

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.904 OF 2001

Dileep Ramdas Mahale

...Appellant

Versus

The State of Maharashtra

...Respondent

....

Mr. Satyavrat Joshi with Mr. Sumant Deshpande for the Appellant.

Mr. P.H. Gaikwad, APP for the Respondent -State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 8th/9th SEPTEMBER, 2021.

ORAL JUDGMENT:-

The Appellant has assailed the judgment dated 07/11/2001 of Additional Sessions Judge, Sangli, in Sessions Case No.21 of 2001, convicting him for offence punishable under Section 304 (II) of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for 5 years with fine of Rs.1,000/- i/d to undergo rigorous imprisonment for three months.

2. The Appellant (herein after referred to as the accused) is the husband of the victim Sunita. Their marriage was solemnised on 18/05/1993. The accused and the victim-Sunita initially resided at Sangliwadi and thereafter shifted to Miraj. They have two children from

this wedlock. The accused and his wife-Sunita did not share a cordial relationship and there used to be constant fights between them over trivial issues. On 13/08/2000 the accused admitted the victim-Sunita to Sangli General Hospital with burn injuries. She was initially taken to the casualty department and later shifted to the Burn ward and was treated by PW3-Dr. Avinash Joshi. The victim narrated to the Doctor that her husband i.e. the accused had poured kerosene on her body and set her ablaze. PW5-Maruti Shinde, police head constable, Vishrambagh police station, who was deputed at Sangli General Hospital recorded the statement of Sunita wherein she narrated that the accused quarreled with her over some trivial issue, poured kerosene on her body and set her ablaze. Based on the statement of the victim-Sunita recorded by PW5 crime No.189 of 2000 came to be registered against the accused at Vishrambagh police station for offence under Section 307 of IPC. On 14/08/2000 the victim-Sunita was shifted to Wanless Hospital at Miraj. The deceased succumbed to the injuries on 19/08/2000 and the case was converted from 307 to 302 of the IPC.

3. PW7-PSI Ramesh Bhokare took over the investigation. He referred the body of Sunita for post mortem, which was conducted by PW4-Dr. Kisan Lokhande. He opined that the death was due to septicemic shock caused by burn injuries. Pw7 conducted the spot

panchanama (Exhibit-22) and seized a can of kerosene, burnt pieces of saree and a match box. He arrested the accused under the arrest panchanama (Exhibit-23) and seized his clothes in presence of PW6 Vijay Khandekar. PW7 recorded the statements of PW1-Prakash Wagh, PW2-Sou. Shaila Shinde, father and maternal aunt of the deceased. Upon completion of the investigation, charge sheet was filed against the accused for the offence punishable under Section 302 of the IPC.

4. The case being sessions triable was committed to the Sessions Court. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined seven witnesses. The statement of the accused was recorded under Section 313 of Cr.P.C. The defence of the accused was that his wife Sunita was of suspicious nature and used to pick up quarrels on petty matters. She would suspect him whenever he talked to the neighbours. He claimed that the deceased had set herself ablaze in an attempt to commit suicide. He tried to extinguish the flames and thereafter took her to the hospital.

5. The learned Judge held that the dying declaration recorded by PW3 and PW5 proves that the death of Sunita was homicidal. Learned Judge held that the evidence of PW3 amply proves that Sunita

was fully conscious, well oriented and in a condition to give valid statement. Learned Judge held that the term 'valid' would include physical and mental condition of the patient. Learned Judge further held that the oral dying declaration made to PW1 and PW2 is in consonance with the dying declaration recorded by PW3 and PW5. Learned Judge observed that the brother of the accused had shifted Sunita to Wanless Hospital against medical advice possibly due to the statement made by Sunita against the accused. Learned Judge discarded the history recorded in MLC at Exhibit-18/5 on the ground that the said history was given by the brother of the accused. Learned Judge has held that admission of genuineness of medical case papers at Exhibit-18 would not amount to admission of history recorded therein. Learned Judge disbelieved the defence that the death was suicidal.

