

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

CRIMINAL APPEAL NO. 791 OF 2014

- 1) Sainath Annasaheb Waghchaure,
Age – 38 years, Occupation – Agril,
R/o. Dhupkheda, Tq. Paithan,
Dist. Aurangabad.
- 2) Annasaheb Madhavrao Waghchaure,
Age – 66 years, Occup – Agril,
R/o. As above.
- 3) Dwarkabai Annasaheb Waghchaure,
Age – 58 years, Occup : Agril,
R/o. As above.

... APPELLANTS
(Original accused)

VERSUS

The State of Maharashtra,
Through Police Station Officer,
Police Station Neknoor,
Tq. & Dist. Beed.

... RESPONDENT

Mr. R. V. Gore, Advocate for the accused
Mrs. V. S. Choudhari, APP for the respondent/State.

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

**RESERVED ON : 29.11.2019
PRONOUNCED ON : 03.03.2020**

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

. The appellants, hereinafter referred to as the accused Nos. 1 to 3 have assailed the judgment and order dated 15/12/2014 passed by the Additional Sessions Judge, Aurangabad in Sessions Case No. 54 of 2013 thereby convicting and sentencing them for different offences of the Indian Penal Code (hereinafter referred to as 'IPC') as under:

(i) They were convicted for the offence punishable under Section 498-A read with Section 34 of IPC and each was sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 3,000/-, in default of payment of fine to suffer further rigorous imprisonment for six months.

(ii) They were convicted for the offence punishable under Section 504 read with Section 34 of IPC and each was sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs. 2,000/-, in default of payment of fine to suffer further rigorous imprisonment for six months.

(iii) They were convicted for the offence punishable under Section 302 of IPC and each was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.2,000/, in default of payment of fine to suffer further rigorous imprisonment for six months.

. Above sentences were directed to run concurrently. Accused Nos. 1 and 2 were given set off from 25/10/2012 from their arrest till the date of judgment and accused No. 3 was given set off from 25/10/2012 the date of her arrest till 26/04/2013 as per Section 428 of the Code of Criminal Procedure. The muddemal property being worthless was ordered to be destroyed after the appeal period.

2. The facts leading to the institution of the present appeal as are revealed from the record are as under:-

(A) Deceased Yashodabai was daughter of PW-2 Muktabai. She was married to accused No. 1 before 15 years of the incident which took place at Dhupkheda, Tq. Paithan, Dist. Aurangabad. Accused Nos. 2 and 3 are respectively father-in-law and mother-in-law of Yashodabai. After marriage she was residing with the accused at Dhupkheda. From the wedlock with accused No. 1 she has one daughter Komal and one son Aniket respectively aged 13 years and 9 years. They were taking education at the time of incident. Accused No. 1 was having $2\frac{1}{2}$ acres land at village Dhupkheda. Yashodabai and her husband used to cultivate the said land. In the year of incident they had yielded sweet lemon plants over one acre of said land.

(B) It is alleged that since 4 to 5 years prior to the incident the accused after selling sweet lemon fruits used to send Yashodabai at her parents house and that time they used to beat her, because they wanted to avoid the payment of sweet lemon fruits to her even

though she used to cultivate the agriculture land alongwith her husband. However, accused No.1-her husband used to take her back giving assurance that he would treat her well.

(C) Further, it is the case of the prosecution that the accused illtreated Yashodabai on account of demand of money for marriage of Munni D/o Kailas Annasaheb Waghchaure, brother of accused No. 1. Accused used to beat her. They used to torture her physically and mentally. The accused Nos. 1 and 2 had mortgaged 1 acre agricultural land and they wanted Rs.2,00,000/- to redeem the said mortgage. Therefore, accused used to insist Yashodabai asking her to bring Rs.2,00,000/- from her parents and for that they used to beat and abuse her. She had told about said illtreatment to her parents on phone and demanded money and at that time her mother Muktabai (PW-2) and brother Vishnu gave Rs.1,00,000/- to the accused at their village Dhupkheda.

(D) It is the further case of the prosecution that on 22/01/2012 at about 7.30 p.m. while Yashodabai was in the house she sustained 95% superficial to deep burns. Therefore, she was admitted in Ghati Hospital, Aurangabad at about 8.52 p.m. by elder brother of her husband, Laxman Shridhar Waghchaure. The information in this respect was given in the Bidkin police Station and on the same day MLC was registered in the said police Station. While she was being treated in the said hospital her dying declaration (Exhibit 17) was recorded by PHC Shinde (PW-1) in presence of Dr. Pathak (PW-3) after 10.25 a.m. after he had given letter Exhibit 16 in this respect to the Medical Officer of the said hospital. In the said dying declaration it is alleged that on 22/10/2012 through out day she was in the house. Her husband had gone to Paithan as there was counting of votes. Her husband came to house at about 2.00 p.m. Again he went in the village. In the evening at about 7.30 p.m. her husband and father-in-law came to house consuming liquor. They said her why she is not bringing

