

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

CRIMINAL APPEAL NO.25 OF 2017

Sk. Javed Sk. Gulam Rasul,
Age-24 years, Occu:Labourer,
Residing at Kumbefal,
Taluka and District-Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra.
(At the instance of Karmad
Police Station, Aurangabad)

...RESPONDENT

...
Ms. Poonam V. Bodke Patil Advocate for Appellant.
Mr. S.D. Ghayal, A.P.P. for Respondent-State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE OF RESERVING JUDGMENT : 3rd AUGUST 2023

DATE OF PRONOUNCING JUDGMENT : 22nd AUGUST 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by original accused No.1 who has been convicted by learned Additional Sessions Judge, Aurangabad on 22nd November 2016 in Sessions Case No.162 of

2014 after holding him guilty of committing offence punishable under Section 302, 498-A of the Indian Penal Code.

2. Before we proceed, we would like to put the relationship of the parties on record. Deceased Surayya was the wife of present appellant. They got married on 5th May 2013. PW-3 Mirza Akbar Baig is the father of deceased. Originally there were two accused persons against whom the charge-sheet was filed. Accused No.2 was Shaikh Sakina Shaikh Gulam Rasul. She is the mother of accused No.1. However, after assessment of the entire evidence, the learned trial Judge has acquitted accused No.2. Further, it is not in dispute that Surayya caught fire on 25th February 2014 and was admitted by original accused No.2 Sakina to Ghati Hospital, Aurangabad. MLC (Medico Legal Case) was sent by Ghati Hospital to the police. Further, it is not in dispute that Surayya had sustained 49% burn injuries.

3. The prosecution story is that after the MLC was given by Ghati Hospital to Medical Chowki in the same Hospital, it appears that the fact was informed to Karmad Police Station as the incident had taken place at village Kumbephal, Taluka and District-Aurangabad, which was within the jurisdiction of Karmad Police Station. Dying declaration came to be recorded

around 2.05 p.m. on 26th February 2014 by PW-8 PSI Durga Barase and that has been treated as the First Information Report (for short "FIR") under Section 154 of the Code of Criminal Procedure. At that time the offence came to be registered vide Crime No. 44 of 2014 under Section 307, 498-A, 323 read with Section 34 of the Indian Penal Code. Request letter was also given to the Special Judicial Magistrate, Aurangabad to record the dying declaration of Surayya. PW-7 Ashok Nandagavali recorded second dying declaration between 8.50 p.m. to 9.00 p.m. on 26th February 2014. The investigation was carried out by PW-10 PSI Baban Gaikwad and PW-9 PI Baliram Gite, respectively. During the course of investigation they have carried out the spot panchnama and recorded statements of witnesses. Unfortunately Surayya expired on 15th March 2014 while undergoing the treatment with Ghati Hospital, Aurangabad and thereafter inquest panchnama was carried out and the dead body was sent for postmortem. After the postmortem was carried out, the probable cause of death that was given, was "Septicemia due to thermal burns". Under the said circumstance, Section 302 of the Indian Penal Code came to be added and further investigation has been carried out. After completion of the investigation, charge-sheet came to be filed.

4. The prosecution has examined in all eleven witnesses to bring home the guilt of the accused and after considering the evidence on record, as aforesaid, original accused No.2 came to be acquitted, whereas present appellant, original accused No.1 came to be convicted. Accused No.1 has been sentenced to suffer imprisonment for life for offence punishable under Section 302 of the Indian Penal Code and was directed to pay fine of Rs.1000/-, in default to suffer simple imprisonment for three months. Further, Accused No.1 has been sentenced to suffer rigorous imprisonment for two years for the offence punishable under Section 498-A of the Indian Penal Code. All the sentences were directed to run concurrently and set off has been granted to accused No.1 for the period of detention already undergone. This conviction is under challenge under Section 374 of the Code of the Criminal Procedure, by original accused No.1.

5. Heard learned Advocate Ms. Poonam Bodke Patil appearing for the appellant and learned APP Mr. Ghayal appearing for the State.