6. The learned Judge further held that the incident had occurred in a heat of passion and the accused had tried to extinguish the flames and in the process sustained burn injuries on his hands and later shifted Sunita to the hospital. The learned Judge therefore held that the case falls under exception -4 of Section 300 of the IPC. Consequently, held the accused guilty of the offence under Section 304 (II) and sentenced him as stated above. The State has not filed any appeal challenging the acquittal under Section 302 of the IPC. Being

aggrieved by the conviction and sentence for offence under Section 304(ii) of the IPC, the accused has preferred this appeal.

7. Challenging the findings of the Court, Mr. Satyavrat Joshi, learned counsel for the accused submits that the initial history recorded in the medico legal record(MLC) Exhibit-13/2 was of accidental burns due to explosion of stove. He further submits that the oral dying declaration made to PW3-Dr. Avinash Joshi recorded in MLC at Exhibit-13 and dying declaration (Exhibit-20) recorded by PW5-Maruti Shinde lack consistency. He submits that the dying declaration at Exhibit-20 was allegedly signed by the deceased even though fingers of both hands were totally burnt. Learned counsel for the accused further contends that PW3- Dr. Avinash Joshi has admitted that condition of the patient was deteriorating and that he had administered Fortvin, a sedative which takes immediate effect upon administration. He therefore contends that the dying declaration (Exhibit-20), which was made by the victim-Sunita in a sedative state cannot be relied upon.

8. Mr. Joshi submits that PW5 had not recorded the time at which the dying declaration at Exhibit-20 was recorded. The medical evidence also does not suggest that the deceased was in a fit mental condition to make the dying declaration. He has relied upon the

decision of the Apex Court in ***Waikhom Yaima Singh vs. State of Manipur (2011) 13 SCC 125*** and ***Laxmi Vs. Omprakash and Ors. (2001) 6 SCC 118*** to contend that one of the important tests of the reliability of the dying declaration is the satisfaction of the court that the deceased was in a fit state of mind to make the statement. He submits that the dying declaration at Exhibits-13 and 20, which suffer from material infirmities, cannot form basis for conviction.

9. Shri Joshi further contends that while the deceased-Sunita was admitted in the Wanless Hospital, she had given history of suicidal burns and this has been recorded in MLC papers at Exhibit-18, genuineness of which has been admitted by the prosecution under Section 294 of the Code of Criminal Procedure. He has relied upon decision of the Apex Court in ***Shamser Singh Verma Vs. State of Haryana, (2016) 15 SCC 485, Akhtar and Ors. vs. State of Uttaranchal, (2009) 13 SCC 722*** and decision of the Full Bench of this Court in ***Shaikh Farid Hussinsab vs. State of Maharashtra, 1981 Mah LJ 345 (FB)*** to contend that once genuineness of the documents is admitted under Section 294 of the Cr.P.C. such documents need not be formally proved and can be read in evidence. He submits that the document at Exhibit-18 clearly indicates that the death of Sunita was suicidal and this is consistent with the defence raised by the accused.

Shri Joshi has relied upon the decision of the Division Bench of this Court in ***Dnyaneshwar Ramchandra Suryawanshi vs. The State of Maharashtra, 2013 All MR (Cri) 3133***, to buttress his contention that conviction cannot be based on multiple inconsistent dying declarations.

10. Referring to the oral dying declaration made to PW1 and PW2, Shri Joshi, learned counsel for the accused submits that oral dying declaration is a weak piece of evidence. He urges that the oral dying declarations allegedly made to PW1 and PW2 is not truthful and reliable. Relying upon the decision of the Apex Court in ***Jayamma and Anr. vs. State of Karnataka (2021) 6 SCC 213***, Mr. Joshi, learned counsel for the accused canvassed that the accused could not have been held guilty solely on the basis of dying declarations, which are inconsistent and contradictory.

