

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

CRIMINAL APPEAL NO. 295 OF 2014

Sanjay S/o Maruti Doule
Age : 50 Years, Occu.: Business,
R/o : Chhatrapati Nagar,
Ranjangaon Shenpunji,
Taluka Gangapur, District Aurangbad

... Appellant
(Orig. Accused)

Versus

The State of Maharashtra
Through Police Station Officer,
M.I.D.C. Waluj,
Taluka Gangapur, District Aurangabad

... Respondent

....

Mr. Joydeep Chatterji, Advocate for the Appellant
Mr. Anand S. Shinde, A.P.P. for Respondent / State

....

**CORAM : V. K. JADHAV AND
SHRIKANT D. KULKARNI, JJ.**

Reserved on : 23.08.2021

Pronounced on : 08.09.2021

JUDGMENT (PER SHRIKANT D. KULKARNI, J.) :-

1. The appellant who is convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- with a default

stipulation to undergo further rigorous imprisonment for six months in the event of non-payment of fine by the Additional Sessions Judge at Vaijapur in Sessions Case No.305 of 2012, by judgment dated 30.04.2014, this appeal under Section 374(2) of the Code of Criminal Procedure questions the correctness of the conviction and sentence.

2. The facts of the prosecution case in narrow compass are as under :

a. Kalpana (since deceased) was wife of the accused. The accused was running his workshop at Waluj. Wife Kalpana and son Kishor were also helping to the accused in the workshop. The accused along with his family were residing at Chhatrapatinagar (Shenpunji) at the time of incident.

b. According to the prosecution, the accused was addicted to liquor. He used to beat his wife Kalpana after consuming liquor. The incident took place on 11.06.2012 about 7.00 a.m. Navnath Vare (first informant), who happens to be brother-in-law of the accused, heard the shouts like “वाचवा वाचवा”. He rushed to the house of accused and saw that the smoke was emitting from her house. The door of her house was closed from inside. Navnath Vare noticed that the accused was running away from his house by bending the tin of the roof of his

house. Navnath Vare (first informant) entered into the house of the accused from the same roof and then opened the door of the house. He noticed that Kalpana had caught fire. He poured water on her body and tried to extinguish the fire. The first informant asked Kalpana as to how the incident occurred. Kalpana disclosed to her brother that accused along with his two friends had been to the house and had dinner. Thereafter, two friends of her husband went away. The accused was fully drunk at that time. After picking up the quarrel, accused poured kerosene on the person of Kalpana from one can and set her ablaze and thereby she received burns.

c. Kalpana was immediately taken to Ghati hospital and admitted there. Navnath Vare lodged the FIR with M.I.D.C. Police Station, Waluj. On that basis C.R. No.126 of 2012 came to be registered against the accused under Section 323 and 307 of the Indian Penal Code.

d. PW-4 Sanjay Ahire (P.S.I.) issued a letter to the Special Judicial Magistrate for recording statement. Mr. Sanjay Ahire, P.S.I. also recorded statement / dying declaration of Kalpana on 12.06.2012.

e. Kalpana succumbed to death due to burn injuries when medical treatment was going on. In view of this development, Section 302 of the Indian Penal Code came to be added. The accused came to be arrested. The Investigating Officer rushed to the scene of offence and prepared the *panchanama* of the scene of offence. From the scene of the offence, he seized one kerosene can, burnt pieces of clothes and one matchstick box. All the seized articles were sent to C.A. for analysis and report.

f. After committal of the case, learned Additional Sessions Judge at Vaijapur framed the charge against the accused for the offence punishable under Section 302 of the Indian Penal Code vide Exhibit 6. Trial was commenced. The prosecution machinery has examined in all 7 witnesses, including Investigating Officer.

g. The defence of the appellant-accused is of total denial. He defended that he has been falsely foisted upon in this case. He was not present at the time of the alleged incident. He has been implicated at the instance of first informant.

h. The learned Additional Sessions Judge at Vaijapur, after appreciating the evidence produced by the prosecution machinery and considering the argument advanced by the learned APP and the

defence counsel, was pleased to hold the appellant-accused guilty for the offence punishable under Section 302 of the Indian Penal code and sentenced to undergo imprisonment for life and fine of Rs.2,000/- with default clause.