6. Learned Advocate Ms. Poonam Bodke Patil for the appellant has taken us through the evidence which was before

the trial Court and submitted that the learned trial Judge has not appreciated the evidence properly. It is not in dispute that Surayya had sustained burn injuries but even as per the case of the prosecution she was admitted by original accused No.2 Sakina to Hospital. At that time it was specifically told by her that Surayya had caught fire when she was preparing food. The prosecution case was based only on two dying declarations, which, the accused had demonstrated, are the outcome of tutoring. The inconsistency between two dying declarations i.e. Exhibit-53 and Exhibit-45 has not been considered. Though the MLC was given to the Police Chowki immediately after the admission of Surayya in the Government Medical Hospital, yet the dying declaration was not recorded immediately. It is also to be noted that FIR Exhibit-53 bears the attestation of PW-3 Mirza, father of the deceased, thereby indicating that he was present when the dying declaration was recorded. This was the piece of evidence which indicates that the dying declaration was tutored. The cross-examination of PW-3 Mirza has not been considered, which shows that though he had met Surayya in hospital around 10.00 a.m. to 10.30 a.m. on 26th February 2014, he had not attempted to lodge any report with police. In clear terms PW-3 Mirza has stated that his daughter had not stated before him

that both the accused had set her to fire. In his examination-in-chief, he has rather tried to say that both the accused had taken active participation, which was contrary to the dying declaration. Cross-examination of PW-6 Dr. Vishram Pande, who had given the remark / endorsement on both the dying declarations would show that since the time of admission the pulse as well as respiratory rate of Surayya was deteriorating. It is, therefore, hard to believe that she was in a position to speak, because the lowest respiratory rate was only 20 and at the time of admission it was 24. The learned trial Judge ought not to have adopted the technical approach. It was only the accidental fire that was caught and unfortunately the girl has expired. The Appeal, therefore, deserves to be allowed by holding that the evidence that was adduced against the appellant was not beyond reasonable doubt.

7. Per contra, the learned APP supported the reasons given by the learned trial Judge. He submitted that there is no merit in the present Appeal as the evidence adduced by the prosecution is consistent. No doubt the prosecution case is based on indirect evidence i.e. two dying declarations, however, those two dying declarations have been proved by examining the writers and also the endorsement by the medical officer. The medical evidence

through PW-6 Dr. Vishram would show that Surayya was in a fit state to give statement and thereafter PW-7 Special Judicial Magistrate Nandagavali and PW-8 PSI Durga Barase had recorded Exhibit-45 and 53, respectively. There is no inconsistency in both the dying declarations. The role attributed to the appellant is the same. The incident has occurred in the room occupied by the deceased and accused, and the incident had taken place at night time, therefore, in view of the burden under Section 106 of the Evidence Act, the accused was supposed to give explanation regarding the circumstances in which his wife caught fire. The testimony of PW-3 Mirza would show that accused No.1 was demanding Washing Machine, Cooler and he was harassing Surayya on that count. The testimony of PW-5 Dr. Sandeep Haridas would show that Surayya had sustained 49% burn injuries, however, she died due to "Septicemia due to thermal burns". The knowledge is required to be attributed. Accused No.1 had used diesel for causing burn injuries and residues of diesel have been found on the clothes of accused No.1 in the C.A. report. Therefore, there was ample evidence to arrive at the conclusion that the offence has been proved beyond reasonable doubt against accused No.1.

8. Before we proceed to discuss the evidence, as in the Appeal re-appreciation of the evidence is permissible, we are also required to consider as to what is the law on the point of dying declaration. Admittedly, the case is based on the dying declaration. It is trite law that sole dying declaration can be made basis of conviction, if at all it qualifies the test of truthfulness, voluntariness and if it is free from suspicion and doubt. There are various rulings of the Hon'ble Apex Court regarding evidentiary value of dying declaration. It has been held time and again that accused being deprived of cross-examination, Court has to be very careful and cautious while assessing dying declaration. It is expected that Court should be on guard that the statement of deceased was not a result of either tutoring, prompting or product of imagination. It is further expected of the Court to satisfy itself that the deceased was in a fit state of mind to give dying declaration. In the case of ***Paniben vs. State of Gujarat; (1992) 2 SCC 474***, the Hon'ble Supreme Court has laid down the principles governing dying declaration, which are as follows :-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

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

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

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(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.