11. Per contra, Mr. P.H. Gaikwad, learned APP submits that evidence of PW3 and PW5 clearly indicates that the deceased was conscious, well oriented and was in a fit condition to make a statement. He states that the oral dying declaration made to PW3 as well as the dying declaration recorded by PW5-Maruti Shinde amply proves that the accused herein had poured kerosene on the deceased-Sunita and set her ablaze. Learned APP further submits that the medical case

papers of Wanless Hospital at Miraj (Exhibit-18) have not been proved and hence the same cannot be read in evidence. In support of this contention he has relied upon the decisions of the Apex Court in ***Alamelu and Anr. Vs. State, 2011 DGLS (SC) 59, Sunil Vs. State of Maharashtra (2017) 11 SCC 260*** and the decision of the Division Bench of this Court in ***Rajesh @ Raju s/o Nagnath @ Nivrutti vs. State of Maharashtra, 2015 3 AIR BomR 873*** and the decision of the Kolkata High Court in ***June @ Arjun Madi vs. The State, 1986 3 Crimes (HC) 145***. He submits that the deceased had in clear terms stated that the accused had poured kerosene on her body and set her ablaze. He submits that the dying declarations are true and voluntary and hence the learned Judge was justified in convicting the accused on the basis of the dying declaration.

12. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

13. It is not in dispute that the accused herein was married to Sunita, daughter of PW1-Prakash Wagh. Their marriage was solemnised on 18/05/1993. They initially resided at Sangliwadi and later shifted to Miraj. It is also not in dispute that on 13/08/2000 said Sunita had sustained burn injuries. The accused had tried to extinguish the flames

and in the process sustained burn injuries. He had admitted the deceased-Sunita to General Hospital, Sangli on 13/08/2000 at about 9.30 p.m. On 14/08/2000 she was shifted to Wanless Hospital at Miraj. She expired on 19/08/2000. The evidence of PW4- Dr. Kisan Lokhande vis-a-vis post mortem report at Exhibit-17 clearly indicates that the deceased-Sunita had sustained 65% burn injuries and her death was as result of septicemic shock due to burn injuries.

14. It is the case of the prosecution that the accused had poured kerosene on Sunita and set her ablaze whereas the defence of the accused is that the death of Sunita was suicidal. The prosecution in support of its case has relied upon (i) the history narrated by Sunita to PW3-Dr. Avinash Joshi, which has been recorded in MLC at Exhibit-13 (ii) dying declaration (Exhibit-20) recorded by PW5-Shinde and (iii) oral dying declaration made to PW1- Prakash Wagh, the father of the deceased and PW2- Shaila S. Shinde, maternal aunt of the deceased. The learned Judge has based the conviction solely on the basis of these dying declarations.

15. It is trite law that conviction can be based on dying declaration provided the dying declaration is clear, unambiguous, true and voluntary and not a result of tutoring, prompting or imagination.

Corroboration is merely a rule of province. In ***Smt. Paniben vs. State of Gujarat AIR 1992 SC 1817*** the Apex Court has summarized the case law relating to the principles governing dying declaration. In the case of ***Jayamma and Anr. Vs. State of Karnataka (2021) 6 SCC 213*** the three Judge Bench of the Hon'ble Supreme Court has reiterated these principles thus:

14. Before we advert to the actual admissibility and credibility of the dying declaration (Ex.P5), it will be beneficial to brace ourselves of the caselaw on the evidentiary value of a dying declaration and the sustenance of conviction solely based thereupon. We may hasten to add that while there is huge wealth of case law, and incredible jurisprudential contribution by this Court on this subject, we are consciously referring to only a few decisions which are closer to the facts of the case in hand. We may briefly notice these judgments.

14.1. In P.V. Radhakrishna. v. State of Karnataka (2003) 6 SCC 443, this Court considered the residuary question whether the percentage of burns suffered is a determinative factor to affect the credibility of a dying declaration and the probability of its recording. It was held that there is no hard and fast rule of universal application in this regard and much would depend upon the nature of the burn, part of the body affected, impact of burn on the faculties to think and other relevant factor.