Rs.2,00,000/- from her parents for marriage of her niece and on saying so they started abusing her. They also said her to prepare tea and while she was sitting for preparing tea accused No.3- her mother-in-law came to house. At that time her husband and father-in-law were abusing her. She said them that her father has already given them Rs.1,00,000/- and from where he would bring money. Thereupon, her mother-in-law caught hold her hand and her father-in-law poured kerosene on her person from the can and her husband set her on fire by lighting the match stick. All the three accused went out of the house. She raised shouts and on hearing the same Laxman Shridhar Waghchaure elder brother of her husband and his son Vikas put off fire with the help of clothes and admitted her in the hospital. It appears that copy of said dying declaration was sent to police Station Bidkin and at about 5.30 p.m. on 23/10/2012 crime No. 209 of 2012 was registered against the accused for the offences punishable under Sections 307, 498-A, 504 and Section 34 of the IPC and PI Shri. K. K. Patil started the

investigation. On the same day i.e. on 23/10/2012 PHC Shidne (PW-1) recorded dying declaration (Exhibit 19) of Yashodabai in the hospital in presence of Dr. Pathak attributing role as above to all the accused and said dying declaration was recorded between 11.00 p.m. to 11.30 p.m.

(E) During the investigation all the accused were arrested on 25/10/2012. Accused Nos. 1 and 2 are in jail since the date of their arrest. Accused No.3 was on bail from 26/04/2013 till the date of judgment. The Investigating Officer had prepared separate arrest panchnamas of all the three accused. He also prepared panchnama of spot of incident and seized articles i.e. plastic can, partly burnt clothes pieces with ash and match sticks from the spot of incident. He also recorded statements of witnesses who where in know of the facts. Yashodabai died on 27/10/2012 at 23.35 hours. Then postmortem examination was conducted on her body by Dr. Vikas Rathod (PW-4) and Dr. Korsale and they had issued

postmortem report (Exhibit 28) stating that cause of death of Yashodabai is septicemia due to burns and they had taken samples of hairs, nails and skin of the deceased and viscera was also preserved. All the seized articles, viscera and samples of hairs and nails of the deceased were sent to the Chemical Analyzer. Reports of the Chemical Analyzer were received. As Yashodabai died offence under Section 302 of the IPC was added in the crime already registered against the accused. After completion of the investigation charge-sheet was submitted in the Court of JMFC, Paithan. Learned JMFC committed to the case to the Sessions Court, Aurangabad.

(F) Learned Addition Sessions Judge framed charge against the accused for the offences punishable under Sections 498-A, 504 and 302 of the IPC. The accused pleaded not guilty to the charge and claimed to be tried.

(G) Defence of the accused is denial and that death of the deceased is suicidal. They have not examined any witness in defence. At the time of their statements under Section 313 of the Code of Criminal Procedure they had filed written statement (Exhibit 31[A]) and in the said statement they have stated that accused Nos. 1, 2 and 3 are residing separately and further stated as under:

(i). Kailas elder brother of accused No. 1 is not traceable since 2001. Since that time his wife Pushpabai and two daughters Jayashri and Mayuri are residing at Wahegaon, Tq. Paithan. Said Pushpabai and her daughters had filed suit bearing RCS No. 67 of 2005 in the Court of Civil Judge, Junior Division, Paithan against accused No. 2 and in the said suit compromise had taken place and 1 Acre 20 Gunthas land has been given to Pushpabai and her two daughters. So also, they have been given house at Dhupkheda. At the time of incident daughter of Pushpabai had just passed SSC examination and therefore,

at that time there was no thought of her marriage. So also, Pushpabai is residing at Wahegaon with her daughters and therefore, accused had no concern with them and there is no responsibility of marriage of daughters of Pushpabai. There is no question of harassing Yashodabai for marriage of daughter of Pushpabai and the accused never harassed the deceased for the same.

(ii) The accused have further stated that accused No. 1 had never taken loan for constructing house and therefore, accused No. 1 had never taken Rs. 1,00,000/- from the mother of the deceased.

(iii) Accused have stated that on 12/10/2012 accused No. 1 had sold his land for consideration of Rs. 2,10,000/- to Vishnu Tulshiram Dhage brother of the deceased because accused No. 1 was to take land at other place. But on the date of sale deed Vishnu was not having money and he said that on the next date he will

give money to the accused No.1 and that the sale deed should be executed. Relying on the words of Vishnu without accepting money on 12/10/2012 accused No. 1 executed sale deed in favour of Vishnu. Thereafter, Vishnu avoided to give money. Therefore, the deceased Yashodabai was under tension because the land which was sold was support for maintenance of her family and it was not possible to purchase land at other place. Thus, as the people from her parental house had cheated her, on 22/10/2012 when there was nobody in the house she got herself burnt and Laxman Waghchaure put off the fire and on the same day in night admitted her in the hospital at Aurangabad and she disclosed to Laxman Waghchaure that she got herself burnt. The accused have filed copy of sale deed dated 12/10/2012 with their written statement. They have contended that people from her parental house are responsible for death of deceased and they have filed false case and collected false evidence with the help of police. They have also stated that they have not committed any offence. Deceased sustained 100% burns.

