

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

CRIMINAL APPEAL NO. 613 OF 2014

Navin Bhimrao Bansode,
Age; 30 years, Occupation; Labour,
R/o; Jaibhim Nagar, Nanded.

...Appellant

V E R S U S

The State of Maharashtra

..Respondent

.....
Shri Joydeep Chatterji, Advocate for the Appellant
Shri. K.S. Patil, A.P.P. for the Respondent/State
.....

**CORAM : T.V. NALAWADE &
M.G. SEWLIKAR, JJ.**

Date of Reserving of the Judgment : 16.01.2020
Date of Pronouncement of the Judgment : 17.02.2020

JUDGMENT [PER : M.G. SEWLIKAR, J.] :

This appeal is preferred by the original accused against his conviction under Section 302, 323 and 506 of Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.500/- and in default to suffer simple imprisonment for one month for the offence punishable under Section 302 of I.P.C. He is also sentenced to suffer rigorous imprisonment for three months and to pay fine of Rs.200/- and in default simple imprisonment for 10 days for the offence punishable under Section 323 of I.P.C. He is

also sentenced to suffer rigorous imprisonment for one month and to pay fine of Rs.100/- and in default simple imprisonment for 7 days for the offence punishable under Section 506 of I.P.C.

2. Facts giving rise to this appeal are that the appellant is the husband of the deceased Pushpa. Deceased Pushpa was the daughter of the maternal uncle of the accused/appellant. Their marriage was solemnized 7 years before the incident.

3. It is the case of the prosecution that the accused/appellant is a liquor addict. In the evening, he used to come home drunk and would assault her on trivial grounds. On 16.10.2012 at about 8.00 p.m., the accused/appellant came home drunk. The deceased questioned him as to why he had consumed liquor, thereupon the accused/appellant abused her and slapped her and said that he would get rid of her. She and her son went to sleep after having dinner. At about 12.00 in the night the accused/appellant poured kerosene on her. At that time she woke up but the accused/appellant ignited the match stick and threw it at her and ran out of the house. She ran out of the house screaming. Thereupon, the accused/appellant poured water on her and extinguished the fire.

4. Deceased Pushpa was shifted to the hospital by Indica Car. The intimation of the admission of the deceased Pushpa was

given to the police station. The mother and the sister of the accused also accompanied her to the hospital. Accordingly, PW-7 H.C. Rathod went to the Civil Hospital and recorded the dying declaration of the deceased Pushpa in which she narrated the incident as stated above. This dying declaration was recorded between 11 a.m. and 11.15 a.m.

5. Second dying declaration was recorded by PW 8 Special Judicial Magistrate Datta Navghare. The Special Judicial Magistrate PW-8 Datta Navghare approached the Medical Officer for recording the dying declaration of the deceased. He recorded the dying declaration of the deceased Exh. 38. In this dying declaration also she stated that the accused/appellant used to drink liquor. He was not ready to give it up, therefore, there was quarrel in the night of 16.10.2012. When she was asleep, the accused/appellant poured kerosene on her and set her on fire.

6. Dying declaration recorded by PW 7 H.C. Rathod was treated as an F.I.R. and offence under Section 307, 323, 504 and 506 of the I.P.C. was registered. The offence was converted into the offence under Section 302 of the I.P.C., as deceased Pushpa breathed her last on 22.10.2012 at 9.00 a.m.

7. Postmortem on the dead body of the deceased was conducted by PW- 6 Dr. Dake, who opined that the deceased died due to 'septicemia due to burns'.

8. Spot panchanama Exh. 21 was prepared. Pant of the accused, a full shirt having black design of the accused, partial burnt cloth pieces, a Can containing kerosene were seized and referred to the Chemical Analyzer. After disclosure of the offence charge-sheet was submitted before the learned J.M.F.C., Nanded who committed the same to the learned Sessions Judge in usual manner.

9. Charge Exh.- 11 was framed by the learned Additional Sessions Judge, Nanded under Section 302, 323, 504 and 506 of the I.P.C. It was read over and explained to the accused/appellant who pleaded not guilty to it and claimed to be tried. His defence is of total denial. It is also his defence that the deceased was burnt because of the fall of 'Chimni' (Oil Lamp).

10. The learned Sessions Judge examined ten witnesses. The learned Sessions Judge found the accused/appellant guilty of the offence punishable under Section 302, 506 and 323 of the I.P.C. and sentenced him as above and acquitted him of the offence punishable under Section 504 of I.P.C.