3. We have heard Mr. Joydeep Chatterji, learned counsel for the appellant and Mr. Anand S. Shinde, learned APP for respondent / State at length. We have gone through the evidence of prosecution witnesses including dying declarations and stock of documentary evidence with able assistance of learned counsel for the appellant and learned APP for the State.

Submissions of learned counsel for the appellant-accused

4. Mr. Joydeep Chatterji, learned counsel for the appellant vehemently submitted that the case is rest upon dying declarations. Marriage between deceased and accused was 20 years old at the time of incident. He submitted that deceased narrated the incident first in time to the first informant who happens to be her brother in the nature of oral dying declaration. The deceased, then disclosed the incident in the form of oral dying declaration to neighbour PW-2 Shivaji and her son PW-5 Kishor also in the form of oral dying declaration. He submitted that there are two written dying

declarations in this case relied upon by the prosecution. One is at Exhibit 29 and another is at Exhibit 35. He submitted that in view of the above, there are multiple dying declarations. He submitted that the dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. He submitted that if above referred two written dying declarations are perused, they are at variance. He invited our attention to written dying declarations vide Exhibits 29 and 35 and pointed out that in dying declaration vide Exhibit 29, the deceased has stated that husband picked up quarrel with her. Whereas in dying declaration vide Exhibit 35, the deceased has stated that she asked her husband as to why he had not gone for work and so her husband beat her and said that he would finish her. The deceased has some how improved the story in the second dying declaration vide Exhibit 35.

5. Learned counsel Mr. Chatterji, further invited our attention that in the dying declaration vide Exhibit 29, the deceased has stated that, in a heat of anger, her husband doused her with kerosene from a can. In the dying declaration vide Exhibit 35, the deceased has stated that her husband doused her with kerosene from a can. He further invited out attention to both the dying declarations and pointed out that in the dying declaration vide Exhibit 29, the deceased has stated that

accused ignited her with a *Diva*, which was kept in *Devghar* and ran away. Whereas, in the dying declaration vide Exhibit 35, the deceased has stated that her husband ignited her with a matchstick.

6. Mr. Chatterji, in view of the above referred scenario coming forth from the two written dying declarations, submitted that none of the dying declaration inspires confidence of the Court. The Court cannot choose one of them in view of variance on material aspects. He also invited our attention to the oral dying declarations relied upon by the prosecution machinery and submitted that there is variance between oral dying declarations and written dying declarations, and it would not be safe to rely upon them and base a conviction. The learned trial Judge has committed an error on facts in relying upon them and convict the accused. Mr. Chatterji submitted that the husband-appellant/accused cannot be convicted on the strength of such a fragile and rickety dying declarations.

7. To buttress the argument, Mr. Joydeep Chatterji has placed his reliance on the following two citations :

- (i) ***Dandu lakshmi Reddy Vs. State of A.P.***, reported in ***AIR 1999 SC 3255*** (Supreme Court)

(ii) *Suresh S/o Arjun Dodorkar (Sonar) Vs. State of Maharashtra*, reported in *ALL MR (Cri) 1599* (Aurangabad Bench)

8. By placing reliance on above said citations, Mr. Chatterji urged that it is a fit case to acquit the appellant-accused from the charge of murder of his wife in view of weak evidence in the nature of dying declarations.

Submissions of learned APP

9. Per contra, Mr. Anand Shinde, learned APP for the State appearing for the respondent / State submitted that in this case there are three oral dying declarations and two written dying declarations which are consistent and specifically describing role of the accused in setting Kalpana ablaze in her house. There is no material discrepancy between oral dying declarations and written dying declarations. Whatever inconsistencies pointed out by the learned counsel for the appellant in the written dying declarations are minor, and not any way fatal to the prosecution case and discard the evidence in the nature of written dying declarations. PW-1 Navnath Vare is the brother of the deceased, who rushed to the house of accused immediately after hearing shouts of his deceased sister

Kalpana. He was first in time to reach the spot to whom the deceased had given narration as to how incident occurred and involvement of her husband in setting her ablaze by pouring kerosene on her person.