She was not in a position to speak. Report given by Dr. Pathak is false and PW-1 Shinde deposed false.

(H) The prosecution has examined four witnesses, namely, PHC Shinde (PW-1), Muktabai Dhage (PW-2) mother of the deceased, Dr. Pathak (PW-3) and Dr. Rathod (PW-4) and relied upon oral and written dying declarations referred earlier and the reports of Chemical Analyzer Exhibits 39, 40 and 41.

(I) Considering the evidence adduced by the prosecution the trial Court held that death of the deceased is homicidal, the accused are responsible for her death, they had subjected her to cruelty and that they had intentionally insulted her in furtherance of their common intention and thus convicted and sentenced all the accused for the offences with which they were charged as referred earlier in detail in the introductory paragraph of this judgment. Therefore, this appeal is filed by the appellants/accused who are in jail.

3. Mr. Gore, learned advocate appearing for the appellants-accused submitted that the marriage of the deceased with the accused No.1 was performed prior to 16 to 17 years of the incident. The deceased has two issues from the said wedlock. Accused never illtreated or abused the deceased. The wife of brother of accused No. 1 is residing in another village with her children and therefore, there was no reason for the accused to demand an amount of Rs. 2,00,000/- to perform marriage of niece of the accused No.1 and to cause cruelty to deceased for said amount. Prior to the incident accused No. 1 had sold land to brother of the deceased and brother of the deceased had not given consideration amount to the accused. Therefore, the deceased was frustrated and hence on the date of incident i.e. on 22/10/2012 while she was in the house she committed suicide by pouring kerosene and setting herself on fire. This fact is also clear from Exhibit 15 MLC papers as it shows that deceased committed suicide. The prosecution has not examined Laxman Shridhar Waghchaure elder brother of the

accused No.1 husband of deceased who had extinguished the fire and admitted the deceased in injured condition in the hospital. So also, prosecution has not examined children of the deceased. As per the spot panchanama door of the room in which the incident took place was closed. Therefore, accused are not responsible for death of the deceased and her death is suicidal.

4. Mr. Gore, learned advocate for the accused further submitted that the prosecution has relied upon two written dying declarations Exhibits 17 and 19. Both these dying declarations are recorded by PHC Shinde (PW-1) on 23/10/2012. PHC Shinde is from Bidkin Police Station. He recorded dying declarations in Ghati Hospital at Aurangabad. It was possible for the police present in the police chowki of Ghati Hospital to record the dying declaration. But PHC Shinde came from Bidkin police station in Paithan Taluka to record the dying declarations and this shows that he is interested witness. In fact, the prosecution should have arranged

to record the dying declaration from the Executive Magistrate. Though letter Exhibit 18 dated 23/10/2012 was given to Tahasildar to record dying declaration no dying declaration was recorded by the Tahasildar. Therefore, both the dying declarations are not reliable. So also, dying declaration was not immediately recorded. Therefore, both the dying declarations have to be excluded from consideration. To support this submission learned advocate for the accused has relied upon the decision in the case of *Imam Bashir Pathan Vs. State of Maharashtra, 1998 Bom. C.R. (Cri.)556* and in the case of *Munnu Raja Versus State of Madhya Pradesh, 1976 AIR (SC)2199*.

5. Mr. Gore, learned advocate for the accused further submitted that at the time of recording dying declaration Exhibit 17 brother of the deceased was present and therefore, there is possibility of tutoring the deceased to make dying declaration and hence said dying declaration is not voluntary and truthful. Further it is submitted that both the written dying declarations

Exhibit 17 and 19 are not consistent and therefore, no reliance can be placed on these dying declarations. To support the said submission learned advocate for the accused has relied upon the decisions of the Apex Court in the case of **Munnu Raja** (Supra) and in the case of **Alkabai Yelanna Vaidu and other Vs. The State of Maharashtra, Criminal Appeal No. 943 of 2012 decided by Division Bench of this Court (Coram- Smt. V. K. Tahilramani & A. R. Joshi, JJ) on 20/08/2014** and in paragraph No. 10 of the said decision it was observed thus;

"10. While recording the dying declaration, it is necessary to ensure that except the person recording the dying declaration, at the most, the medical officer should be present and no relative or friend or any other person should be present. This is to ensure that the patient is not tutored or deterred while making the dying declaration. These are essentials to attach credibility to a dying declaration. It has been so observed in a decision of this Court in the case of **Imam Bashir Pathan Vs State of Maharashtra**. In the present case, on perusal of the dying declaration (Exh. 31), we find that it is clearly mentioned therein that while the dying declaration was being recorded, the mother of the deceased i.e Lata was present. Looking to the fact that

Lata is the mother of Sunita, she is a highly interested witness and the fact is also to be noted that Lata has admitted in her evidence that she was angry with the appellants. From the fact that Lata was present all through out when the dying declaration was being recorded, we find it unsafe to rely on the dying declaration (Exh. 31). There is no other credible or reliable material to connect the appellants with the death of Sunita. In this view of the matter, the appeal deserved to be allowed".