11. The learned Sessions Judge found that both the dying declarations are voluntary and truthful. The deceased was in sound state of mind while giving the dying declarations. He found that the deceased was burnt by the accused/appellant and also found that the defence of the accused was improbable and therefore he

recorded the conviction as stated above.

12. Heard Shri Joydeep Chatterji, learned Counsel for the Appellant and Shri. K.S. Patil, learned A.P.P. for the Respondent/State.

13. Shri Chatterji, learned counsel for the accused/appellant submitted that the deceased, while admitting in the hospital stated that she was burnt because of fall of 'Chimni'. He submitted that the deceased was sleeping with her son. If kerosene had been sprinkled by the accused/appellant on the deceased, some kerosene must have fallen on the son of the deceased. In that case along with the deceased the son would also have sustained burn injuries. He also submitted that the prosecution has changed the spot of the incident. The deceased has stated that the incident occurred in the bed room, whereas in the bed room nothing was found. The burnt cloth pieces were found in the kitchen. He further submitted that the conduct of the accused/appellant in extinguishing the fire also indicates that the accused/appellant did not set her on fire. He argued that all these circumstances clearly indicate towards the happening of the incident due to accidental fire. He submitted that the brother of the deceased, father of the deceased did not support the prosecution to whom the oral dying declaration was given by the deceased. He therefore prayed for allowing of the appeal and acquittal of the accused/appellant.

14. Learned A.P.P. argued that the dying declarations are truthful and voluntary. The evidence of H.C. Rathod PW 7, PW-8 Special Judicial Magistrate Datta Navghare, Dr. Khan PW-9 clearly indicates that the deceased was in sound state of mind while giving the dying declaration. He further submitted that the clothes of the accused/appellant and the burnt cloth pieces of the deceased were having kerosene residues which indicates that the accused/appellant had poured kerosene oil on the person of the deceased. He submitted that in the spot panchanama the presence of 'Chimni' is not shown. This indicates that the defence of the accused/appellant is false. The learned Trial Court has therefore correctly recorded the conviction.

15. The learned A.P.P. further argued that the accused has not explained as to how the deceased was burnt. He was in the house at the time of incident and therefore it was within his knowledge as to how the deceased sustained burn injuries. He failed to explain the sustaining of the burn injuries by the deceased. Therefore, for these reasons also the conviction recorded by the learned Trial Court is correct and no interference by this Court is called for.

16. The prosecution to prove its case has examined as many as ten witnesses.

17. The case of the prosecution hinges on written dying declaration and oral dying declaration as well. Written dying declarations are recorded by PW 7 H.C. Rathod and PW 8 Special Judicial Magistrate Datta Navghare. Oral dying declaration was given by the deceased to PW 2 Namdeo Kapale the father of the deceased. Father of the deceased turned hostile and therefore the oral dying declaration has been completely ruled out. Prosecution has not examined the brother of the deceased to whom allegedly oral dying declaration was given by the deceased.

18. There is no eye witness to the incident. The entire case of the prosecution is based on two dying declarations Exh. 36 recorded by H.C. Rathod PW 7 and the dying declaration Exh. 38 recorded by the Special Judicial Magistrate Datta Navghare (PW 8).

19. So far as the dying declaration is concerned the law is well settled. The principle on which the dying declaration is admitted in evidence is based on the legal maxim "**Nemo Moriturus Praesumitur Mentire**" i.e. the man will not meet his maker with a lie in his mouth. It is based on the principle that in the face of death, all the worldly aspirations of a man do not exist. It is unlikely that a person who is on death bed would falsely implicate an innocent. In the case of "**Paniben Vs. State of Gujarat; AIR 1992 SUPREME COURT 1817**", the principles governing the dying declaration are enumerated as under:

“It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring-corroboration is merely a rule of prudence. The Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

(I) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P. (1976) 2 SCR 764) (AIR 1976 SC 2199).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Ram Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264 : (AIR 1974 SC 332).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P., AIR 1982 SC 1021).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram

Manorath v. State of U.P., 1981 SCC (Crl.) 581).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505)

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and another v. State, AIR 1988 SC 912).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan, AIR 1989 SC 1519)."

20. On the basis of these principles it will have to be examined whether the dying declarations are truthful, voluntary and not the product of imagination or tutoring.

21. The law on the dying declaration 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 the dying declaration cannot be relied upon without corroboration. When the dying declaration is suspicious, it should not be relied upon without having corroborative evidence. Court has to scrutinise the dying declaration carefully and must ensure that the dying declaration is not the result of tutoring, prompting or a product of 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 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 guarantee of its veracity. When the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction.