14.2. In Chacko v. State of Kerala (2003) 1 SCC 112, this Court declined to accept the prosecution case based on the dying declaration where the deceased was about 70 years old and had suffered 80 per cent burns. It was held that it would be difficult to accept that the injured could make a detailed dying declaration after a lapse of about 8 to 9 hours of the burning, giving minute details as to the motive and the manner in which he had suffered the injuries. That was of course a case where there was no certification by the doctor regarding the mental and physical condition of the deceased to make dying declaration. Nevertheless, this Court opined

that the manner in which the incident was recorded in the dying declaration created grave doubts to the genuineness of the document. The Court went on to opine that even though the doctor therein had recorded "patient conscious, talking" in the wound certificate, that fact by itself would not further the case of the prosecution as to the condition of the patient making the dying declaration, nor would the oral evidence of the doctor or the investigating officer, made before the court for the first time, in any manner improve the prosecution case.

- 14.3. *In Sham Shankar Kankaria v. State of Maharashtra, (2006) 13 SCC 165 it was restated that the dying declaration is only a piece of untested evidence and must like any other evidence satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. Further, relying upon the decision in Paniben v. State of Gujarat (2006) 13 SCC 165 wherein this Court summed up several previous judgments governing dying declaration, the Court in Sham Shankar Kankaria(Supra) reiterated:(Sham Shankar Kankaria SCC pp.172-73, para 11*

"11...(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P.[(1976) 3 SCC 104]);

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav[(1985)1 SCC 552 and Ramawati Devi v. State of Bihar [(1983)1SCC 211]);

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K.Ramachandra Reddy v. Public Prosecutor[(1983) 1 SCC 211]);

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P.[(1974) 4 SCC 264]);

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it

- is to be rejected. (See Kake Singh v. State of M.P. [1981 Supp SCC 25]);*
- (vi) *A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P. [(1981) 2 SCC 654]);*
- (vii) *Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu [1980 Supp SCC 455]);*
- (viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar [1980 Supp SCC 769]);*
- (ix) *Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanhau Ram v. State of M.P. [1988 Supp SCC 152]);*
- (x) *Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan [(1989) 3 SCC 390]);*
- (xi) *Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra [(1982) 1 SCC 700])"*
15. *It goes without saying that when the dying declaration has been recorded in accordance with law, and it gives a cogent and plausible explanation of the occurrence, the Court can rely upon it as the solitary piece of evidence to convict the accused. It is for this reason that Section 32 of the Evidence Act, 1872 is an exception to the general rule against the admissibility of hearsay evidence and its Clause (1) makes the statement of*

the decease admissible. Such statement, classified as a "dying declaration" is made by a person as to the cause of his death or as to the injuries which culminated to his death or the circumstances under which injuries were inflicted. A dying declaration is thus admitted in evidence on the premise that the anticipation of brewing death breeds the same human feelings as that of a conscientious and guiltless person under oath. It is a statement comprising of last words of a person before his death which are presumed to be truthful, and not infected by any motive or malice. The dying declaration is therefore admissible in evidence on the principle of necessity as there is very little hope of survival of the maker, and if found reliable, it can certainly form the basis for conviction.

- 16. We may also take note of the decision of this Court in the case of Surinder Kumar v. State of Haryana (2011) 10 SCC 173. In the said case, the victim was admitted in hospital with burn injuries and her dying declaration was recorded by an Executive Magistrate. This Court, first doubted whether the victim could put a thumb impression on the purported dying declaration when she had suffered 95.97 per cent burn injuries. Thereafter, it was noted that "at the time of recording the statement of the deceased.....no endorsement of the doctor was made about her position to make such statement", and only after the recording of the statement did the doctor state that the patient was conscious while answering the questions, and was "fit to give statement". This Court lastly noticed that before the alleged dying declaration was recorded, the victim in the course of her treatment had been administered Fortwin and Pethidine injections, and therefore she could not have possessed normal alertness. It was hence held that although there is neither a rule of law nor of prudence that the dying declaration cannot be acted upon without corroboration, the Court must nonetheless be satisfied that the dying declaration is true and voluntary, and only then could it be the sole basis for conviction without corroboration.*
- 17. Consistent with the cited principles, this Court refused to uphold the conviction in the case of Sampat Babso Kale and Another v. State of Maharashtra (2019) 4 SCC 739. The dying declaration in that case was made by a victim who had suffered 98 percent burn injuries, and the statement was recorded after the victim was injected with painkillers. This*

Court adopted a cautious approach, and opined that there were serious doubts as to whether the victim was in a fit state of mind to make the statement. Given the extent of burn injuries, it was observed that the victim must have been in great agony, and once a sedative had been injected, the possibility of her being in a state of delusion could not be completely ruled out. Further, it was specifically noted that: (SCC p. 744 para 14) "14.....the endorsement made by the doctor that the victim was in a fit state of mind to make the statement has been made not before the statement but after the statement was recorded. Normally it should be the other way around."