10. Mr. Shinde further pointed out that the incident took place in the house of accused. The accused and his wife late Kalpana were alone in the house. Deceased Kalpana sustained severe burn injuries in the house of accused. No explanation is coming forth from the side of appellant/accused much less to the satisfaction of the Court as to how his wife sustained burn injuries and what happened on that night. Even though the defence is not required to prove its probable defence in a strict sense, but Section 106 of the Evidence Act cast duty on the accused to offer some kind of explanation. The accused cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish his case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation. To support his submissions, learned APP has placed his reliance on *Trimukh Maroti Kirkan vs State of Maharashtra*, reported in **2007 CRI. L.J. 20** (Supreme Court).

11. Mr. Shinde, learned APP took us through the relevant paras of the impugned judgment and order passed by the learned Additional

Sessions Judge. He pointed out that the learned Additional Sessions Judge has properly appreciated the evidence and also considered the legal position on the point of dying declarations. The defence raised by the accused is considered. The findings recorded by the learned Additional Sessions Judge are based upon cogent evidence. The oral dying declarations as well as written dying declarations, if perused carefully with the evidence of respective witnesses, there is no scope to take any doubt on dying declarations though in the form of oral as well as written dying declarations. Mr. Shinde, learned APP submitted that the law on dying declaration is well settled in view of the Constitution Bench Judgment of the Apex Court in case of ***Laxman Vs. State of Maharashtra***, reported in ***(2002) 6 SCC 710***. He submitted that there is no merit in the appeal. The impugned judgment and order of conviction passed by the learned Additional Sessions Judge needs to be confirmed by dismissing the appeal.

12. We have considered the arguments advanced by Mr. Joydeep Chatterji, learned counsel for the appellant/accused and Mr. Anand S. Shinde, learned APP for the respondent/State. We have also studied the citations relied upon by both the sides in order to see the correct position law on the subject of dying declaration and the requirement of of law. On perusing the evidence produced before the learned trial

Judge, it is noticed that the prosecution machinery has examined following seven witnesses:

- (I) PW-1 Navnath Bhausahab Vare vide Exhibit 17.
(First informant/brother of the deceased to whom the deceased had given first oral dying declaration)
- (ii) PW-2 Shivaji Vishwanath Jadhav vide Exhibit 19.
(Neighbour of accused before whom the deceased Kalpana had also narrated the incident by way of second oral dying declaration and also acted as *panch* witness on scene of offence)
- (iii) PW-3 Sakharam Mukundlal Gokhale vide Exhibit 26.
(Special Judicial Magistrate/author of first written dying declaration vide Exhibit 29)
- (iv) PW-4 Sanjay Baburao Ahire vide Exhibit 32.
(PSI M.I.D.C. Waluj Police Station and author of second written dying declaration vide Exhibit 35)
- (v) PW-5 Kishor Sanjay Dawale vide Exhibit 38.
(Son of the deceased Kalpana before whom the deceased had narrated the incident in the form of third oral dying declaration)
- (vi) PW-6 Dashrath Nimba Choudhary vide Exhibit 4.0
(API M.I.D.C. Waluj Police Station/Investigating Officer)

- (vii) PW-7 Dr. Shaikh Mohiuddin Fahimuddin vide Exhibit 43.
(Medical Officer who conducted the postmortem examination)

13. First, we shall deal with the medical evidence in order to find out the cause of death. The testimony of PW-7 Dr. Shaikh reveals that he has conducted the postmortem examination on the dead body of Kalpana on 12.06.2012 between 10.10 a.m. to 11.10 a.m. at Government Medical College and Hospital at Aurangabad. He noticed the following external injuries on the dead body.