22. The dying declaration is enshrined in Section 32 of the 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.

23. As indicated above prosecution relies on two dying declarations i.e. Exh. 36 and 38.

24. In case of multiple dying declarations the law is well settled. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, medical evidence, voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of the judicial discretion by the Court in such matters. The Hon'ble Supreme Court in the case of **"Raju Devade Vs. State of Maharashtra - AIR 2016 AIR (SC) 3209** has observed as under :

"27. This court had clearly laid down that the each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider the each one of them in its correct perspective and satisfy itself that which one of them reflects the true state of affairs. "

25. PW 7 H.C. Rathod is the witness who recorded the dying declaration Exh. 35. This witness has proved the dying declaration Exh. 35. When he went to the Civil Hospital, Dr. Khan PW 9 was present there. He met Dr. Khan and requested Dr. Khan to certify whether the deceased was in a position to give the statement. Dr. Khan examined the patient and certified that the deceased was in a position to give the statement.

26. Testimony of this witness shows that he took all the precautions as are required for recording the dying declaration. He first got the certificate of fitness from Dr. Khan. Then he asked all the relatives of the deceased to leave the ward and then commenced the recording of the dying declaration. This clearly indicates that he ensured while recording the dying declaration that nobody from the relatives of the deceased was present, so that there should not be any scope for tutoring.

27. This witness has further stated that while recording of the dying declaration the deceased stated to him that the deceased was beseeching her husband not to drink alcohol. Her husband came home drunk on 16.10.2012 at 8.00 p.m. She questioned him about his drinking habits which led to the exchange of hot words between her and the accused. The accused threatened her that it had become a usual affair and this will not end unless she was killed. All of them went to sleep. At about 12.00 a.m. the accused sprinkled kerosene on her, ignited a match stick threw it on her and ran out of the house. She raised shouts. Her neighbours gathered there and doused fire and shifted her to the hospital. This witness has further stated that as per her narration he recorded the dying declaration. After conclusion of the dying declaration, he again requested Dr. Khan (PW 9) to examine the deceased and certify whether she was conscious and in a position to give the statement. Accordingly Dr. Khan examined her and certified that she was mentally fit to give the

statement. Then he obtained the thumb impression of her right toe on the statement. The statement was read over to her and then he also signed the statement. He further stated that the deceased was in critical condition but was speaking.

28. The testimony of this witness shows that he had taken every care to see that while recording the dying declaration no one was present. He took all the precautions which are necessary for recording the dying declaration. After completion of the dying declaration he read over its contents to the deceased and took her toe thumb impression on it. In the cross-examination, nothing could be elicited from this witness so as to dis-credit his testimony. Therefore, this dying declaration appears to be truthful and voluntary.

29. PW 9 Dr. Khan has proved that the deceased was in sound state of mind while making the dying declaration. On the request of PW 7 H.C. Rathod, he examined the deceased Pushpa and was satisfied that she was fit to give the statement. He made the endorsement and signed the same. It has also come in his evidence that he was present throughout the recording of the dying declaration. After recording of the dying declaration was concluded, he again examined the patient and certified that the patient/deceased was mentally fit to give the statement and signed it.

30. In the cross-examination nothing could be brought on record to indicate that the deceased was not in sound state of mind while making the declaration. The testimony of these two witnesses i.e. PW 7 Rathod and PW 9 Dr. Khan lends credence to the case of the prosecution that the deceased was in sound state of mind. Their evidence does not even remotely suggest that there was any possibility of tutoring or that the declaration was the product of imagination. Therefore, having regard to all these attending circumstances, it has to be held that the deceased was in sound state of mind while giving the dying declaration.

31. This takes me to the 2nd dying declaration which was recorded by PW 8 the Special Judicial Magistrate, Datta Navghare. It has come in his evidence that he met Dr. Khan in charge of the Ward No. 14 and disclosed him the purpose of his visit. On his request, Dr. Khan examined the deceased Pushpa and informed PW 8 Datta Navghare that the deceased was in a position to give the statement and accordingly made the endorsement. PW 8 also asked some questions about the health of the deceased Pushpa to satisfy himself that she was in a position to speak.