(emphasis supplied)

16. In the light of the aforesaid enunciation of the law, the question for consideration is whether the dying declarations at Exhibit-13 and 20 and oral dying declaration made to PW1 and PW2 are free from all doubts and can be relied upon to hold the accused guilty of the offence, without further corroboration. It is not in dispute that the accused had taken Sunita to the casualty department of Sangli General Hospital. The history recorded at the time of admission in the medical case records (Exhibit-13/2) is of accidental burns i.e. due to explosion of stove. The records do not indicate that this history was given by the victim-Sunita and hence the history recorded in the admission papers at Exhibit-13/2 is of no relevance.

17. The victim-Sunita was subsequently shifted to burn ward and was treated by PW3-Dr. Avinash Joshi, Resident Medical Officer attached to General Hospital, Sangli. He has deposed that the patient

was admitted in Burn Ward at about 10 p.m. He examined the patient and questioned her as to how she had sustained the burn injuries. He has deposed that Sunita had told him that there was a quarrel between her and her husband and thereafter her husband brought a can of kerosene from the bathroom and poured it on her body and set her ablaze. She further told that her husband thereafter tried to extinguish the flames and brought her to the hospital. PW3 recorded the alleged history in the MLC at Exhibit -13.

18. The prosecution has also examined PW5-Maruti Shinde, the head constable, who had recorded the statement/ dying declaration of Sunita. He has deposed that on 13/08/2000 he was deputed in Sangli General Hospital. He had received a telephonic message at 10.00 p.m. from PSO Vishrambag police station to record dying declaration of Sunita. He has deposed that he had enquired with the concerned Doctor of the Burn Ward, whether Sunita was able to make statement. The Doctor opined that Sunita was in fit condition to make a statement and made an endorsement to that effect on the statement.

19. PW5 has deposed that Sunita had told him that on 13/8/2000 the accused had picked up a quarrel with her, beat her and thereafter brought a can of kerosene from Bathroom and poured

kerosene on her person and set her ablaze. He recorded the statement at Exhibit-20, read over the contents of the same to Sunita and obtained her signature on the same. He once again asked PW3 to examine Sunita and upon examination, PW3 made an endorsement that she was in fit condition. He has confirmed the contents of the dying declaration at Exhibit-20.

20. In the dying declarations at Exhibits-13 and 20 the deceased -Sunita had implicated the accused by stating that he had poured kerosene on her and set her ablaze. The question is whether the deceased was in a fit mental condition to make the dying declaration. In ***Laxmi Vs. Om Prakash*** (supra) the Apex Court has reiterated that the dying declaration is relevant and admissible in evidence provided the Court is satisfied that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and or recorded. The Apex Court has held that if the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains great doubt whether the deceased was in a fit physical or mental state to make a statement, the court may in the absence of corroborating evidence lending assurance to the contents of the declaration, refuse to act on it. In ***Nallapat Sivaiah vs. Sub Divisional Officer, Guntur, AIR***

2008 SC 2019 the Apex Court has held that it is a duty of the Court to find out whether the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration the Courts have to look for the medical opinion.

21. In this regard it is relevant to note that PW3-Dr. Avinash Joshi had certified that Sunita was in fit condition to make the statement. He has deposed that he had examined Sunita and reported to PW5 that she was conscious and oriented. He had made an endorsement on the dying declaration at Exhibit-20 certifying that 'the patient is fully conscious and oriented and is in condition to give valid statement'. He has deposed that the statement made by Sunita was recorded by the police in his presence. He has stated that he once again examined Sunita, she was conscious and oriented throughout the statement. Accordingly, he made an endorsement at the foot of the dying declaration at Exhibit-20 that 'patient was fully conscious and oriented throughout the statement and was in condition to give valid statement throughout the statement. The statement is recorded in my presence.'

