

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

CRIMINAL APPEAL NO. 378 OF 2014

The State of Maharashtra,
Through Police Station In-charge,
Mukundwadi Police Station,
Aurangabad.

..Appellant..
(orig complainant)

Versus

1. Raju Kashinath Shendge,
age 35 years, Occ. Rickshaw Driver.
R/o Bharat Nagar, Garkheda Parisar,
Aurangabad.
2. Kashinath Tukaram Shendge,
(since deceased proceedings abated)
3. Anil Totaram Sabale,
age 38 years, Occ. Labour
4. Mangal @ Gauri Anil Sabale,
age 25 years, Occ. Household.
5. Ravi Kashinath Shendge,
age 22 years, Occ. Painter.

All r/o Bharat Nagar, Garkheda Parisar,
Aurangabad

..Respondents..
(orig. accused.)

...

Mr. G O Wattamwar, APP for the appellant-State.
Mr. A K Bhosale Advocate, for the respondents.

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CORAM : V.K. JADHAV & SHRIKANT D.KULKARNI, JJ.

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Reserved on : 21.09.2021
Pronounced on : 22.11.2021

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JUDGMENT :- (Per V. K. Jadhav, J.)

1. This appeal is directed against the judgment and order of acquittal passed by the learned Sessions Judge, Aurangabad dated 3.5.2013 in Sessions Case No.162 of 2011.

2. Brief facts of the prosecution case, are as follows :-

a] Accused no.1-Raju and deceased Kavita got married before about ten years prior to the incident. They have got four daughters and one son from their marital wedlock. Appellant/accused no.1 Raju was working as a rickshaw driver, while deceased Kavita was the housemaid. On 18.12.2010 at about 8.00 p.m. accused Raju returned to his house. Deceased Kavita had questioned him as to where he was for last two to three days and why he had not come to the house. She had also told him that she was not having money to bring necessary things for the children. Thus, accused Raju got annoyed and asked her that as to who she was to ask him and started hurling abuses against her. Deceased Kavita had again questioned as to why he was hurling abuses against her. Thereupon, accused Raju

started beating her. Accused Raju thereafter picked up the kerosene can from his house, poured kerosene therefrom on the person of the Kavita with intent to kill her, set her on fire by lighting a match-stick. Though, Kavita had raised shouts, but nobody has come forward. Kavita herself poured water on her person and extinguished the fire. Thereafter, brother-in-law Sunil and his wife came there, put a blanket on her person and extinguished the fire. They took her to the Government Medical College and Hospital (GHATI), Aurangabad and admitted there for treatment at about 9.10 p.m.

b] After admission of the deceased Kavita in the Ghati Hospital, Aurangabad she had informed the incident to Casualty Medical Officer (C.M.O. for short.) Thus, the C.M.O. on duty informed about burn injuries sustained by Kavita and about her admission in the hospital to Police Head Constable, Chaudhary, who was on duty to the Police Outpost situated in the premises of Ghati Hospital. PHC Chaudhary has sent that information to the Police Station Officer, Police Station,

Mukundwadi, Aurangabad. The P.S.O. of Mukundwadi Police Station, Aurangabad, on the basis of that information, taken station diary entry no.353 of 2010. M.L.C. No.45 of 2010 was registered at about 9.40 p.m. Said MLC report is marked at exhibit 36.

c] PW 9 PSI Bhimrao Shahuji Bankar went to the Ghati Hospital at about 11.55 p.m. on 18.12.2010. PW 9 PSI Bankar has recorded the statement-cum-dying declaration exhibit 60 of deceased Kavita after obtaining the opinion from the Medical Officer as to the fit state of mind of deceased Kavita for recording her statement. On the basis of said complaint-cum-dying declaration exhibit 60, crime no.372 of 2010 came to be registered in the police station Mukundwadi on 19.12.2010 at about 5.05 p.m. against the accused for the offence punishable u/s 307, 323, 504 r/w 34 of the Indian Penal Code.

d] PW 9 PSI Bankar gave a letter to the Special Judicial Magistrate for recording the dying declaration of Kavita. Accordingly, the Special Judicial Magistrate PW 7 Ashok Nandagawali went to Ghati Hospital at about

2.00 p.m, obtained the opinion of Medical Officer that Kavita was in a fit condition to give the statement and recorded her statement between 02.05 p.m to 02.25 p.m. Exhibit 47.