- (i) Intravenous injection mark over left leg above ankle, reddish.
- (ii) Superficial to deep burn injuries present on body about 98%. They were antemortem injuries.

14. According to the opinion given by Dr. Shaikh, cause of death of deceased Kalpana was “death due to shock due to burns”. It was a team of three doctors, who conducted the postmortem on the dead body and the postmortem report to that effect is placed on record vide Exhibit 44. Dr. Shaikh has opined that even though it was a case of 98% burn injuries, such patient may talk till death. He has further

explained that though thorax was partly burnt, but other parts were internally partly burnt, the patient of such injuries can talk.

15. Even though Dr. Shaikh was cross-examined at length, no useful material is brought on record to dispute the opinion given by the doctors. There is no other evidence, which may throw light to classify the death of Kalpana in any other category.

16. In view of the above referred medical evidence, we have no manner of doubt that the deceased met with death due to shock due to burns.

17. The case is rest upon dying declarations in the form of oral as well as written coupled with Section 106 of the Evidence Act regarding absence of any explanation from the side of appellant/accused as to how his wife sustained burn injuries in his house when both of them were alone.

18. The law on dying declaration is settled in view of citation of the Constitution Bench of the Hon'ble Supreme Court in case of ***Laxman Vs. State of Maharashtra*** (supra). There is one more recent judgment of the Hon'ble Supreme Court in case of ***Purushottam Chopra and another Vs. State (Government of NCT of Delhi)*** (supra), wherein the

Hon'ble Supreme Court has laid down principles relating to recording of dying declaration and its admissibility and reliability by following the decision in case of *Laxman Vs. State of Maharashtra* (supra). Following are the principles laid down by the Hon'ble Supreme Court in case of *Purushottam Chopra and another Vs. State (Government of NCT of Delhi)* (supra), which are summed up as under :

- “(1) A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the Court.
- (2) The Court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.
- (3) Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.
- (4) When the eyewitnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.
- (5) The law does not provide as to who could record dying declaration nor there is any prescribed format

or procedure for the same but the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement

- (6) Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording the dying declaration.
- (7) As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.
- (8) If after careful scrutiny, the Court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration”.

19. Having regard to the parameters laid down by the Hon’ble Supreme Court in case of **Laxman** (supra) and in case of **Purushottam Copra** (supra), it is absolutely necessary to examine dying

declarations in the form of written as well as oral. In case of ***Laxman*** (supra), the Hon'ble Supreme Court has made it clear that oral dying declaration is admissible in evidence and there is no legal bar. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate with certification of doctor about the mental fitness of the patient. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

ORAL DYING DECLARATIONS

20. Following are the prosecution witnesses before whom deceased Kalpana had given narration about the incident in the form of oral dying declaration:

- (i) PW-1 Navnath Vare (brother of the deceased).
- (ii) PW-2 Shivaji Jadhav (neighbour of accused).
- (iii) PW-5 Kishor Dawale (son of the deceased).

21. On making scrutiny of the evidence of above referred three witnesses, it is evident that the deceased Kalpana had given narration about the incident as to how and in what manner incident occurred in

the evening of 11.06.2012 about 7.30 p.m. when deceased Kalpana and her husband were alone in the house. PW-1 Navnath was the person first in time who rushed to the house in response to shouts (“वाचवा वाचवा”) of her sister. On reaching the house of accused, PW-1 Navnath noticed that the flames were emitting from the house. The door was closed from inside. He saw the accused while running from his house by bending tin of his house. He took entry into the house from the same way. He noticed that his sister had caught fire. He poured water and tried to extinguish the fire. On making enquiry with his sister, she disclosed that the accused and his two friends had been to the house. They had dinner, and thereafter, friends of her husband went away. Her husband had consumed liquor. He had beaten her under the influence of liquor. The accused has latched the door from inside and poured kerosene from the can on her person and set her ablaze and thereby she received burns. He further stated that he took her sister immediately to Ghati Hospital, Aurangabad and admitted there. However, on 12.06.2012 about 5.00 p.m. his sister succumbed to burns injuries.