6. Mr. Gore, learned advocate for the accused further submitted that the endorsements regarding consciousness of the deceased at the time of commencement of recording dying declarations and at the time of conclusion of recording of written dying declarations on the dying declarations are not proved by Dr. Vipul Pathak (PW-3) and as such state of health of the deceased at the material time of recording dying declaration is not brought on record and therefore, it cannot be said that the deceased was in a fit state of mind to make the dying declarations and therefore, it cannot be said that the written dying declarations were voluntarily made by the deceased. To support this

submission the learned advocate has relied upon the decision in the case of ***Sunil Kashinat Raimale Vs. State of Maharashtra, 2006(2) Bom.C.R. (Cri.)873.***

7. Learned advocate for the accused referring the decision in the case of ***Banka Nayako Vs. State of Orissa, 1976 AIR (SC)2013*** and particularly paragraph 8 of the said decision submitted that as the brain of the deceased was found congested she was unable to give valid statement and hence the written dying declarations cannot be said to be voluntary statements of the deceased.

8. Learned advocate for the accused further relying upon the decision in the case of ***Sitaram Nana Sarvade and Anr. V. The State of Maharashtra, 2014(3) ABR (Cri) 434*** submitted that only dying declaration cannot be made basis for the conviction of the accused when the prosecution has failed to establish the motive behind committing the offence and therefore, accused are entitled to benefit of doubt.

9. Learned advocate for the accused further submitted that PW-2 is mother of the deceased and therefore, oral dying declaration made to her by the deceased is not believable as she is interested witness. The prosecution has not examined Laxaman Shridhar Waghchaure elder brother of the accused No. 1 and his son Vikas who extinguished the fire and admitted the deceased in the hospital. The deceased had disclosed to Laxaman Shridhar Waghchaure at that time that she got herself burnt. Thus, the prosecution has suppressed the material evidence. It is submitted that in all the above circumstances the prosecution has failed to prove all the offences against the accused for which they have been convicted and sentenced by the trial Court by the impugned judgment and therefore, the conviction and sentence recorded against them is not sustainable and the same is liable to be set aside and they are entitled to be acquitted of the said offences by allowing the appeal.

10. Mrs. Choudhary, learned APP appearing for the respondent on the other hand submitted that dying declaration Exhibits 17, 19 and the oral dying declaration are consistent in material particulars as regards the role attributed to the individual accused in the commission of offences and therefore, there is no reason to disbelieve the said dying declarations. It is submitted that at the time of recording written dying declarations and making oral dying declaration by the deceased to her mother the deceased was in a fit state of mind to make statement. It is further submitted that the evidence adduced by the prosecution is sufficient to hold the accused guilty for the offences punishable under Section 302, 498-A and 504 of the IPC. The defence of the accused that the death of the deceased is suicidal is not acceptable. Thus, learned APP has prayed to dismiss the appeal.

11. We have carefully considered the submissions made by the learned advocate appearing for the accused

and the learned APP. With their assistance, we have perused the evidence on record and we have also perused the impugned judgment and order.

12. There is no dispute that the deceased was married to accused No. 1 prior to 16-17 years of the incident which took place on 22/10/2012. The deceased has one daughter aged 13 years and son aged 9 years from the said wedlock. At the material time of incident she was at the house of accused. On 22/10/2012 she sustained 95% burns at about 7.30 p.m. and after the said incident she was admitted in the Gathi Hospital, Aurangabad by Laxaman Shridhar Waghchaure elder brother of her husband accused No.1 and son of Laxman Waghchaure and she died due to burn injuries while taking treatment in the hospital on 27/10/2012 at about 23.35 hours.

13. PW-4 Dr. Rathod who conducted postmortem examination on the dead body of the deceased on 28/10/2012 deposed that in the postmortem examination he noted following injuries on the person of the deceased:

(1) Head neck face 8% with evidence of signing of hairs, eyebrows, eyelashes. Spared area is left check and forehead and also left ear spared.

(2) Chest 9%

(3) Abdomen 9%

(4) Back 18%

(5) Upper limb: Left upper limb 8%, Upper 1/3rd of arm spared (b), right upper limb 9%

(6) Lower limbs: Right lower limb 17%, sole spared, left lower limb 17% sole spared.

. According to Dr. Rathod thus the deceased sustained 95% superficial to deep burns with evidence of foul smelling. Yellowish, greenish slough formation with inflammatory changes seen all over burn areas. Evidence of venesection over right medial malleolus. Two stitches seen. According to him as mentioned in column No. 18-A of the postmortem report Exhibit 28 cause of death of deceased is septicemia due to burns and hairs, nails and skin were kept for chemical analysis. Exhibit 28 postmortem report also shows that the deceased suffered

above referred injuries as mentioned in paragraph No. 17 of the report and cause of death as deposed by Dr. Rathod. Thus, on the basis of evidence of Dr. Rathod and postmortem report Exhibit 28 it can be said that death of the deceased was caused due to burns and her death was unnatural.