22. PW3 has admitted that he had not endorsed either in the

dying declaration recorded by him in MLC at Exhibit – 13 or in the dying declaration at Exhibit – 20 that the deceased was in physically and mentally fit condition to make the statement. He had merely certified that Sunita was fully conscious and oriented and was fit to give the statement. As it has been held by the Apex Court in ***Paparambaka Rosamma and ORs. Vs. State of Andhra Pradesh 1995 7 SCC 695*** consciousness and fitness of state of mind are distinct and not synonymous. One may be conscious and oriented but not necessarily in a fit state of mind. In the instant case, the evidence of PW3 reveals that the victim had sustained 65% burn injuries. He has deposed that she was in severe pain. He has further stated that her condition was critical and was deteriorating moment to moment. He has stated that the patient was restless. He has further explained that 'restless condition relates to mental condition of the patient'. Under these circumstances it was necessary for this witness to satisfy himself that the deceased Sunita was not only conscious and oriented but was in a mentally fit condition to make the statement.

23. PW3 has admitted that he had not put any general questions to the witness to ascertain her state of mind. The endorsement made on the dying declaration at Exhibit-20 does not indicate that he had examined the patient before recording that the witness was in a

condition to make the statement. PW5 has also admitted in his cross examination that he has not mentioned in the dying declaration at Exhibit-20 that Sunita was physically and mentally fit to make the statement. The evidence of PW3 and PW5 does not indicate that they had satisfied themselves that Sunita was in a proper mental condition to make the dying declaration. There is thus no cogent evidence, either medical or otherwise to prove that the deceased was in a fit state of mind to make the statement. In the absence of such evidence, it would not be safe to rely upon the dying declaration at Exhibits 13 and 20.

24. The dying declaration at Exhibit-20 is also sought to be challenged on the ground that it was recorded by a police personnel and not by a Magistrate. In ***Laxmi Vs. Omprakash*** (supra) the Apex Court has held that the dying declaration made to a police officer is admissible in evidence. The Apex Court has however discouraged the practice of dying declaration being recorded by an investigating officer and has urged the investigating officer to avail the services of a Magistrate for recording the dying declaration except when there is no other alternative due to the precarious condition of the deceased. In the light of the principles laid down by the Apex Court, the dying declaration cannot be rejected solely on the ground that it was recorded by a police personnel and not by a Magistrate, if the other

requirements in this regard are satisfied and the dying declaration inspires confidence.

25. Hence, the core question is whether the dying declaration at Exhibit-20 meets the essential requirements and is reliable and trustworthy; particularly in view of the fact that PSI-Manohar, the paternal uncle of the deceased, who as deposed by PW1 was well acquainted with the investigating officer-PW7, had visited the hospital.

26. The evidence on record indicates that the deceased was brought to the casualty ward of Sangli General Hospital on 13/08/2000 at 9.30 p.m. and was shifted to burns ward at 10.10 p.m. She died on 19/08/2000 while undergoing treatment at Wanless Hospital. There was time gap of 5 to 6 days from the date of the incident and the death of Sunita. The prosecution therefore had sufficient time and opportunity to avail service of the Magistrate to record the dying declaration. No reasons are assigned by PW5 for not securing presence of the Magistrate for recording the dying declaration. The explanation given by the investigating officer that he did not secure the presence of the Magistrate because he was busy with the investigation is far from satisfactory.