32. PW 8 Datta Navghare has proved the dying declaration Exh. 38. He has stated that he asked some questions to her and she replied to those questions. He recorded the same in question and answer form in his own hand writing. He introduced himself and

explained the deceased Pushpa the purpose of his visit. The deceased Pushpa told her name as Pushpa Navin Bansode resident of Jaibhimnagar, Nanded. Thereafter, he commenced the recording of the dying declaration. He asked her how she sustained the burn injuries. She replied that she was insisting on her husband to give up the habit of drinking alcohol but the accused was adamant on it, owing to which which there used to be quarrels. On this very count, there was a quarrel between the deceased and the accused in the night of the incident. Thereafter they went off to sleep. At mid night, her husband i.e. the accused sprinkled kerosene on her and set her ablaze. He recorded her statement as per her narration and read it over to her. He also took the right toe thumb impression on the dying declaration. On his request, Dr. Khan PW 9 again examined her and gave written endorsement that she was fit to give the statement and signed it. This dying declaration is at Exh. 38. He has further stated that no relatives were allowed to come there. In the cross-examination he has stated that the deceased was in serious condition and was talking in low voice.

33. Thus, these dying declarations un-mistakeably show that the deceased was in sound state of mind while giving the dying declaration. PW 9 Dr. Khan's testimony has strengthened this inference. PW 9 Dr. Khan has stated that on the request of PW 8 Datta Navghare, he examined the deceased and found her mentally fit to give the statement and made the endorsement under his

signature. PW 9 Dr. Khan has further stated that after closure of the statement, PW 8 Datta Navghare again requested him to examine the deceased Pushpa and certify whether she was fit to give the statement. He accordingly examined her and found her fit through out the statement and then he made endorsement under his signature.

34. This dying declaration Exh. 38 states that there was quarrel between her and her husband on account of drinking habits of the accused. In the night of 16.10.2012 after the quarrel, she went off to sleep. Thereafter the accused poured kerosene on her and set her on fire. She further stated in dying declaration that she and the accused only were there in the house at that time.

35. These two dying declarations Exh. 35 and 38 clearly indicate that both the dying declarations are consistent. The deceased has implicated the accused to be the author of the crime in both the dying declarations. It was argued by Shri Chatterji, learned counsel for the accused that both the dying declarations are not consistent as presence of son of the deceased is not shown in the dying declaration Exh. 38 whereas, in the dying declaration Exh. 35 presence of the son of the deceased is shown. According to the learned counsel for the accused the dying declarations are therefore inconsistent with each other and no implicit reliance can be placed on these two dying declarations. Both the dying declarations

therefore need to be rejected. This submission cannot be sustained. If both the dying declarations Exh. 35 and 38 are perused carefully the position that emerges is that in the dying declaration Exh. 35 the presence of the son is indicated whereas in the dying declaration Exh. 38 the presence of the son is not indicated. Barring this, there is no in-consistency in both the dying declarations. The said inconsistency is so minuscule that no importance can be attached to it. The deceased has been consistent in both the dying declarations that there was a quarrel between her and her husband, thereafter they went off to sleep and then the accused poured kerosene on her and set her on fire. A minor inconsistency, by no stretch of imagination, can affect the veracity of the dying declarations. Therefore, both the dying declarations appear to be truthful, voluntary and do not appear to be the product of tutoring or imagination. Hence, the learned Trial Court committed no error in holding that both the dying declarations are truthful and voluntary.

36. The learned counsel for the accused tried to pick holes to the prosecution case contending that two theories of burning have appeared on record. It was contended that in the medical papers while recording the history it was stated that she was burnt due to 'Chimni' fall on 17.10.2012 at 1.45 a.m. It was contended that this medical history of burn due to 'Chimni' fall renders the prosecution case doubtful. This submission cannot be sustained for multiple reasons. In the first place, the spot panchanama does not show the

presence of 'Chimni'. If the incident had taken place due to fall of 'Chimni', reference of 'Chimni' in all probability would have been there in the spot panchanama. Secondly, the deceased had sustained 95% burns. Dr. Dake PW 6 has given the distribution of burn surfaces as follows :-

Head neck, face	6% with scalp spared.
Chest and abdomen	18%
Back	18%
Right upper limb	09%
Left upper Limb	09%
Right lower limb	17% with sole spared.
Left Lower limb	17% with sole spared.
Genitals	01%

Total burn body surface area - 95%

37. In the cross-examination PW 6 has denied the suggestion that mere fall of kerosene lamp on the person of anybody can cause such extensive burns. This clearly proves that such kinds of burns are not possible due to fall of 'Chimni'. Moreover, the C.A. report Exh. 61 shows that full Pant of accused, his partially burnt bluish white and reddish cloth pieces, a whitish full shirt having black check design had kerosene residues. If she had sustained burns due to fall of 'Chimni', kerosene residues would not have been detected on the clothes of the accused. It was for the accused to explain as to

how the kerosene residues were detected on his clothes. Needless to say that there is no explanation on this aspect of the matter. Therefore, sustaining burns by the deceased by 'Chimni' fall does not appear to be probable.