14. Case of the prosecution is that after the marriage while the deceased was cohabiting with accused No. 1 the accused in furtherance of their common intention caused cruelty to the deceased for unlawful demand of an amount of Rs. 2,00,000/- to perform marriage of niece of accused No.1 i.e. daughter of elder brother of accused No. 1, the accused intentionally insulted her by abusing her and on 22/10/2012 at about 7.00 to 7.30 p.m. accused No. 3 caught hold her hand, accused No. 2 poured kerosene on her person and accused No. 1 her husband set her on fire by lighting the match stick and after she was admitted in the Ghati Hospital,

Aurangabad she died on 27/10/2012. Thus, according to prosecution death of the deceased is homicidal.

15. Now it is to be seen whether the accused are responsible for death of the deceased or whether death of the deceased is suicidal as per the defence of the accused. To prove that death of the deceased is homicidal and accused are responsible for her death the prosecution has relied upon dying declarations Exhibits 17, 19, oral dying declaration made by the deceased to her mother PW-2 Muktabai and circumstantial evidence in the form of spot panchnama Exhibit 10 and reports of chemical analyzer Exhibits 39, 40, 41.

16. Now coming to the first dying declaration Exhibit 17 recorded by PHC Shinde (PW-1) on 23/10/2012 at about 04.15 p.m. is concerned, PHC Shinde has deposed that on 22/10/2012 while he was present in the police station he received MLC from Ghati hospital. He conducted inquiry in the said MLC Exhibit 15. On 23/10/2012 he went to Ghati Hospital, Aurangabad.

Deceased Yashodabai was admitted in the hospital. He gave letter Exhibit 16 to Medical Officer stating that he wants to record statement of deceased whether she is able to speak. He deposed that Medical Officer gave endorsement on said letter that deceased Yashodabadi is in a position to give statement. He went to the ward where she was admitted. He introduced her. She was able to talk, she was mentally sound. He asked her, her name and she disclosed her name as Yashodabai Sainath Waghchaure. He recorded her statement as per her say. Said statement was read over to her. He obtained her thumb impression on her statement. He signed on said statement. Thereafter, he again obtained endorsement of doctor on said statement and said statement Exhibit 17 shown to him is the same and its contents are correct and thus, he has proved statement/dying declaration Exhibit 17.

17. PHC Shinde further deposed that Yashodabai had stated before him that on 22/10/2012 her husband had

been to Paithan for counting votes. In the afternoon he came to the house. Thereafter, he again went in the village. On that day at about 7.00 p.m. to 7.30 p.m. her husband and father-in-law had come to the house under influence of liquor. Thereafter, he told her as to why she had not brought amount of Rs. 2,00,000/- and she told her husband that she had brought Rs. 1,00,000/- from her father and therefore, her father is not in a position to pay money. She stated that her mother-in-law had also come there and when her father-in-law and her husband were abusing her, her mother-in-law caught hold her hands. Her father-in-law poured kerosene on her person and her husband set her on fire by igniting match stick. She stated that she caught fire, but all accused went out of house. On hearing her shouts, Vikas Waghchaure and his father came there and they extinguished fire covering her body by means of clothes and she was taken to Ghati Hospital by the vehicle.

18. In the cross-examination PHC Shinde has admitted that at the time of recording statement of deceased Yashodabai her brother was present. Half an hour was required for recording her statement. He denied that he had not read over the contents of her statement to deceased. He also denied that deceased was not in a position to talk. He also denied that he was personally not satisfied that the deceased was in a position to give her statement and further denied that he is deposing false that he recorded the statement. Thus, nothing is found in favour of accused in the cross-examination of PW-1 except the fact that at the time of recording dying declaration Exhibit 17 brother of the deceased was present. This dying declaration also shows that at the time of recording the same Raju Tulshiram Dhage brother of the deceased was present. In fact PW-1 was required to ensure that except he and the Medical Officer no relative of the deceased is present at time of recording dying declaration of the deceased to rule out the possibility that the dying declaration is out

come of tutoring by the relative i.e. brother of the deceased. But PW-1 has not taken said care. Therefore, as brother of the deceased was present at the time of recording dying declaration Exhibit 17 applying ratio laid down by this Court in the case of ***Alkabai Yelanna Vaidu and other (Supra)*** it is unsafe to rely on the dying declaration Exhibit 17 therefore, dying declaration Exhibit 17 cannot be said to be trustworthy and it can not be taken in to consideration.

19. Now coming to the second dying declaration Exhibit 19 recorded by PHC Shinde-PW-1 on 23/10/2012 between 11.00 p.m. to 11.30 p.m., he has stated that on the same day i.e. on 23/10/2012 he again recorded statement of deceased-Yashodabai as per her say, said statement Exhibit 19 shown to him is the same. He obtained her thumb impression on said statement and its contents are correct. In the cross-examination he stated that second statement of deceased was started at 11.30 p.m. 45 minutes were required for recording her

statement. Her second statement was reduced into writing by him. He denied that he has recorded second statement to remove discrepancies appearing in first statement. He also denied that he has not read over the contents of first and second statement to the deceased. He also denied that personally he was not satisfied that the deceased was in a position to give her statement and further denied that he is deposing false to have recorded statement of deceased.