3. PW 9 PSI Bankar took over the investigation of the crime. He has recorded the statement of the witnesses on 19.12.2010 and also effected arrest of the accused no.1 at about 11.30 p.m. and accused nos.2 to 5 on 20.12.2010. He has also visited the house of the accused and prepared the panchnama thereof on 21.12.2010. Thereafter, on 21.12.2010 he seized a kerosene can, a match-box, a burnt saree and blouse from the house. On 18.1.2011 Kavita died in the Ghati Hospital, Aurangabad during treatment. PSI Bankar prepared the inquest panchnama of her dead body and referred it for postmortem examination. As per the opinion given by the medical officer, Kavita died due to 'Septicemia due to burns'. After death of Kavita, offence punishable under section 302 came to be substituted for the offence punishable u/s 307 of the IPC. PW 9 PSI Bankar sent seized articles for chemical analysis on

19.1.2011. On completion of the investigation, PW 9 PSI Bankar has submitted the charge-sheet against the present accused Raju and accused nos.2 to 5 for the offence punishable under sections 302, 323, 504, 498-A r/w 34 of IPC.

4. The learned Sessions Judge, Aurangabad has framed charge Exhibit-19 against the appellant/accused nos.1 to 5 for the offences punishable under section 302, 498-A, 34 of IPC and read over and explained the contents thereof to each of the accused in vernacular. The learned Sessions Judge, Aurangabad has framed individual charge against accused no.1 (respondent no.1) for the offence punishable u/s 302 and 504 of the IPC and explained the contents thereof to him in vernacular. All the accused pleaded not guilty to the charge and claimed to be tried. Prosecution has examined in all 10 witnesses to substantiate the charges levelled against the accused. After completion of the prosecution evidence, statement of the accused under section 313 of the Cr.P.C. came to be recorded. Their defence is of total denial. It appears from the cross-examination to the

witnesses that the defence of the accused is that deceased Kavita had sustained burns accidentally due to bursting of the stove while cooking.

The learned Sessions Judge, Aurangabad by judgment and order dated 3.5.2013 Aurangabad has acquitted all the accused for the offence punishable under sections 302, 498-A, 504 r/w 34 of the IPC. Operative part of the order passed by the Sessions Judge, Aurangabad dated 3.5.2013 in Sessions Case No.162 of 2011 reads as under :-

- 1- Accused nos. 1 and 3 to 5 are acquitted of the offences punishable under sections 302, 498-A and 504 of the Indian Penal Code vide Section 235 (1) of the Code of Criminal Procedure.
2. Accused no.1 is in jail. He be released if not required in any other case on his executing a bail bond in the sum of Rs.15,000/- with a surety in the like amount vide section 437-A of the Code of Criminal Procedure.
3. Accused nos.3 to 5 shall execute bail bonds in the sum of Rs.15,000/- each with a surety in the like amount vide section 437-A of the Code of Criminal Procedure.
4. The bail bonds of accused nos.3 to 5 are cancelled. They are set at liberty subject to the directions given in clause 3 above.
5. The seized kerosene can, match-box and burnt clothes of the deceased Kavita be destroyed after the appeal period is over.

5. Being aggrieved by the same, the State has preferred this appeal against all the accused persons. So far as accused no.2 Kashinath Tukaram Shendge is concerned, he died, and, therefore, proceeding stands abated against him. By order dated 1.7.2014 this Court has admitted the appeal as against respondent no.1 Raju Kashinath Shendge (husband) only.

6. Learned APP submits that the prosecution case entirely rests upon the two dying declarations exhibit 60 recorded by PW 9 PSI Bhimrao Bankar and dying declaration exhibit 47 recorded by PW 7 Ashok Nandagawali, Special Judicial Magistrate. Learned APP submits that both the dying declarations are consistent on material parts. Both the dying declarations are trust worthy, reliable and inspiring the confidence. In both the dying declarations, deceased Kavita had stated that respondent/accused Raju had picked up quarrel when deceased Kavita had questioned him about his return to the house after a gap of 2 to 3 days and further questioned him as to how she would bear the expenses of day-to-day necessities of children. Thereupon, the

respondent/accused Raju has not only extended the beating by giving abuses to her, but also poured kerosene from the can on her person and set her on fire with the help of match stick.

