

the bursting (bhadka) of the stove. This possibility has been ruled out as the stove was found to be intact. She has then stated in her dying declaration Exh.53 that the accused beat her in such a way that she felt compelled to pour diesel on to herself and the accused set her on fire. In the last dying declaration Exh.29, she states that the accused poured diesel upon her and set her on fire.

86. In the case of **Lakhan Vs State of Madhya Pradesh [2010 AIR SCW 5993]**, the Hon'ble Apex Court, while considering Section 32 of the Evidence Act (1 of 1872) Act, has observed in paragraph Nos. 8 to 13 and 20 as under :-

*"8. The doctrine of dying declaration is enshrined in the legal maxim **"Nemo moriturus praesumitur mentire"**, which means "a man will not meet his maker with a lie in his mouth". The doctrine of Dying Declaration is enshrined in Section 32 of the Indian Evidence Act, 1872 (hereinafter called as, "Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.*

9. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been

recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution's version differs from the version given in the dying declaration, the said declaration cannot be acted upon, (vide : Kushal Rao v. State of Bombay, AIR 1958 SC 22; Rasheed Beg and Ors. v. State of Madhya Pradesh, AIR 1974 SC 332; K. R. Reddy and Anr. v. The Public Prosecutor, AIR 1976 SC 1994; State of Maharashtra v. Krishnamurti Laxmipati Naidu, AIR 1981 SC 617; Uka Ram v. State of Rajasthan, (2001) 5 SCC 254 : (AIR 2010 SC 1814 : 2001 AIR SCW 1478); Babulal and Ors. v. State of M.P., (2003) 12 SCC 490 : (AIR 2004 SC 846 : 2003 AIR SCW 7074); Muthu Kutty and Anr. v. State, (2005) 9 SCC 113 : (AIR 2005 SC 1473 : 2004 AIR SCW 7396); State of Rajasthan v. Wakteng, AIR 2007 SC 2020 : (2007 AIR SCW 3802); and Sharda v. State of Rajasthan, (2010) 2 SCC 85 : (AIR 2010 SC 408 : 2010 AIR SCW 1)].

10. In *Munnawar and Ors. v. State of Uttar Pradesh and Ors.* (2010) 5 SCC 451 : (2010 AIR SCW 3296), this Court held that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after recording of the dying declaration. That may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded.

11. A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim, however, circumstances showing anything to the contrary should not be there in the facts of the case. [vide *Ravi Chander and Ors. v. State of Punjab*, (1998) 9 SCC 303; *Harjit Kaur v. State of Punjab*, (1999) 6 SCC 545 : (AIR 1999 SC 2571 : 1999 AIR SCW 2751); *Koli Chunilal Savji and Anr. v. State of Gujarat*, (1999) 9 SCC 562 : (AIR 1999 SC 3695 : 1999 AIR SCW 3727); and *Vikas and Ors. v. State of Maharashtra*, (2008) 2 SCC 516 : (AIR 2008 SC (Supp) 1356 : 2008 AIR SCW 915).]

12. In *Balak Ram v. State of U.P.*, AIR 1974 SC 2165, the question arose as to whether a dying declaration recorded by a higher officer can be discarded in case of multiple dying declarations. The Court held as under (Para 53 of AIR) :-

"The circumstances surrounding the dying declaration, though uninspiring, are not strong enough to justify the view that officers as high in the hierarchy as the Sub-Divisional Magistrate, the Civil Surgeon and the District Magistrate hatched a conspiracy to bring a

false document into existence. The Civil services have no platform to controvert allegations, howsoever grave and unfounded. It is, therefore, necessary that charges calculated to impair their career and character ought not to be accepted except on the clearest proof. We are not prepared to hold that the dying declaration is a fabrication."

13. In Sayarabano @ Sultanabegum v. State of Maharashtra, (2007) 12 SCC 562 : (AIR 2007 SC (Supp) 398 : 2007 AIR SCW 1136), two Dying Declarations had been recorded. As per the first declaration, the deceased had met with an accident. She was hit by the kerosene lamp which fell on her body and caught fire. While recording the second declaration, the Judicial Magistrate asked her why she was changing her statement. The deceased replied that her Mother-in-Law had told her not to give any statement against the family members of her in-laws and that was the reason, why she had not involved any person in the earlier statement. But, in fact, it was her Mother-in-Law who threw the kerosene lamp on her and thus, she was burnt. She also stated that her Mother-in-Law was harassing her. In such a situation, this Court held that the second dying declaration was true and inspired confidence. III-treatment of the deceased was clearly established and completely proved on the basis of the evidence of other witnesses.

20. In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made

under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance. ”

87. The doctrine of dying declaration assumes importance in view of the legal maxim “*Nemo moriturus praesumitur mentire*”. It is everybody's belief that a man will not meet his maker with a lie in his mouth. If a dying declaration is recorded by a competent Magistrate, the same would stand on a much higher pedestal as compared to a declaration recorded by any officer of a lower rank. We find in the case in hand that in the earlier dying declarations (4 in number), prior to the recording of Exh.53 and 29, a dying Vandana has consistently stated that she suffered injury due to the high flames (Bhadka) or bursting of the stove. In Exh.53, she implicates the accused for the first time that he had compelled her to pour diesel on to herself. In the last declaration Exh.29, she states that he poured diesel and set her on fire. It is, therefore, quite intriguing as to why

did Vandana consistently say that it was an accident. Whether we could safely apply the above stated legal maxim to the case in hand ?

88. The dying declaration at Exh.53 was recorded on 04/02/2013 i.e. on the 4th day of the incident and when Vandana was in the company of her parents for almost 3 days. Similarly, the dying declaration Exh.29 was recorded on 05/02/2013. The element of tutoring and prompting which led to Vandana taking a complete somersault and changing her version to implicate the accused, cannot be ruled out. In this backdrop, I do not find that we could hold the accused guilty by applying Section 106 of the Evidence Act and draw an inference that he has failed to explain the cause of death of his wife and since he has failed to do so, he must have been the person who killed his wife.

89. In **Gagan Kanojia and another Vs. State of Punjab [(2006) 13 SCC 516]**, the Hon'ble Apex Court has concluded that in criminal jurisprudence, conviction cannot be based on a conclusion that the accused may have committed the crime. A conviction can only be handed down if the Court comes to a firm conclusion that it was the accused and the accused alone who has committed the offence. Paragraph Nos.9 and 10 read as under :-

- "9. *The prosecution case is based on circumstantial evidence. Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well-settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between 'may be true' and 'must be true'. Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must raise a presumption that the accused is innocent and in the event two views are possible, one indicating to the guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on records and analyze and assess the same objectively.*
10. *We would proceed on the well-known principles in regard to appreciation of the circumstantial evidence which were noticed by the High Court in the following terms :*
- "1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.*
- 2) Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.*

3) There should be no missing links but it is not that everyone of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.

4) On the availability of two inferences, the one in favour of the accused must be accepted.

5) It cannot be said that prosecution must meet any and every hypothesis put forwarded by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise."

(Emphasis supplied)

90. As such, I am of the view that the benefit of doubt has to be given to the accused and the appeal deserves to be allowed.

(RAVINDRA V. GHUGE, J.)