20. Dr. Vipul Pathak (PW-3) in whose presence dying declarations Exhibits 17 and 19 were recorded has stated that on 23/10/2012 Police Head Constable had been to the hospital for recording statement of deceased. He examined the patient and found that she was in a position to give statement. Accordingly, he made endorsement Exhibit 23 on dying declaration Exhibit 17. He has not specifically stated that he made endorsements on dying declaration Exhibit 19 that the patient was conscious oriented etc. as mentioned in Exhibit 19. In

the cross-examination he denied that he has given false opinion. He also denied that no such statement was given by the patient in his presence and further denied that deceased was not in a position to give valid statement at any time. Thus, on the basis of above evidence it can be said that deceased was in a position to make statement at the time of recording dying declaration Exhibit 17, but it is doubtful whether she was in a position to make statement at the time of recording dying declaration Exhibit 19 in the night on 23/10/2012.

21. Now it is to be seen whether dying declaration Exhibit 19 can be taken into consideration when PHC Shinde (PW-1) has not stated about the contents of said dying declaration. As referred earlier PHC Shinde has only stated that he recorded statement Exhibit 19 as per say of deceased Yashodabai. He has not stated about the contents of said statement/dying declaration which runs into 3½ pages. In fact, he should have stated about the contents of said dying declaration in view of the

decision of this Court in the case of *Deorao s/o Sonbaji Bhalerao and another Vs. State of Maharashtra, 2008(4), Mh.L.J. (Cri.)474* in the said case as observed in paragraph No. 7 following two questions arose for determination and they are as under:

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

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

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

"22. Having gone through the evidence on record, we find that the prosecution has relied upon only one piece of evidence to prove the charge against the appellants and the same is dying declaration (Exh.23) of deceased Sunita Bhanse. There is no other evidence relied on by the

prosecution in support of its case. Insofar the dying declaration (Exh.23) is concerned, the same was recorded by Wasudeo Mahore (P.W.4)- the Special Judicial Magistrate on 6-7-2001. In his substantive evidence before the Court, Wasudeo (P.W.4) deposed that after getting deceased Sunita examined from the medical officer he was satisfied that she was physically and mentally fit to give the statement, he recorded her dying declaration. Thereafter he read over the said dying declaration to the patient who admitted the same to be correctly written as per her say. Accordingly he made an endorsement and again requested the medical officer to examine the patient about her mental and physical condition. It is noteworthy that in his substantive evidence before the Court he did not depose a single word as to who were the offenders who had poured kerosene on her person and set her on fire and in what manner. The witness is blissfully silent about the same and the prosecution preferred to rely upon the document of dying declaration which was exhibited. We have held by answering both the questions in this judgment, that the document of dying declaration cannot be presumed to be correct under section 80 of Evidence Act, unless proved according to law. This is particularly so because no presumption under section 80 is available in respect of the dying declaration. Since Wasudeo (P.W.4) did not depose a word about the name and the role of the appellants as told to him by the deceased Sunita, in view of the statement of law recorded by us in the foregoing part of the judgment,

we hold that the prosecution failed to prove its case and did not discharge the initial burden of proof required to be discharged in a criminal case. For this reason therefore we reject the sole piece of evidence in the form of dying declaration (Ex.23) relied upon by the prosecution. There is no other evidence and consequently the finding of the trial Court about conviction on the basis of dying declaration will have to be reversed. Thus Criminal Appeal No. 103/03 will have to be allowed."

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

. Thus, when PHC Shinde (PW-1) has not stated about the contents of dying declaration Exhibit 19 applying the ratio laid down in the case of *Deorao s/o Sonbaji Bhalerao* (Supra), we hold that said dying declaration Exhibit 19 cannot be taken into consideration.

22. Another ground for not considering dying declaration Exhibit 19 is that the contents of this dying declaration Exhibit 19 i.e. incriminating circumstances appearing in this dying declaration against the accused were not put to the accused in their statement under Section 313 of the Criminal Procedure Code, because the question No. 11 in respect of this dying declaration put to the accused was thus:

"11. It has further come in his evidence that on the same day he again recorded statement of Yeshodabai Exh. 19 as per her say and obtained her thumb impression on it and also obtained endorsement of doctor on it. What have you to say?

Ans. It is false."

. Thus, from the above question put to the accused in their statement under Section 313 of the Criminal Procedure Code it is clear that the incriminating circumstances appearing in second dying declaration Exhibit 19 recorded by PHC Shinde (PW-1) were not at all put to the accused and no explanation of the accused was sought on the said circumstances and

therefore, said dying declaration cannot be used against the accused and said has to be excluded from consideration in view of the decision of the Apex Court in the case of *Raj Kumar Singh alias Raju Alias Batya Vs. State of Rajasthan, AIR 2013 Supreme Court 3150* wherein it was held that the circumstances which are not put to the accused in his examination under Section 313 of the Criminal Procedure Code cannot be used against him and have to be excluded from consideration.