7. Learned APP submits that so far as the complaint-cum-dying declaration exhibit 60 recorded by PW 9 PSI Bankar is concerned, the trial court has discarded the same merely on the ground that PW 9 PSI Bankar has admitted in his cross-examination that the contents of portion marked 'A' of the statement-complaint-cum-dying declaration exhibit 60 of deceased Kavita have been incorporated by him on his own. Learned APP submits that PW 9 PSI Bankar on 18.12.2010 himself went to the Ghati Hospital, Aurangabad and he met to the Medical officer in ward no.14. PW 9 PSI Bhimrao Bankar gave a letter to the said Medical Officer requesting therein to give opinion whether said Kavita was in a fit condition to give the statement. Said letter is marked at exh 59. The Medical Officer examined Kavita and given opinion on the letter that Kavita was in a fit condition to give the statement. PW 9 PSI Bankar

thereafter asked name and address to Kavita. From the answers given by her, he realized that she was in a fit condition to give the statement. PW 9 PSI Bankar asked her how she got burns. Accordingly, deceased Kavita has disclosed to him how she got burn injuries. PW 9 PSI Bankar has reduced her statement into writing as per her say. After recording her statement, he has read over the contents thereof to deceased Kavita. She admitted the correctness of the said contents. Thereafter, he took her left hand thumb impression on the statement. Said complaint-cum-dying declaration exhibit 60 also bears his signature. Learned APP submits that prosecution has examined PW 8 Dr. Pramod Gangurde, who was on duty in Casualty department on 18.12.2010. According to him, on that day at about 9.10 p.m. Kavita was admitted in a casualty ward having sustained burn injuries. He took entry about her admission in the case papers. PW 8 Dr. Pramod Gangurde has further deposed that on the same day at about 11.30 pm PSI Bankar came to him. He wanted to record the statement of Kavita. PW 9 PSI Bankar gave a letter to him with a request to give his

opinion whether Kavita was in a fit condition to give the statement. Thus, PW 8 Dr.Gangurde examined Kavita and also asked her certain questions. Thereafter, he has opined that Kavita was in a fit condition to give the statement. Accordingly, he has given his opinion in writing on the letter exhibit 55.

8. Learned APP submits that after completing all the necessary formalities, PW 9 PSI Bankar has recorded the complaint-cum-dying declaration of Kavita. Deceased Kavita was in a fit state of mind as per the opinion given by PW 8 Dr. Pramod Gangurde. It is also a matter of record that deceased Kavita died in the month of January, 2011 due to “Septicemia due to burns” to the extent of 56%. It is not suggested even to PW 9 PSI Bankar or PW 8 Dr. Pramod Gangurde that said complaint-cum-dying declaration exhibit 60 was the outcome of tutoring, prompting or the product of imagination.

9. Learned A.P.P. submits that PW 9 PSI Bankar though admitted in his cross-examination that the contents of the portion marked 'A' of the statement of

deceased Kavita have been incorporated by himself on his own, however, it should not be ignored that said contents portion marked 'A' of the dying declaration exhibit 60 are introductory in nature and the same came to be recorded as PW 9 PSI Bankar was recording the complaint of deceased Kavita. It is a part of the record that on the basis of the said complaint exhibit 60, crime no.372 of 2010 for the offence punishable under section 307, 323, 504, 34 of IPC came to be registered. The learned APP submits that reasons given by the learned Sessions Judge in discarding said dying declaration on this ground alone is not acceptable and the same is perverse in nature.

10. Learned APP submits that so far as dying declaration exhibit 47 recorded by PW 7 Ashok Nandgawali, a Special Judicial Magistrate is concerned, the same was recorded on 19.12.2010 after completing all the formalities including the opinion of the concerned Medical Officer about fit state of mind of deceased Kavita to give her statement. PW 8 Dr. Pramod Gangurde has again examined deceased Kavita and

given his opinion in terms of the letter exhibit 46 given by PW 7 Ashok Nandgawali. Even, PW 7 Ashok Nandagawali, Special Judicial Magistrate had asked deceased Kavita about her name and address, to which she has stated and he was satisfied on the basis of the answers given by deceased Kavita. Deceased Kavita had thereafter given all the details of the incident explaining as to how she had sustained burn injuries. PW 7 Ashok Nandagawali, Special Judicial Magistrate has recorded the dying declaration exh.47 of Kavita as per her version and read over the contents thereof to her. She admitted the correctness thereof. Then, PW 7 Ashok Nandagawali obtained her left hand thumb mark on the statement. Furthermore, PW 7 Ashok Nandgawali, Special Judicial Magistrate has again obtained the opinion of PW 8 Dr. Pramod Gangurde as to fit condition of deceased Kavita to give statement, and accordingly, PW 8 Dr. Pramod Gangurde has given his opinion in writing at the bottom of dying declaration exhibit 47. Learned APP submits that dying declaration exhibit 47 is reliable and inspiring the confidence. Deceased Kavita was in a fit state of mind to give the dying declaration exhibit 47.

There is no possibility of tutoring, prompting nor it was a product of imagination.