22. He lodged the FIR on the basis of narration given by his sister vide Exhibit 18. It was attempted by way of cross-examination of PW-1 Navnath to bring on record that he was not having cordial relation

with the accused. The accused has given one complaint to Waluj Police Station against PW-1 Navnath, which was subsequently settled between them. That material is not any way helpful to the defence to take doubt on the testimony of PW-1 Navnath. Whatever complaint lodged by the accused against PW-1 Navnath, was settled and there was no dispute amongst them as appearing from the cross-examination of PW-1 Navnath.

23. Further, it is evident that the house of PW-1 Navnath is just adjoining to the house of the accused and there is a common wall. If this material aspect is taken into consideration, the presence of PW-1 Navnath after hearing the shouts of his sister Kalpana and reaching there appears to be natural in absence of any material brought on record during the cross-examination. He is the person who took his sister with the help of others to Ghati Hospital at Aurangabad immediately and admitted there for treatment. We do not find any material to suspect the presence of PW-1 Navnath soon after the incident and the statement made by his sister in the form of oral dying declaration given about the incident and the role of accused. The testimony of PW-1 Navnath needs to be accepted though minor omissions are brought on record. Those minor omissions are not any way affect the credibility of this witness.

24. PW-2 Shivaji Jadhav vide Exhibit 19 appears to be an independent witness. He is a neighbour of accused. PW-2 Shivaji also disclosed that after hearing the noise of quarrel between Kalpana and accused, and shouts “वाचवा वाचवा”, he noticed that the accused came out of the house by removing the tin of roof of his house and thereafter accused ran away. He rushed to the house of the accused. He saw that door of house of the accused was latched from inside. They tried to open the door, but could not open it. PW-1 Navnath went inside by way of roof from the place where the tin was removed and thereafter PW-1 Navnath opened the door from inside. He saw that Kalpana had caught fire. She narrated that the accused poured kerosene on her person and set her ablaze because of quarrel between them. He has also stated about *panchanama* of scene of offence, which is proved at his hands and produced vide Exhibit 20. The evidence of PW-2 Shivaji is not any way shaken by way of cross-examination. No material is brought on record by way of cross-examination to discard his evidence. PW-2 Shivaji has stated about the narration given by Kalpana in the form of oral dying declaration about the incident and accordingly he has stated before the Court. It is consistent with the oral dying declaration given to PW-1 Navnath.

25. Now coming to third oral dying declaration. PW-5 Kishor Dawale, who happens to be the son of the accused vide Exhibit 38. His evidence disclosed that he rushed to the hospital after receiving a phone call from his maternal uncle PW-1 Navnath. He had interacted with his mother. He asked to his mother as to what had happened. His mother disclosed that accused/husband along with his two friends had been to their house. The accused was under the influence of liquor. After having dinner, friends of the accused went away. There was quarrel between his mother and father and thereafter his father/accused locked the door of the house from inside and poured kerosene on the person of his mother and set her ablaze and thereby she received burns. The evidence of PW-5 Kishor cannot be discarded only because he is interested witness and happens to be the son of the deceased. Whatever PW-5 Kishor has stated is found to be consistent and goes hand in hand with the evidence of PW-1 Navnath and PW-2 Shivaji on the point of incident and involvement of accused in setting Kalpana ablaze after pouring kerosene from the can in his house. He had no reason to speak against his father. They were residing together at the time of incident. Even though PW-5 Kishor has admitted that his mother was suffering from pains, not any way sufficient to discard the evidence on the point of oral dying declaration given by his

mother. He has specifically denied the suggestion that his mother was unconscious and there was no talk between him and his mother.

26. Having regard to the appreciation of above referred three witnesses on the point of oral dying declaration, we do not find any material to discard them. The deceased was conscious when she narrated the incident and the role of her husband in setting her ablaze by pouring kerosene on her person when both of them were alone in the house.