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

9. The above principles are affirmed, relied, summarized and applied in various other rulings, namely, ***Surinder Kumar vs. State of Punjab, (2012) 12 SCC 120, Madan vs. State of Maharashtra; (2019) 13 SCC 464.***

10. Similarly, very recently Hon'ble Apex Court in the case of ***Ganpat Bakaramji Lad vs. State of Maharashtra, 2018 ALL MR***

(Cri) 2249, has also reiterated certain tests to be put to use before accepting that dying declaration. It has been held thus:-

“ In respect of the dying declaration, the general principles to be kept in mind are

(i) that it is not a weaker kind of evidence and it stands on the same footing as other evidence, and (ii) that there is no absolute rule of law that it cannot form the sole basis of conviction, unless corroborated by other independent evidence. The first step required to be taken in every case, is to consider the three-fold questions as under :

(a) Whether a declarant had an opportunity to observe and identify the assailant or the accused?,

(b) Whether a declarant was in a conscious and fit condition at the time of recording the statement?, and

(c) Whether the Court is so convinced of the truthfulness and voluntary nature of the statement of the declarant that it inspires confidence to such an extent that it can be the sole basis of conviction?

The absence of an endorsement in the dying declaration - (a) by a doctor regarding the fitness of mind of the declarant, or (b) that the statement was read over and explained to the declarant, who found it to be correct, cannot be the reason for holding that the dying declaration is unacceptable, if the Court is otherwise satisfied that such a dying declaration inspires confidence.

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of

reading over and explaining the declaration and the declarant confirming it to be true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.

Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct. Such a requirement therefore cannot be held as mandatory.

The observations in the cases of ***Shaikh Bakshu 2007 ALL SCR 2407*** and ***Kantilal (2009)***

12 SCC 498, are based on the facts and would not, therefore, constitute a precedent or a *ratio decidendi* or even an *obiter dicta* to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials. ”

11. We may also consider the Constitution Bench decision of Hon’ble Supreme Court in ***Laxman vs. State of Maharashtra, 2002, Cri. L.J. 4095***, wherein it was held that:-

“Absence of certification of doctor as to fitness of mind of declarant will not render dying declaration unacceptable. What is essentially required is that the person who records it must be satisfied that deceased was in fit state of mind. Certification by doctor is rule of caution. The voluntary and truthful nature of declaration can be established otherwise also.”

12. It is further observed in ***Laxman vs. State of Maharashtra***, (supra) that:-

“It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration.”

13. Further, we may also rely on ***Vikas and others vs. State of Maharashtra [2008 (2) B. Cr. C. 235 (SC)]***, wherein it has been observed that, special sanctity accorded to evidence of dying declaration should be respected. Unless there are clear circumstances brought out showing that person making statement was not in expectation of death, admissibility of dying declaration should not be questioned. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is no evidence. Section 32(1) of the Evidence Act makes a statement of the deceased admissible. Those statements made by a person as to the cause of his death or to any of the circumstances of the transaction which resulted in his death, are admissible when the person's death comes into question. The essential requirement of such statement to be accepted as evidence would be that the person who makes such statement is under the expectation of death. The special sanctity has been given to such statements as it is believed that a person on the death-bed will not speak lie.

14. Further, in ***Vithal vs. State of Maharashtra, (2006) 13 SCC 54***, it has been reiterated that in case of multiple dying declarations, if there is no inconsistency, the same are reliable. It has been further held that the mere fact that the accused who

is alleged to have poured kerosene on the deceased was inimically disposed of towards the deceased cannot by itself be a fact to disbelieve the dying declaration or to throw out the prosecution case. In ***Ranjit Singh and others vs. State of Punjab, (2006) 13 SCC 130***, it has been laid down that if there is an inconsistency between two dying declarations, the Court should apply rule of caution but the consistent part can be taken note of.