11. Learned APP submits that the learned Sessions Judge, Aurangabad has discarded the said dying declaration mainly on the ground that PW 7 Ashok Nandagawali was working as a Special Judicial Magistrate from 16.6.2010 to 15.6.2011 and though he had not given his address of Aurangabad to Mukundwadi Police Station, even then, he was given letter for recording the dying declaration of deceased Kavita. The learned Sessions Judge, Aurangabad has also observed that the prosecution has not explained as to why a Special Judicial Magistrate appointed for the area of Ghati Hospital, Aurangabad was not called to record the dying declaration exhibit 47. Prosecution has also not explained as to how PW 7 Ashok Nandagawali, Special Judicial Magistrate himself has approached the police, though he had not given any address of Aurangabad to the Police Station, Mukundwadi. The learned Sessions Judge has observed that these facts creates suspicion about the role played by PW 7 Ashok

Nandagawali as a Special Judicial Magistrate in this case.

12. Learned APP submits that PW 7 Ashok Nandagawali, Special Judicial Magistrate is an independent person. There is nothing in the cross-examination to suggest that he was having animus against the accused persons. Learned APP submits that the Special Judicial Magistrate, though appointed for Vaijapur Taluka, assigned duties to record the dying declaration within the limits of Vaijapur Taluka, however, his appointment is for the entire District Aurangabad. Learned APP submits that there is no reason to discard his evidence merely on the said ground. Learned APP submits that, the observations made by the learned Sessions Judge are perverse. The dying declaration exhibit 47 is reliable, trust worthy and consistent with the complaint-cum-dying declaration exhibit 60. Learned APP submits that at the most the learned Sessions Judge should have insisted for corroboration. Learned APP submits that there is enough corroboration for the dying declarations.

During the course of the spot visit, PW 9 PSI Bankar had seized the kerosene can, match stick, burnt pieces of the saree of the deceased Kavita. There is no possibility of accidental burns by bursting of the stove.

13. Learned APP appearing for the appellant/State, in order to substantiate his contentions, placed reliance on the following judgments :-

- i. Laxman Vs. State of Maharashtra reported in 2002 AIR SC 2973.
- ii. Kundula Bala Vs. State of A.P. Reported in 1993 (2) SCC 684.
- iii. Khushal Rao Vs. State of Bombay reported in AIR (SC) 22.
- iv. Sham Shankar Kankariya Vs. State of Maharashtra reported in 2007 (2) scc (cri) 663.
- v. Paniben Vs. State of Gujarat reported in 1992 (2) SCC 474.
- vi. Jagbir Singh Vs. State (NCT of Delhi) criminal appeal no.967 of 2015.
- vii. Maniben Vs. State of Gujarat reported in AIR 2007 SC 1932.
- viii. Ganpat Bakaramji Lad Vs. State (Full Bench) in Criminal appeal No.186 of 2013 decided on 9.3.2018.
- ix. Amarsingh Vs. State of Maharashtra reported in 2007 (12) Scale 764. Appeal (cri) 97 of 2006.
- x. Koli Chunilal Savji and anr Vs. State of Gujarat (SC) decided on 29.9.1999.

xi. Purushottam Chopra and another Vs. State (Govt. of NCT Delhi).

xii. Sasikumar Vs. State of Tamilnadu reported in 2009 AIR (SCW) 6451.

14. Learned counsel for the respondent-accused submits that the prosecution case rests upon the circumstantial evidence and there is no direct evidence in this case. Prosecution case entirely rests upon two dying declarations exhibit 60 and exhibit 47, respectively. Learned counsel submits that PW 9 PSI Bankar has admitted in his cross-examination that the contents of portion marked 'A' of dying declaration exhibit 60 of deceased Kavita have been incorporated by him on his own. PW 9 PSI Bankar has deposed before the Court that he has recorded the dying declaration exhibit 60 as per the narration of deceased Kavita. There was no reason for PW 9 PSI Bankar to record the version marked 'A' on his own. Learned counsel submits that, even if exhibit 60 is recorded by PW 9 PSI Bankar as a complaint-cum-dying declaration, it should be in the words of the deceased and the person who has recorded the dying declaration is not supposed to make addition on his own in the said dying declaration.

Learned counsel for respondent/accused further submits that the learned Sessions Judge has not merely discarded the dying declaration exhibit 60 on this ground alone, however, it has also been found in the dying declaration that deceased Kavita had stated that respondent/accused had poured kerosene on her person and set her on fire by match-stick with intent to kill her. Deceased Kavita was an ill-literate lady. It is not possible for deceased Kavita to use said language about intention of the respondent-accused. Learned counsel submits that even time recorded on exhibit 60 is also doubtful.