WRITTEN DYING DECLARATIONS

27. Now coming to two written dying declaration, which are at Exhibits 29 and 35. PW-3 Sakharam Gokhale, the Special Judicial Magistrate is the author of dying declaration vide Exhibit 29. Whereas, PW-4 PSI Sanjay Ahire is the author of second dying declaration vide Exhibit 35.

28. PW-3 Sakharam Gokhale, the Special Judicial Magistrate has stated about recording of written dying declaration of deceased Kalpana on 11.06.2012 in view of request letter received from PSI Sanjay Ahire of M.I.D.C. Police Station vide Exhibit 27. Further, it is revealed that PW-3 Sakharam Gokhale after obtaining opinion from

the doctor vide Exhibit 28, recorded a statement of Kalpana in the form of written dying declaration vide Exhibit 29. He has obtained toe impression of left leg of Kalpana on the statement vide Exhibit 29. After recording the statement/dying declaration, he again obtained an opinion from the doctor vide Exhibit 30. Thereafter, doctor opined that Kalpan was fully conscious and well oriented in time and place. It was attempted to bring on record that there was a possibility of tutoring the deceased at the hands of the relatives, who were present in the Hospital at that time. But PW-3 Sakaram Gokhle, the Special Judicial Magistrate while facing the cross-examination has categorically stated that he had asked the relatives, viz. brother and the daughter of the patient to go out. In view of that, there is no scope of tutoring though attempted to be brought on record. It was attempted to bring on record that dying declaration vide Exhibit 29 does not have an endorsement of the doctor and the doubt is raised.

29. On going through the dying declaration vide exhibit 29, it is noticed by us that a format has been used by the Special Judicial Magistrate (PW-3) to record the dying declaration. There is no endorsement of doctor before recording of dying declaration and after recording of dying declaration on written dying declaration vide Exhibit 29. However, it is noticed by us that there is an endorsement

of doctor on Exhibit 28, which is a letter addressed to the Medical Officer, Government Medical College and Hospital at Aurangabad. The doctor has certified that the patient is fully conscious, oriented in time and place and fit to give a statement. After recording of dying declaration vide Exhibit 29, the Special Judicial Magistrate (PW-3) has obtained certification from the doctor vide Exhibit 30, whereby doctor has certified that the patient is fully conscious, oriented in time and place and fit to give oral statement. The written dying declaration vide Exhibit 29 cannot be doubted only because there is no endorsement of the doctor. The Special Judicial Magistrate seems to have obtained certification from the doctor about the fitness of the patient to record her statement on the Exhibits 28 and 30 independently, which is not any way fatal to the prosecution. Moreover, it is held by the Hon'ble Supreme Court in case of ***Laxman Vs. State of Maharashtra*** (supra) that, "a certification by the doctor is essentially a rule of caution and it is not mandatory. The voluntary and truthful nature of the declaration can be established otherwise". The Special Judicial Magistrate (PW-3) has categorically stated before the trial Court in his evidence that he had put certain questions to the patient to find out her consciousness and after satisfying himself, he has recorded the dying declaration. The Special Judicial Magistrate

(PW-3) has satisfied himself that the patient was conscious and merely because he has not obtained medical certification on a dying declaration, which is at Exhibit 29, there is no scope to take doubt, when there is independent certification of doctor.

30. Let us examined second dying declaration vide Exhibit 35. PW-4 PSI Sanjay Ahire attached to M.I.D.C. Police Station has recorded the same. He has disclosed in detail that he has followed the practice of recording the dying declaration, including an opinion from the doctor before the recording the dying declaration. He has stated that he has recorded the statement of the patient, namely Kalpana Sanjay Dawale as per her narration. She has disclosed before him that her husband picked up quarrel with her under the influence of liquor and poured kerosene from the can on her person and set her ablaze by igniting matchstick. He has stated that statement was recorded on 12.06.2012, however, he has committed a mistake while mentioning the date on that statement as 11.06.2012. It was a pure mistake on his part. The cross-examination of PW-4 PSI Sanjay Ahire speaks that the relatives of the patient were not present, when he recorded the statement/dying declaration of deceased. On perusing the documents vide Exhibit 34, it is evident that PSI Sanjay Ahire has obtained an

opinion from the concerned doctor about the fitness of the patient/deceased before recording her statement/dying declaration.