27. It is also to be noted that the evidence of PW5 indicates that while he was on duty at Sangli General Hospital, he had received instructions from PSO, Vishrambagh Police Station to record the dying declaration. There is absolutely no evidence on record to indicate that the incident was reported to the police and that PSO had issued such instructions to PW5. This gives rise to suspicion that PW5 was not acting under the instructions of PSO -Vishrambag police station but was probably developing a story of homicidal death implicating the accused under the influence of some other person. This suspicion stands strengthened by the fact that PW5 had not mentioned in the dying declaration at Exhibit-20 the time of recording or concluding the dying declaration. Nevertheless, the endorsement made by PW3 on the dying declaration indicates that the dying declaration was recorded between 10.15 to 10.35 p.m. The endorsement on the dying declaration at Exhibit-20 reveals that the crime was registered at Vishrambagh police station at 10.50 p.m. i.e. within 15 minutes from recording of the dying declaration. It is also relevant to note that PW5 does not claim that he had dispatched the dying declaration to the Vishrambagh police station. He admits that he had not obtained an acknowledgment of the person, who had received the said dying declaration. He also admits that he had not forwarded a copy of the dying declaration to the concerned Magistrate. PW5 admits that he had not submitted a report to the PSO,

Vishrambagh regarding recording of the dying declaration. PW7 has tried to cover up this lacuna by claiming that PW5 had sent the report to the police station. Suffice it to say that the manner of recording the dying declaration is not in consonance with the settled procedure.

28. It is also to be noted that the dying declaration at Exhibit-20 recorded by PW5 is purportedly signed by the victim-Sunita. PW5 asserts that there were no burn injuries on right hand fingers of Sunita. This is in sharp contradiction with the evidence of PW3 and PW1, who have categorically stated that there were burn injuries on the fingers of both hands. The evidence of PW1 and PW3 belies the contention of PW5 and raises a grave doubt if the deceased could have signed the dying declaration at Exhibit-20 and whether she had in fact signed the dying declaration. Under such circumstances, the veracity and truthfulness of the dying declaration remains suspect. The prosecution has not examined the neighbours of the deceased and in the absence of corroborating evidence lending assurance to the contents of the declaration, it would not be safe to rely upon the dying declaration.

29. PW1-Prakash Wagh and PW2-Shaila Shinde, father and maternal aunt of the deceased Sunita have deposed that on 13/08/2000 they had received telephonic message that Sunita had sustained burn

injuries. They reached Sangli on 14/08/2000. They were informed that Sunita was shifted to Wanless Hospital. They visited Sunita in the hospital. She was admitted in ICU ward and was in serious condition. PW1 has deposed that Sunita had told him that 13/08/2000 was a holiday and her husband and children were present in the house. She further told him that the accused had left the house at about 7.30 p.m. alongwith the children. He returned about half an hour later. She asked him whether he had brought 'Rakhi'. The accused retorted angrily that he had not brought 'Rakhi'. He thereafter beat her with fist blows and kicks, then picked up a can of kerosene and poured on her and set her ablaze. He has deposed that the accused had threatened not to inform about the incident to the police or the relatives. She further told him that thereafter the accused took her to General Hospital Sangli by an auto rikshaw. PW2 has also deposed that Sunita had told her that there was quarrel between her and the accused because she had asked him to purchase Rakhi. Sunita had also stated that the accused had assaulted her, poured kerosene on her and set her ablaze.

30. As it has been held by the Apex Court in ***Waikhom Yaima Singh*** (Supra) the oral dying declaration is a weak piece of evidence, where the exact words uttered by the deceased are not available, particularly because of failure of memory of the witnesses, who are said

to have heard it. In the instant case, the evidence on record clearly indicates that Sunita was in critical condition when she was admitted in General Hospital, Sangli. As noted above, her condition was constantly deteriorating and she was shifted to Wanless Hospital, Sangli, and was admitted in ICU in critical condition. PW2 has also admitted that Sunita was in critical condition and was undergoing treatment. It is thus obvious that by the time Pw1 and PW2 reached the Wanless Hospital condition of Sunita had further deteriorated. It is therefore difficult to believe that Sunita was in a mentally fit condition to make a detailed narration of the incident to her father and maternal aunt. Furthermore, the motive attributed in the oral dying declaration made to PW1 and PW2 does not find place in the dying declaration at Exhibit-13 or Exhibit-20 recorded by PW5- Maruti Shinde. Moreover, the evidence on record reveals that the deceased had already sent Rakhis to her brother much before the incident. Hence, there could be no question of any quarrel over purchase of Rakhi, which had allegedly culminated in alleged incident of setting her ablaze. Consequently, the alleged motive for homicidal death is highly doubtful. In the above facts and circumstances, the oral dying declaration made to PW1 and PW2 is clouded with serious doubt and cannot be relied upon.