15. Learned counsel submits that even if it is assumed that it was recorded by PW 9 PSI Bankar after 11.55 p.m. On 18.12.2010, however, PSI Bankar had handed over the said statement-cum-dying declaration exhibit 60 to P.S.O. of Police Station, Mukundwadi, Aurangabad on 19.12.2010 at about 5.05 p.m. PW 9 PSI Bankar has also admitted that in case any serious offence is disclosed from any statement or report recorded, it is necessary that crime has to be registered at the earliest.

Prosecution has not given any explanation for delay in registration of the crime on the basis of the statement-cum-dying declaration exhibit 60. Learned counsel submits that even there is no endorsement of PW 8 Dr. Pramod Gangurde at the bottom of the dying declaration exhibit 60. It has come on the record that condition of deceased Kavita was critical during the intervening night of 18.12.2010 and 19.12.2020. Learned counsel submits that, the learned Sessions Judge, Aurangabad has considered all these aspects and discarded the dying declaration exhibit 60.

16. Learned counsel for respondent/accused submits that so far as dying declaration exhibit 47 is concerned, prosecution has not explained as to why Special Judicial Magistrate assigned with the duties to record the dying declaration at Aurangabad was not called for recording the dying declaration of deceased Kavita and, even though, PW 7 Ashok Nandgavali, Special Judicial Magistrate appointed for Taluka Vaijapur had not given his address to Police Station, Mukundwadi, he had come on his own for recording the dying declaration of

deceased Kavita in Ghati Hospital, Aurangabad. Even, PW 7 Ashok Nandagawali, a Special Judicial Magistrate has made improvement that he had read over the contents of the dying declaration exhibit 47 to Kavita and she admitted the correctness thereof. It is not observed on dying declaration exhibit 47 to that effect. Learned counsel submits that even deceased Kavita in her dying declaration exhibit 47 stated that she has a complaint against her father-in-law, husband, sister-in-law and the husband of sister-in-law. Learned counsel has pointed out that as seen from the account of the incident given by the deceased Kavita, she did not even whisper about the presence of her brother-in-law and the husband of her sister-in-law at the time of alleged incident. Even then, she stated that she had a complaint against husband of her sister-in-law. There are no allegations against them about any overt act at the time of incident. There was no reason for deceased Kavita to make complaint against them. Thus, mentioning of these three persons in the dying declaration exhibit 47 in response to question no.6 creates doubt about truthfulness of her version.

17. Learned counsel submits that the appellate court may overrule or otherwise disturb the trial court's acquittal if it has a very substantial and compelling reasons for doing so. Learned counsel submits that acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable. Learned counsel submits that the trial court has advantage of watching the demeanor of the witnesses who have given evidence and, therefore, the appellate court should be slow to interfere with the decision of the trial court. Learned counsel submits that the appellate court undoubtedly has wide powers of re-appreciating and re-evaluating the entire evidence, but it would be justified in interfering with the judgment of acquittal when the judgment of the trial court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse. Learned counsel submits that the view taken by the learned Sessions Judge, Aurangabad is a possible view. There is a presumption of innocence in favour of the

accused and it has been enforced by the acquittal recorded by the trial court.

18. Learned counsel for the respondent/accused, in order to substantiate his contentions, placed reliance on following judgments :-

- i. Sampat Babso Kale and anr. Vs State of Maharashtra reported in 2019 Cri.L.J. 2428.
- ii. Muralidhar alias Gidda and another Vs. State of Karnataka reported in (2014) 5 Supreme Court Cases 730.
- iii. Ghurey Lal Vs. State of Uttar Pradesh reported in (2008) 10 Supreme Court Cases 450.
- iv. Subhash Vs. State of Haryana reported in AIR 2011 Supreme Court 349.
- v. State of Punjab Vs. Phola Singh and another reported in (2003) 11 Supreme Court Cases 58.
- vi. State of M.P. Vs. Bacchudas Alias Balram and others reported in (2007) 9 Supreme Court Cases 135.
- vii. Naresh Kumar Vs. Kalawati and others reported in 2021 AIR (SC) 1605.
- viii. Paparambika Rosamma and others Vs. State of A.P. Reported in (1999) 7 Supreme Court Cases 695.

19. We have carefully considered the submissions advanced by the learned APP for the appellant-State and the learned counsel appearing for the respondent-accused. With their able assistance, we have perused

the grounds taken in the appeal memo, annexures thereto, the record and proceedings and the case laws cited by the respective parties.