15. Keeping the above said legal position in mind, the evidence is required to be re-assessed and re-appreciated.

16. As aforesaid, the case of the prosecution is based on two dying declarations. First is the dying declaration recorded by PW-8 PSI Durga Barase. It is stated to be recorded at 2.05 p.m. on 26th February 2014 i.e. Exhibit-53. Examination-in-chief of PW-8 PSI Durga Barase would show that she was attached to Karmad Police Station on 26th February 2014 and on that day they had received the MLC. However, we cannot forget the fact that Surayya caught fire around around 23.45 hours i.e. 11.45 p.m. on 25th February 2014 and was admitted to Ghati Hospital within an hour. MLC Exhibit-54 shows that it was recorded at 01.15 hours on 26th February 2014 and it was given to Head

Constable Khillare attached to Ghati Police Chowki i.e. Police Chowki situated within the Government Hospital itself at about 1.15 a.m. of 26th February 2014. Why Head Constable Khillare had not gone to the burn ward and tried to record the dying declaration, is a question to which prosecution has not given any answer. Rather, it appears that the said MLC was then forwarded to Karmad Police Station, which is far away from the Ghati Hospital / Ghati Hospital Police Chowki. The very purpose for which the dying declaration has to be recorded immediately or the Police should make immediate arrangements to get the dying declaration recorded as early as possible, appears to have been lost in this case. In the cross-examination, further things have been revealed by PW-8 PSI Barase. She says that MLC was assigned to her at 1.15 a.m. on 26th February 2014 itself but still she says that she was not informed about the investigation at night time. She says that she came to Police Station, Karmad, where she was attached, at about 9.00 a.m., on 26th February 2014 and at that time she came to know about the assignment. This kind of work in the Police Station is not contemplated in any legal provisions. Even after coming to know that she was assigned with the said job around 9.00 a.m., she does not say exactly when she went to Ghati Hospital. The endorsement on

Exhibit-53 by CMO i.e. PW-6 Dr. Vishram was around 1.00 p.m. and in cross-examination PW-8 Durga Barase clearly admits that immediately after giving the endorsement by the medical officer she did not record the statement of the patient. She tries to give an explanation that the doctor at the ward had asked her to give one letter to him, therefore, it has caused half an hour delay in recording the statement. First of all, she has not acted swiftly nor her Police Station has acted swiftly even after receiving the MLC around 1.00 to 1.15 a.m. Still there is delay in recording the statement. This delay is unexplained and the benefit of the same should go to the accused.

17. It has come on record through the cross-examination of PW-3 Mirza that he had reached to Ghati Hospital around 10.00 to 10.30 a.m. on 26th February 2014. Thus, before arrival of the relatives of the deceased, the Police had every opportunity to record the dying declaration of the deceased, yet they have not recorded it and no reason has been assigned for not recording it at the earliest and therefore, the said dying declaration becomes doubtful. PW-8 Barase has not explained as to why she had taken attestation of PW-3 Mirza on Exhibit-53, dying declaration. Rather in her cross-examination, PW-8 Barase says that she is unable to state what is the meaning of word '*Dastur*', when it

has been already written on Exhibit-53. Another fact to be noted from her cross-examination is that she says that patient was telling her statement and upon her dictation her writer, Head Constable Borade was taking it down. She says that Head Constable Borade was having experience of recording dying declaration, therefore, he was deputed. This type of procedure ought to have been avoided by PW-8 PSI Barase. When she was supposed to record the said statement, it ought to have been recorded by her in her own handwriting. Of course, that cannot be the single factor to discard the dying declaration. But the inordinate delay, presence of PW-3 Mirza, father of the deceased, are the two factors which creates doubt in respect of the first dying declaration / FIR / Exhibit-53. We would like to turn towards the inconsistencies those have been pointed out, at a later stage.