23. For the above reasons we hold that both the dying declarations Exhibits 17 and 19 have to be excluded from consideration and they are of no help to the prosecution to prove the offences alleged against the accused.

24. Now coming to the oral dying declaration allegedly made by the deceased to her mother Muktabai Dhage (PW-2), her evidence is that after marriage deceased was residing with her husband, mother-in-law and father-in-law at village Dhupkheda, Tq. Paithan.

Initially for 5 to 6 years accused treated her well. Thereafter, accused started illtreating her. Accused were beating deceased on account of demand of money. Deceased informed about illtreatment to her by the accused as and when she had been to her house. Accused had taken loan of Rs.1,00,000/- by mortgaging their land and constructed their house and therefore, they were demanding money from the deceased. Accused demanded Rs.1,00,000/- to deceased saying that they wanted to pay said money to Babasaheb Veer from whom they had obtained loan for construction of house. Further she deposed that accused were illtreating deceased on account of demand of money.

25. PW-2 has further stated that incident took place before two years. Before 15 days of the incident she had paid Rs.1,00,000/- to accused No. 1 in presence of brother of accused No.1, namely, Kishor Waghchaure. According to her after 8 days there from deceased had been to her house. She was weeping and saying that all

accused were demanding Rs.2,00,000/- for marriage of niece of accused No. 1. She told her that she would pay Rs.2,00,000/- after Diwali and on saying so she sent deceased back to house of accused for cohabitation. After 4 to 5 days therefrom her son received phone of Kishor Waghchaure that deceased caught fire and that she was admitted in Ghati hospital. She, her husband, her brother and son came to Ghati hospital and they reached Ghati hospital at 8.00 p.m. She went in the ward and saw deceased. Deceased had received burns on her entire body. She was in a position to talk properly. She had told her that on 22/10/2012 accused were quarreling with her since morning. Accused were demanding Rs.2,00,000/- and were saying why her father was not paying Rs.2,00,000/-. Thereafter, her mother-in-law had caught hold her hand and her father-in-law poured kerosene in plastic can on her person and her husband set her on fire by lighting the match stick. She further stated that on sixth day of admitting the deceased in the

hospital, she died. All the accused committed murder of her daughter the deceased.

26. In the cross-examination PW-2 mother of the deceased stated that accused Nos. 2 and 3 are residing separate in the village. She denied that deceased was not in a position to talk. She also denied that accused have not constructed house by obtaining loan and that she had not paid Rs. 1,00,000/- to accused No. 1. She also denied that she is deposing false that the accused were demanding Rs. 2,00,000/-. She also denied that deceased never made a statement before her in Ghati hospital since she was not in a position to talk and that since deceased was under tension she set herself on fire and they have foisted false case against the accused. Thus, nothing is found in favour of accused in the cross-examination of PW-2. As per the evidence of PW-2 she went in Ghati hospital on the date of incident at 8.00 p.m. immediately after the incident and the deceased made oral dying declaration to her about the

role played by the accused in setting the deceased on fire. Thus, the evidence of PW-2 is not shattered in the cross-examination. It was quite natural for the deceased to disclose PW-2 her mother about the incident happened. It is also clear from the evidence of PW-2 that the deceased was in a position to talk properly at the relevant time. Therefore, on the basis of evidence of PW-2 it can be inferred that deceased made oral dying declaration to her mother (PW-2) that on the date of incident i.e. on 22/10/2012 the accused No. 3 caught hold hands of the deceased, accused No. 2 poured kerosene from the plastic can on the person of the deceased and accused No. 1 husband of the deceased set her on fire by lighting the match stick. Thus, the oral dying declaration made to PW-2 by the deceased regarding incident of setting the deceased on fire is truthful and reliable.

27. The accused have not disputed the spot panchnama Exhibit 10. It shows that incident took place

in the eastern side room of the house of accused. This room has two doors. At the time of panchnama on 23/10/2012 it's western side door was locked from outside and eastern side door was closed from inside, but that does not mean that both the doors were locked from inside by the deceased at the time of sustaining burns. From the spot of incident i.e. eastern side room can of kerosene, half burnt pieces of clothes, ash and match stick were seized. There is no dispute that said articles were sent to the Chemical Analyzer. Exhibit 40 report of the chemical analyzer shows that kerosene residues were found on article No. 2 partly burnt clothes pieces with ash. So also, Exhibit 41 report of the chemical analyzer shows that kerosene residues were found/detected on tissue like matter Exhibit No. 3. Thus, on the basis of above circumstantial evidence it can be said that incident took place in the house of accused in the eastern side room and kerosene residues were found on the half burnt cloth pieces of the clothes of the deceased. The above circumstances corroborate

oral dying declaration made to mother of deceased that kerosene was poured on her person and then she was set on fire.