31. The learned Judge has observed that the brother of the

accused had shifted the deceased Sunita to Wanless Hospital because she had implicated the accused in the statement recorded by PW3 and PW5. As stated above, the condition of the deceased was fast deteriorating. It is in the evidence of PW3 that General Hospital, Sangli did not have intensive care unit and that Wanless Hospital had better facilities. It is thus evident that the victim was shifted to Wanless Hospital for further and better treatment and not because of the statement made by the deceased to PW3 and PW5. Hence, the motive attributed to the brother of the accused is nothing but a figment of imagination.

32. It is pertinent to note that the accused had produced medical records of Wanless Hospital. The prosecution was called upon to admit genuineness of the documents under Section 294 of the Cr.P.C. The prosecution having admitted genuineness of these documents at Exhibit-18, formal proof of the documents was dispensed with. In **Akhtar and Ors.** (supra) the Hon'ble Supreme Court has held that it is 'a settled position of law that genuineness of any document filed by a party is not disputed by the opposite party, it can be read as substantive evidence under Sub Section 3 of Section 294 of Cr.P.C.' Similarly, in **Shamshersingh Varma** (supra) the Apex Court has observed that the object of Section 294 of Cr.P.C. is to accelerate the pace of trial by

avoiding the time wasted by the parties in recording the unnecessary evidence. The Apex Court has further observed that it is not necessary for the Court to obtain admission or denial personally from the accused or complainant or the witness. The endorsement of admission or denial made by the counsel for defence or by the public prosecutor on a document is sufficient. The Apex Court has observed that in case the document is admitted, it need not be formally proved and can be read in evidence.

33. In the instant case, as noted above, the genuineness of the medical case papers of Wanless Hospital (Exhibit-18) has been admitted under Section 294 of the Cr.P.C. and hence ought to have been read in evidence without formal proof. A perusal of the said medical records indicate that at the time of admission, the victim -Sunita was conscious and well oriented. The MLC record at Exhibit-18 further indicates that the deceased-Sunita had herself given the history of suicidal burns by pouring kerosene on 13/08/2000 at 8.30 p.m. The observations of the trial court that the history recorded in MLC at Exhibit-18 was given by the brother of the accused are contrary to the material on records.

34. It goes without saying that if the endorsement in dying declarations at Exhibits 13 and 20 that the deceased was conscious and

well oriented is an indication of the deceased being in mentally fit condition to make a valid dying declaration, the same analogy would apply to the dying declaration at Exhibit-18. This dying declaration records that the deceased was conscious and well oriented and states that the death was suicidal. The dying declaration at Exhibit-18 is therefore inconsistent and contradictory with the dying declaration at Exhibits 13 and 20 recorded by PW3 and PW5. Hence, it would not be prudent to base conviction solely on the dying declaration recorded by PW3 and PW5.

35. Another important aspect, which needs to be noted is that several unlit matchsticks, about 10 to 12 according to the investigating officer, were found at the place of the incident. It is thus, obvious that the deceased, who was not under confinement had sufficient time to run out of the house and cry for help. Evidently, the deceased did not cry for help nor escaped but appears to have stood still waiting for the accused to set her ablaze. Such unnatural conduct of the deceased coupled with the conduct of the accused in trying to extinguish the fire and taking the deceased to the hospital probablises the defence of suicidal death.

36. Under the circumstances, the possibility of Sunita

committing suicide cannot be ruled out. In the facts and circumstances of the case the accused is entitled for benefit of doubt. Accordingly, the appeal is allowed. The impugned judgment is quashed and set aside. The accused is acquitted of offence under Section 304 Part II of the IPC. Bail bonds stand discharged.

(SMT. ANUJA PRABHUDESSAI, J.)