31. Mr. Chatterji, learned counsel for the appellant/accused attempted to show that dying declarations vide Exhibit 29 and 35 are at variance on material particulars, and as such, none of them can be relied upon as discussed during the part of his argument.

32. We have carefully gone through the oral dying declarations vide Exhibits 29 and 35. We have also gone through the citation in case of ***Dandu Lakshmi Reddy Vs. State of A.P*** (supra) heavily relied upon by Mr. Chatterji so as to take doubt on both the written dying declarations. The Hon'ble Supreme Court in para 4 has observed as under :

“The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under s.32(1) of the Indian Evidence Act in a case in which the cause of that persons death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an

exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, imposing on it an obligation to closely scrutinise all the relevant attendant circumstances”.

33. In case of *Suresh Arjun Dodorkar (Sonar) Vs. State of Maharashtra* (supra), the Division Bench of this Court, bench at Aurangabad has observed that, “where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross examination”.

34. Upon perusal of both the dying declarations vide Exhibits 29 and 35, it would reveal that there is no material variance, as such. In dying declaration vide Exhibit 29, it is stated by the deceased that she cooked at home and husband used to come home drunk daily. Whereas, in another dying declaration vide Exhibit 35, it is stated by the deceased that the husband came home drunk. There is no material variance in above referred two sentences. In dying declaration vide Exhibit 29, deceased has stated that the husband quarrelled with her. Whereas, in dying declaration vide Exhibit 35,

she has stated that she has asked her husband why he had not gone for work, so he beat her and said that he will finish her today. Again, we do not find any material variance. It cannot be termed as an improvisation or a material variance in view of careful examination of the above said two sentences stated by the deceased. In the dying declaration vide Exhibit 29, deceased has stated that in a heat of anger, accused doused her with kerosene from a can. Whereas, in dying declaration vide Exhibit 35, she has stated that her husband doused her with kerosene from a can. Again, we do not find any variance as such, except the words of “heat of anger” which can not be termed as material.

35. Now coming to last so called material variance focused by Mr. Chatterji, learned counsel for the appellant. In dying declaration vide Exhibit 29, the deceased has stated that her husband ignited her with *Diva* from *Deoghar* and ran away. Whereas, in dying declaration vide Exhibit 35, the deceased has stated that her husband ignited her with a matchstick. The only variance in the above referred two statements given by the deceased is about using of *Diva* from *Deoghar* and ignited her with a matchstick. Even though there is some variance about using of means to ignite the deceased, it cannot be given undue importance to such minor variance. In both the written dying

declarations, the deceased has given narration as to how the incident had occurred and how her husband poured kerosene and set her ablaze after pouring kerosene from a can on her person.

36. On careful scrutiny of the above referred two dying declarations vide Exhibits 29 and 35 in respect of the incident, there is no dominant and sizable variance. The deceased has stated about the involvement of her husband by pouring kerosene on her person and set her ablaze. That statement is also consistent with oral dying declarations given by the deceased before PW-1 Navnath, PW-2 Shivaji and PW-5 Kishor. In these two dying declarations, there is consistency in respect of the role played by the accused/her husband.

37. In case of *Suresh Arjun Dodorkar (Sonar)* (supra), there was variance in the two dying declarations in respect of the incident itself. The variance was apparent on perusal of dying declarations and held to be discerned from the perusal of the same. Therefore, the Division Bench of this Court held that the dying declarations are not truthful. The narration found to be doubtful and in that background, held that no reliance can be placed on such written two dying declarations. The facts of the case on hand are distinguishable. In the case in hand, there are three oral dying declarations and two written dying

declarations. All of them are found to be consistent about the role of the accused in setting his wife ablaze after pouring kerosene from a can in the house when both of them were alone. We are unable to accept the argument advanced by Mr. Chatterji, learned counsel for the appellant/accused in this regard.