38. It was further contended that the son of the deceased was sleeping with her and if the kerosene had been sprinkled on her, in all probability, some portion of it would certainly have fallen on son also. The clothes of the son were not seized. Therefore, this infirmity in the prosecution case makes the prosecution case wholly unreliable.

39. The dying declaration Exh. 35 negates this submission. The dying declaration Exh. 35 does not show that the deceased was sleeping with her son. The dying declaration shows that after she had a quarrel with the accused at 8.00 p.m. over his drinking habits, all of them i.e. she, her husband and their son went off to sleep. The dying declaration (Exh. 35) does not indicate that the son was sleeping with her. PW 7 Rathod has stated in his cross-examination that it was disclosed in her statement that the deceased was sleeping with her son at the time of the incident. This statement is contrary to the record i.e. the dying declaration. Any admission contrary to the record (in this case the dying declaration) is no admission at all. Once the dying declaration is found to be worthy of credence, the statement made in the dying declaration will always

prevail over the statement made by the person who recorded the dying declaration as regards the incident. In this view of the matter, this submission of the learned counsel for the accused cannot be sustained.

40. Another limb of argument of Shri Chattarji was that the incident took place in the bed room but the burnt pieces of clothes were not found in the bed room but they were found in the kitchen. The deceased went out of the house running. But the burn pieces were not found even outside the house. It was argued that this circumstance goes against the prosecution theory that the accused had burnt the deceased. For meeting his submission the spot panchanama will have to be looked into. The spot panchanama Exh. 21 shows that the drawing room is of 10 x 10 diameter and the kitchen is also of the same diameter. Therefore, there is hardly any distance between the kitchen and the bed room. Therefore, this circumstance is insignificant.

41. Much was argued about the non electrification of the house of the accused. Since the electricity was not provided to the house of the accused, the accused was using kerosene lamp for illumination during night hours.

42. This submission again does not have any substance for the reason that the spot panchanama shows the presence of L.G. -

Television . If the electrification of the house was not done, the accused has not explained as to how T.V. was installed in his house. It is true that the defence witness is examined by the accused DW 1 Nagesh Lone, the Assistant Engineer of Maharashtra State Electricity Distribution Company (Mahavitaran) to show that there was no electricity in the house. However, in the cross-examination he has admitted that some people also have illegal connection from main line. Therefore, possibility of taking illegal connection cannot be ruled out since there was T.V. in the house of the accused.

43. It is pertinent to note that the accused was in the house at the time of the incident. He has failed to explain as to how the deceased was burnt. He made un-successful attempt to prove that the deceased was burnt due to 'Chimni' fall i.e. kerosene lamp. This defence is proved to be false. It is settled law as held by the Hon'ble Supreme Court in the case of **Dhal Singh Dewangan vs State of Chhattisgarh, (2016) 16 Supreme Court Cases 701** that false defence provides missing link to the prosecution case. He has also taken the defence that there was no electricity connection in the house and that has been falsified by the T.V. installed in the house. Shri Chatterji, the learned counsel for the accused/appellant submitted that in case of dying declaration the principle enshrined in Section 106 of the Evidence Act cannot be made applicable. He submitted that there is evidence in the form of the dying declaration. In such case the accused is absolved of the burden of explaining

circumstances which are within his knowledge as contained in Section 106 of the Indian Evidence Act. For this purpose he placed reliance on the case of **Murlidhar and others Vs. State of Rajasthan - AIR 2005 Supreme Court 2345** in this case the facts were that one Ramlal had taken lift in camel cart of witness Manaram. This cart was stopped by Khemaram and his family members when the Camel cart was passing by his field. Ramlal was pulled down, beaten up and was taken to some unknown place. The camel cart owner informed the villagers about the abduction and beating to Ramlal. On these facts the Hon'ble Supreme Court held that rules in Section 106 of Indian Evidence Act would apply when the facts are especially within the knowledge of the accused. It would be impossible, or at any rate disproportionately difficult for the prosecution to establish such facts 'especially' within the knowledge of the accused. It was further held that the prosecution did not proceed on the footing that the facts were especially within the knowledge of the accused and therefore principle in Section 106 of the Evidence Act cannot not apply. On the other hand, the prosecution proceeded on the footing that there were eye witnesses to the facts of murder.