20. Prosecution case entirely rests upon circumstantial evidence and there is no direct evidence in this case. Prosecution case rests upon two dying declarations exhibit 60 and exhibit 47 respectively. The learned Sessions Judge has discarded the dying declaration exhibit 60 recorded by PW 9 PSI Bankar for various reasons. PW 9 PSI Bankar has admitted in his cross-examination itself that the portion marked 'A' of dying declaration exhibit 60 came to be recorded by him on his own. We have carefully gone through the contents of portion marked 'A' of dying declaration exhibit 60. Deceased Kavita had given all the details of her children and family background. It also appears from the portion marked 'A' of the dying declaration that occupation of respondent-accused is mentioned as rickshaw driver and that elder daughter of deceased Kavita namely Pratiksha is taking education in fourth standard and son is the youngest one. Deceased Kavita

was doing the work of utensil cleaning. We are just unable to understand as to how all these details have been recorded by PW 9 PSI Bankar on his own. There was no reason for PW 9 PSI Bankar to have any acquaintance with the family of deceased Kavita. Thus, the only inference could be drawn that someone, who was interested in recording the said dying declaration exhibit 60 of deceased Kavita, had given all these details to PW 9 PSI Bankar. It is not necessary to mention here that, in the dying declaration, the person who is recording the dying declaration is not supposed to make any addition on any count and it should be in the words of the declarant only and not otherwise. Furthermore, it is quite surprising that deceased Kavita, who is an ill-literate lady had stated in her dying declaration that respondent-accused had poured kerosene from the can on her person and set her on fire with the help of match-stick with an intention to kill her (जीवनिशी ठार मारण्याच्या उद्देशाने). On this backdrop, the learned Sessions Judge has observed that dying declaration exhibit 60 is not in the words and recorded as per the narration of deceased Kavita. In the given set of facts, as discussed

above, this can be a possible view. Even if for the sake of discussion, if we assume that portion marked 'A' is introductory in nature and might have been recorded because PW 9 PSI Bankar was recording it in the complaint format, however, the question remained as it is as to who has given all these details to PW 9 PSI Bankar and, so also as to how an ill-literate woman gave her statement expressing herself about murderous intention of the respondent-accused.

21. Furthermore, the learned Sessions Judge, Aurangabad has also observed the conduct of PW 9 PSI Bankar about his late submission of the said dying declaration exhibit 60 in the concerned Mukundwadi, Police Station. Learned Sessions Judge, Aurangabad has also observed on the basis of the prosecution evidence that condition of deceased Kavita was serious in between night of 18.12.2010 and 19.12.2010, however, even then, PW 9 PSI Bankar has not obtained the certificate of the concerned Doctor PW 8 Dr. Pramod Gangurde certifying at the bottom of the dying declaration exhibit 60 about the fit state of mind of the

Kavita even at the time of completion of the dying declaration. There is no time mentioned on the dying declaration exhibit 60. PW 8 Dr. Pramod Gangurde has given his opinion about fit condition of Kavita on 18.12.2010 at about 11.55 p.m. PW 9 PSI Bankar has stated that he has handed over the dying declaration exhibit 60 to PW 2 P.S.O. of Mukundwadi Police station in the morning on 19.12.2010. Learned Sessions Judge has taken a serious note of it. Even though, the dying declaration exhibit 60 might have been recorded in the morning of 19.12.2010, however, on the basis of said complaint-cum-dying declaration exhibit 60, crime came to be registered at about 5.05 p.m. Prosecution has not at all explained the said delay. It is not clear from the prosecution evidence as to where the said dying declaration exhibit 60 was kept by PW 9 PSI Bankar till it was submitted in the Mukundwadi Police Station. So far as this aspect is concerned, no other view is possible. The learned Sessions Judge, Aurangabad has rightly observed about suspicious conduct of PW 9 PSI Bankar and late submission of the dying declaration

exhibit 60 in the concerned Mukundwadi Police Station, Aurangabad.

22. So far as the dying declaration exhibit 47 is concerned, the learned Sessions Judge has observed that PW 7 Ashok Nandgawali, Special Judicial Magistrate, who was assigned the duties to record the dying declaration in Vaijapur Taluka had recorded the dying declaration exhibit 47 in Ghati Hospital, Aurangabad. PW 7 Ashok Nandagawali, a Special Judicial Magistrate also accepted in his cross-examination that he had not given his address to Mukundwadi Police Station. It is not clear and prosecution has also not explained as to how PW 7 Ashok Nandagawali, Special Judicial Magistrate had come to Ghati Hospital, Aurangabad for recording the dying declaration of deceased Kavita. Even assuming that PW 7 Ashok Nandgawali, Special Judicial Magistrate was appointed for the entire Aurangabad District for recording of the dying declaration and there is nothing in the evidence to suggest any animus, however, still then, it was necessary on the part of the prosecution to

explain as to why there was no attempt made to contact the Special Judicial Magistrate of Aurangabad city for recording the dying declaration of deceased Kavita.