38. It is evident from the record and even not disputed by the accused that incident took place in his house. Even though the accused has attempted to show that he was not present at the time of the incident, it is found to be after thought and false story. The prosecution has established from the testimony of PW-1 Navnath and PW-2 Shivaji that the accused and deceased Kalpana/wife were alone present in the house when the incident took place. Both of them have stated that soon after the incident of setting Kalpana on fire, accused ran away from his house. That piece of evidence is found trustworthy and reliable. It is not the case of defence that Kalpana had committed suicide by setting herself ablaze after pouring kerosene on her person. We have no manner of doubt that accused and his wife late Kalpana were alone in their house when the incident took place. The prosecution has travelled the journey successfully in establishing that it is none else, but accused had set his wife/Kalpana ablaze after pouring kerosene from a can on her person after picking up quarrel

and thereafter ran away from the house. Kalpana raised hue and cry for help and in response, her brother PW-1 Navnath rushed there as well as PW-2 Shivaji and they extinguished the fire and brought her to the Ghati Hospital for treatment. Admittedly, Kalpana died due to 100% burn injuries and incident took place in her house. Here it is necessary to keep in mind Section 106 of the Evidence Act, which says that, “when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him”.

39. In case of *Trimukh Maroti Kirkan* (supra), it is held by the Hon’ble Supreme Court that, “where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime”. In this case, the accused has not offered any kind of explanation, even while his examination under Section 313 (1)(b) of the Code of Criminal Procedure. Certainly, it must be treated as an important incriminating circumstance against

him in view of absence of any explanation as contemplated under Section 106 of the Evidence Act in view of citation in case of *Trimukh Maroti Kirkan* (supra).

40. Now coming to the investigation of the case. It is evident from the record that seized articles viz. Partly burnt sloth pieces, empty plastic can and nail clippings of Kalpana, tissue material in a small bottle labelled “skin” were sent for analysis to the Chemical Analyzer. As per the C.A. report vide Exhibits 45 and 46. The results of analysis are important. The C.A. reports speak that kerosene residues were detected in those articles. It is one more incriminating evidence against the appellant/accused, which clearly speaks that kerosene must have been poured on the person of the deceased, and thereafter, she was set on fire.

41. On making careful scrutiny of the evidence of above referred witnesses coupled with the oral and written dying declarations, we have no manner of doubt that the prosecution has proved dying declarations, which undoubtedly speak that it is none else, but the accused set his wife Kalpana ablaze after pouring kerosene from a can on her person after picking up quarrel with her when both of them were alone in the house. The appellant-accused ran away from the house from the roof of his house by bending the tin shed. PW-1

Navnath and PW-2 Shivaji rushed to the house of accused in response to hue and cry raised by Kalpana and attempted to save her life by immediately taking her to Ghati Hospital at Aurangabad. Kalpana sustained 100% burns and she met with death due to shock due to burns. The accused/husband is found to be author of the murder of his wife. It was a homicidal death, amounting to murder as rightly held by the learned trial Judge. We do not find any fault with the findings recorded by the learned trial Judge while arriving at a conclusion and convicting the accused for committing the murder of his wife. There is no scope to interfere with the order of sentence recorded by the learned trial Judge. Resultantly, the conviction needs to be upheld at our hands in the appeal. No merit in the appeal.

ORDER

- (i) The Criminal Appeal stands dismissed.
- (ii) The impugned judgment and order of conviction passed in Sessions Case No.305 of 2012 by the Additional Sessions Judge, Vaijapur, District Aurangabad is hereby confirmed.

(SHRIKANT D. KULKARNI)
JUDGE

(V. K. JADHAV)
JUDGE