44. The learned A.P.P., to counter the submission of Shri Chatterji, placed reliance on the case of **State of Rajasthan v. Prathu - AIR 2008 Supreme Court 10**. In this case facts were almost identical. One Smt. Lali had received burn injuries and was

lying in serious condition. Her dying declaration was recorded wherein she disclosed that she was burnt by her husband. The said Lali died subsequently after the registration of the offence. The Hon'ble Supreme Court held that at the time when the incident occurred, the husband of Lali was in the house together with the deceased. If the deceased and Respondent were together in the house at the time when the incident took place it was for the respondent (husband of Lali) to show how the death of the deceased took place. The Hon'ble Supreme Court further held that in the absence of sufficient and cogent explanations in that behalf the Court would be entitled to consider the same as the circumstances against the accused. The reliance is placed on the case of **Raj Kumar Prasad Tamakar vs. State of Bihar, 2007 (1) SCALE 19**). The Hon'ble Supreme Court further held that large number of decisions in a case of this nature had also applied the principles of Section 106 of the Indian Evidence Act. The reliance was placed on the case of **State of Rajasthan Vs. Kashi Ram, 2006 (XI) SCALE 440**.

45. Thus in case of dying declaration also, accused has to explain the circumstances which are especially within his knowledge. In view of this, the submission of the learned counsel for the accused cannot be accepted. In the case of **Murlidhar and others Vs. State of Rajasthan** (supra) there were eye witnesses and therefore there was no occasion for invoking the principle enshrined in Section

106 of the Indian Evidence Act i.e. the facts especially within the knowledge of the accused.

46. As indicated above, the accused has failed to explain the circumstances in which the incident occurred. The prosecution has proved both the dying declarations. It has also proved the presence of the accused at the time of incident and has also proved that kerosene was detected on the clothes of the accused. Having regard to this the learned Trial Court did not commit any error in placing reliance on both the dying declarations and recording the conviction against the accused under Section 302 of the I.P.C.

47. Shri Chatterji, the learned counsel for the accused further submitted that the accused/appellant herein had no intention to commit the murder of the deceased because he had poured water on the person of the deceased soon after she was engulfed by fire. He argued that this conduct belies the theory of murder. If really, he had intention to commit the murder of the deceased, he would not have poured water on the deceased and therefore the accused may be convicted under Section 304 part II of I.P.C.

48. Pouring of kerosene and setting a person on fire is an imminently dangerous act. A person who pours kerosene on someone and sets him on fire has no right to say that he had no knowledge that this act of his would cause death or would cause

such bodily injury as is likely to cause death. The act is so inherently dangerous that a man of ordinary intelligence can also contemplate that setting a person on fire would entail death or would cause such bodily injury as is likely to cause death. The act is so imminently dangerous that it puts the accused on the knowledge that it would cause death or bodily injury as is likely to cause death. Section **300 4thly of the I.P.C.** reads as under :-

“If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury”.

In the case at hand the accused poured kerosene on the deceased and then set afire by igniting a match stick. These two acts are so inherently dangerous that a person who does these acts knows that in all probability it would cause death. The accused first poured kerosene on her and then set her on fire. Therefore, this act denotes that he had the intention to set the deceased on fire. The dying declaration Exh. 35 shows that the accused had quarrel with deceased at 8.00 p.m. All of them went to sleep and in the night at 12.00 a.m. he poured kerosene on the person of the deceased and then set her ablaze. These acts clearly indicate that the accused had the intention to commit her murder. Thus, the prosecution has proved that the death is homicidal. It has been held in the case of ***Suraj Jagannath Jadhav vs The State Of Maharashtra in***

Criminal Appeal No. 1885 of 2019 (Supreme Court) decided on 13 December, 2019 by the Hon'ble Supreme Court as under :-

“Even assuming that the accused had no intention to cause the death of the deceased, the act of the accused falls under clause Fourthly of [Section 300 IPC](#) that is the act of causing injury so imminently dangerous where it will in all probability cause death. Any person of average intelligence would have the knowledge that pouring of kerosene and setting her on fire by throwing a lighted matchstick is so imminently dangerous that in all probability such an act would cause injuries causing death”.

49. Thus the learned Trial Court has rightly convicted the accused under Section 302 of the I.P.C. Therefore, the appeal is bereft of any merit. Appeal is dismissed.

(M.G. SEWLIKAR, J.)

(T.V. NALAWADE, J.)