22. Learned Sessions Judge, Aurangabad in paragraph no.31 has specifically observed the answers given by deceased Kavita to question no.6 of the dying declaration exhibit 47. We have carefully perused the dying declaration exhibit 47. It appears that in answer to question no.6, deceased Kavita had stated that she had a complaint against her father-in-law, husband, sister-in-law and the husband of her sister-in-law. It appears that deceased Kavita even did not whisper about the presence of her brother-in-law and husband of her sister-in-law at the time of alleged incident. Thus, implicating some additional persons in the dying declaration exhibit 47 creates doubt about its truthfulness and also possibility of interference by others. Learned Sessions Judge has also questioned about reading over the contents of the dying declaration to deceased Kavita by PW 7 Ashok Nandagawali, Special Judicial Magistrate.

24. In a case of **Muralidhar Alias Gidda and another Vs. State of Karnataka** reported in (2014) 2 SCC (Cri) 690, relied upon by the learned counsel for respondent-accused, in paragraph nos.10 to 13 the Supreme Court has considered the appeal against acquittal, the powers of appellate courts, proper exercise thereof and summarized the principles as under :-

11.Lord Russell in Sheo Swarup, highlighted the approach of the High Court as an appellate court hearing the appeal against acquittal. Lord Russell said, "... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The opinion of the Lord Russell has been followed over the years.

11. As early as in 1952, this Court in Surajpal Singh while dealing with the powers of the High Court in an appeal against acquittal under [Section 417](#) of the Criminal Procedure Code observed,

"7.....the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu, Madan Mohan Singh, Atley, Aher Raja Khima, Balbir Singh, M.G. Agarwal, Noor Khan, Khedu Mohton, Shivaji Sahabrao Bobade, Lekha Yadav, Khem Karan, Bishan Singh, Umedbhai Jadavbhai, K. Gopal Reddy, Tota Singh, Ram Kumar, Madan Lal, Sambasivan, Bhagwan Singh, Harijana Thirupala, C. Antony, K. Gopalakrishna, Sanjay Thakran and Chandrappa. It is not necessary to deal with these cases individually.

Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following : (i) There is presumption of innocence in favour of an accused person and such presumption

is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.

13. In Ghurey Lal, the Court has culled out the principles relating to the appeals from a judgment of acquittal which are in line with what we have observed above.”

25. In a case of **Sampat Babso Kale and anr. Vs. State of Maharashtra** (supra) relied upon by the learned counsel for the respondent-accused in paragraph no.7 the Supreme Court has made following observations :-

- “7. With regard to the powers of an appellate court in an appeal against acquittal, the law is well established that the presumption of innocence which is attached to every accused person gets strengthened when such an accused is acquitted by the trial court and the High Court should not lightly interfere with the decision of the trial court which has recorded the evidence and observed the demeanor of witnesses. This Court in the case of [Chandrappa & Ors. v. State of Karnataka](#) (2007) 4 SCC 415, laid down the following principles :-

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge :-

- (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

- (2) [The Code](#) of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
- (3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
- (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
- (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

26. In a case of **Subhash Vs. State of Haryana (supra)**, in paragraph no.3 in the identical facts about recording of the dying declaration by the Magistrate from the another area, the Supreme Court has observed that even though the witness has admitted that the area of Safdarjung Hospital did not fall within his jurisdiction but clarified that it was the practice that dying declaration could be recorded by any Magistrate when the Magistrate of that area concerned was not available but clarified that he had made no efforts to find out as to whether the Magistrate of the area in which

Safdarjung Hospital lay was available or not. The Supreme Court has thus expressed deep suspicion about the very conduct of the witness and the manner in which dying declaration was recorded.

27. In a case **State of Panjab Vs. Phola Singh and another** (supra), relied upon by the learned counsel for respondent-accused, it is observed by the Supreme Court that on appreciation of the evidence, if there is possibility of two views, the view favourable to the accused should be adopted. The Supreme court has also considered the powers and duties of the appellate Court in the appeals preferred against acquittal. The Supreme Court in paragraph no.9 of the judgment has made following observations :-

- “9. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or

not. ([See Bhagwan Singh v. State of M.P.](#), 2003 (3) SCC 21). The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in [Shivaji Sahabrao Bobade v. State of Maharashtra](#) (1973 (2) SCC 793), [Ramesh Babulal Doshi v. State of Gujarat](#) (1996 (9) SCC 225), [Jaswant Singh v. State of Haryana](#) (2000 (4) SCC, [State of Punjab v. Karnail Singh](#).”

28. In a case of **State of M.P. Vs. Bacchudas alias Balram and others** (supra), relied upon by the learned counsel for the respondent/accused in paragraph no.9 the Supreme Court has made similar observations.