28. Now, coming to the defence of the accused, at the cost of repetition their defence is that the deceased committed suicide due to frustration as her brother did not pay amount of consideration of land purchased by him from accused No. 1 by sale deed dated 12/10/2012 and therefore deceased disclosed to Laxman Waghchaure who admitted the deceased in the hospital that she set herself on fire. Therefore, in the MLC (Exhibit 15) it has been mentioned that the deceased herself set her on fire and therefore, accused are not responsible for burn injuries suffered by the deceased and her death. Muktabai Dhage (PW-2) mother of the deceased has denied that accused No. 1 had sold his land to her son on 12/10/2012. She denied that on 12/10/2012 her son did not pay money to accused and told that he would pay money on next day. She denied that on the next

date her son did not pay money to accused No. 1 and thereafter also he did not pay money to him inspite of the fact that accused No.1 made phone calls to her son in that respect. She further denied that her daughter-the deceased made phone calls to her son and demanded money in respect of the land purchased by him from accused No.1 Sainath. She denied that since her son did not pay money to accused No. 1 her daughter deceased Yashodabai was under tension as her son who is brother of deceased cheated the deceased. She also denied that since deceased was under tension she set herself on fire. Thus, nothing is found in favour of the accused in the cross-examination of PW-2 to state that the defence of accused of suicidal death of the deceased is probable. The accused have produced copy of sale deed dated 12/10/2012. It shows that on the date of sale deed brother of the deceased had paid consideration amount of Rs. 2,10,000/- to accused No.1. Therefore, defence of the accused that as the brother of the deceased had not paid consideration of land to accused No.1 deceased was

under tension and therefore she committed suicide is not acceptable.

29. For all the reasons discussed above on the basis of oral dying declaration made by the deceased to her mother (PW-2) and circumstantial evidence in the form spot panchanama and reports of the Chemical Analyzer referred earlier an inference can be drawn that on 22/10/2012 accused No. 1 to 3 in furtherance of their common intention caused burns to the deceased as deposed by her mother (PW-2). As said earlier deceased died due to burn injuries and as defence of the accused of suicidal death of the deceased is not acceptable, we hold that the prosecution has proved that the accused are responsible for death of the deceased and their act of setting the deceased on fire after pouring kerosene and causing her death is a culpable homicide amounting to murder punishable under Section 302 of the IPC. From the role of the accused in setting the deceased on fire as deposed by PW-2 mother of the deceased it can be said

that the accused had knowledge as well as intention that by the said act there would be death of deceased and thus they had motive to commit murder of the deceased. Therefore, argument of learned advocate appearing for the accused that they had no motive to commit murder is not acceptable. Therefore, we find that the trial court has rightly held that the prosecution has proved offence punishable under Section 302 read with Section 34 of the IPC against the accused and no fault can be found with the said finding of the trial Court.

30. As regards the offence under Section 498-A of IPC there is only evidence of mother of deceased as referred in paragraph 24 and 25 (Supra). It has come on record that wife and daughters of brother of accused No. 1 are residing in another village. Therefore, case of the prosecution that accused caused illtreatment to deceased for demand of Rs. 2,00,000/- for marriage of daughter of brother of accused No. 1 is not appearing probable. So also, PW-2's evidence regarding demand of

accused of Rs.1,00,000/- for repay loan of construction of house is vague and not sufficient to state that accused caused cruelty to deceased punishable under Section 498-A of IPC.

31. As regards offence under Section 504 of IPC there is absolutely no evidence to show that the accused intentionally insulted the deceased. Therefore, we hold that the prosecution has failed to prove offences under Section 498-A and 504 read with Section 34 of IPC against accused and findings of trial Court holding them guilty for said offences are not correct and sustainable.

32. For the foregoing reasons, we hold that the conviction and sentence recorded against the appellants/ accused by the trial Court for the offences punishable under Sections 498-A and 504 read with Section 34 of IPC is liable to be set aside and conviction and sentence recorded against them by the trial Court for the offence punishable under Section 302 read with Section 34 of the

IPC is to be maintained, by allowing the appeal partly.
Therefore, following order is passed:

ORDER

(i) Appeal is partly allowed.

(ii) The conviction and sentence recorded against the appellants/accused Nos. 1 to 3 for the offences punishable under Sections 498-A and 504 read with Section 34 of IPC as per judgment and order dated 15/12/2014, passed by the Additional Sessions Judge, Aurangabad in Sessions Case No. 54 of 2013 is set aside and the accused Nos. 1 to 3 are acquitted of the said offences. Fine, if paid, by them for the said offences as per the impugned judgment shall be refunded to them.

(iii) The conviction and sentence recorded against accused Nos. 1 to 3 for the offence punishable under Section 302 read with Section 34 of the IPC is confirmed.

(iv) Rest part of the impugned judgment and order about disposal of Muddemal property and set off given to

the accused as per Section 428 of the Code of Criminal Procedure is maintained.

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

[S.M. GAVHANE, J.]

[T. V. NALAWADE, J.]