29. It appears from the observations made and the ratio laid down by the Supreme Court in the aforesaid cases and the cases cited above that there is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court; and so, the fact that the accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal. Though, powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate Court is generally

loath in disturbing the finding of fact recorded by the trial court. If the trial court takes a reasonable view of the facts of the case, interference by the High Court with the judgment of the trial court is not justified merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view. Interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.

30. Learned APP has placed reliance on the cases of Laxman Vs. State of Maharashtra, ii-Khushal Rao Vs. State of Bombay, iii-Kundu Bala Subrahmanyam Vs. State of A.P., iv-Shamshankar Kankariya Vs. State of Maharashtra, v-Paniben Vs. State of Gujarat, vi-Jagbir Singh Vs. State (NCT of Delhi), vii-Maniben Vs. State of Gujarat. In [viii] - Ganpat Bakaramji Lad Vs State of Maharashtra (Full Bench) (supra), wherein the full Bench has answered the question of reference as to “Whether the dying declaration can be rejected merely

because the same is not read over to the declarant admitting the same to have correctly recorded” and recorded the finding that 'dying declaration cannot be rejected merely because the same is not read over to the declarant and the declarant admitting the same that same have been correctly recorded.'

31. In case of **Amarsingh Vs. State of Maharashtra**, wherein certain broad principles are laid down in recording and appreciation of the dying declaration. This is the settled position and there is no reason to discuss it again.

32. In a case of **Koli Chunilal Savji and anr. Vs. State of Gujarat** (supra) relied upon by the learned APP for the appellant-State, the Supreme Court has observed that the “law is well settled that powers of the High Court while sitting in appeal against an order of acquittal is the same, as the powers while sitting in appeal against the conviction and the High Court, therefore, would be fully entitled to re-appreciate the materials on record and incoming to its own conclusion.

The only compulsion on the part of the appellate court is to bear in mind the reasons advanced by the learned Sessions Judge, while acquitting the accused and indicate as to why those reasons cannot be accepted.”

33. In a case **Sasikumar Vs. State of Tamil Nadu** reported in 2009 AIR (SCW) 6451 relied upon by the learned APP, wherein the Supreme Court has summed up the principles governing the dying declaration by referring the earlier cases.

34. In the instant case, in our considered opinion, the view taken by the trial court while appreciating the dying declaration exhibit 47 and exhibit 60 is a possible view. The sanctity is attached to dying declaration because it comes from the mouth of a dying person. If the dying declaration is not recorded in the words of the maker, this by itself creates suspicion about credibility of such dying declaration.

35. In the instant case, the learned Sessions Judge, Aurangabad expressed suspicion over the credibility of the dying declaration exhibit 60. Furthermore, the way

in which the language that has been used in the dying declaration exhibit 60 indicates that the same is not in the actual words of the maker thereof, but as dictated by someone else. Thus, the view taken by the trial court on the basis of the evidence on record was a possible view. So far as the other dying declaration exhibit 47 is concerned, though we may not fully agree with the observations made by the trial court about recording of the dying declaration by the Special Judicial Magistrate from Vaijapur Taluka, however, we agree that the view taken by the learned Sessions Judge, Aurangabad that the Investigating Officer has made no efforts at all to find out the Special Judicial Magistrate from Aurangabad city for recording the dying declaration of Kavita, who was admitted in Ghati Hospital, Aurangabad. Further, the observations of the learned Sessions Judge, Aurangabad about certain admissions given by PW 7 Ashok Nandgavali, a Special Judicial Magistrate for not making the endorsement on the dying declaration exhibit 47 to the effect that the contents of the dying declaration exhibit 47 were read over and explained to Kavita and she has admitted the same,

however, in the light of Full Bench Judgment of this Court (in case of Ganpat Bakaramji Lad Vs. State of Maharashtra) the same may not be appropriate. In case of multiple dying declarations, it is well settled that the Court cannot pick and choose one from it and base the conviction on it. Further, PW 5 Sudam Jadhav, the father of deceased Kavita, PW 4 Sanjay Jadhav-brother of deceased Kavita and PW 6 Pratiksha Shendge-daughter of deceased Kavita have not supported the prosecution case in any manner.

36. We are thus not inclined to interfere in the well reasoned judgment and order passed by the learned Sessions Judge, Aurangabad. In view of the same and in terms of the ratio laid down by the Supreme Court in dealing with the appeals against acquittal, we proceed to pass the following order.

ORDER

- i. Criminal Appeal is hereby dismissed.
- ii. Criminal appeal is accordingly disposed off.

(SHRIKANT D. KULKARNI, J.) (V.K. JADHAV, J.)

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