18. Turning towards the point, as to whether deceased Surayya was in a position to give the statement when Exhibit-53 was recorded, we will have to consider the cross-examination of PW-6 Dr. Vishram Pande. Though he has stated that she was in a conscious state when Exhibit-53 was recorded, yet in his cross-examination he has stated that at the time of admission Surayya was in critical condition and therefore, they had obtained

signature of accused No.1 on the case paper. It was mentioned on the case paper that condition of the patient was poor. He has stated that pulse rate as well as respiratory rate of 116 and 24 are treated to be abnormal. He says that at the time of Surayya's examination around 4.00 p.m. on 26th February 2014, her pulse rate was 136 and respiratory rate was 20. The pulse as well as respiratory rate as 136 and 20, respectively denotes that the condition of the patient was deteriorating. In fact the case papers which he had brought, had no entry about the blood pressure check. In the morning the pulse rate of Surayya was 136 and the respiratory rate was 20. He further admits that since 26th February 2014 to 2nd March 2014 blood pressure of Surayya was not recordable. Therefore, under these conditions, it is hard to believe that Surayya would have talked so much, so that about two pages content in the form of FIR Exhibit-53 would have been given. Therefore, this is the additional point which casts doubt over Exhibit-53.

19. Now, turning towards the second dying declaration, it can be seen that it has been recorded by PW-7 Ashok Nandagavali. As regards the respiratory rate and pulse rate is concerned, the same yardstick is applicable here. According to PW-8 PSI Durga Barase, she had given letter to PW-7 Special Judicial Magistrate,

Nandagavali around 1.00 p.m. of 26th February 2014 requesting him to record the dying declaration of Surayya. But PW-7 Nandagavali says that he received the said letter around 6.30 p.m. and thereafter around 8.00 p.m., he went to Ghati Hospital. Why he had spent around one hour and thirty minutes even for proceeding to record dying declaration is unexplained. In his cross-examination PW-7 Nandagavali has stated that there was no talk between him and doctor about the treatment. He had not gone through the case papers. He did not inquire with the patient about her health. That means, which questions he had asked for ascertaining whether she was in a fit state to give the statement or not, and whether he had asked such questions, becomes doubtful. According to him, except the questions which he has given in the dying declaration (as said dying declaration is in question and answer form) he has no talk with the patient. Under these circumstances, the second dying declaration also becomes doubtful.

20. Now turning towards the inconsistencies those have been pointed out, according to Exhibit-53 Surayya says that she was treated properly for about 15 days after her marriage with accused No.1 and thereafter accused No.2 started saying that she has not brought Cooler and Washing Machine. She was

abused on that count. Then again she says that for about 1 ½ months her relationship with her husband was proper but thereafter, he started raising suspicion over her character and started beating her. She had informed the said fact to her parents and thereafter her father had come to her matrimonial home 7 to 8 times, gave advice to both the accused persons. If this portion from dying declaration Exhibit-53 is considered, then she has not attributed the demand of Cooler and Washing Machine to accused No.1 but it is restricted to accused No.2 only. Surayya has not assigned the allegation of raising suspicion over her character to accused No.2 but it is restricted to accused No.1 only. Now, the position stands that accused No.2 was acquitted by the learned trial Judge from all the offences including Section 498-A of the Indian Penal Code. With the said one line allegation that accused No.1 was raising suspicion over her character, whether the trial Court can reach to the conclusion that the offence under Section 498-A of the Indian Penal Code has been proved beyond reasonable doubt, is a question.

21. As regards the incident dated 25th February 2014 around 11.45 p.m. is concerned, in Exhibit-53 Surayya says that her husband talked to her brother on Mobile and after accused No.1 talked with her brother, she has also talked with brother and

then she had put off the phone. She has not explained on what subject there was talk between her brother and accused No.1 and also with herself. Her brother has not been examined by the prosecution to elaborate the situation. Then Surayya says that thereafter her husband went to her mother-in-law i.e. accused No.2 and after they had talked with each other, accused No.1 came and poured diesel from the *Bisleri* bottle on her person, ignited the match stick and set her to fire. She raised hue and cry and then their tenant had extinguished the fire. Her husband had called her mother-in-law, who then came near Surayya but did not extinguish the fire. But then Surayya says that her mother-in-law, cousin father-in-law brought her to Ghati Hospital. This shows that certain allegations have been made for the sake of allegations. If the mother-in-law had no intention to extinguish her fire or had not taken any active part, then why she would have taken Surayya to Ghati Hospital for treatment, is a question. Another fact is that the tenant who extinguished the fire, has not been examined by the prosecution for the reasons best known to it. He was the person who had reached the spot immediately and would have asked her the reason as to why she caught fire. This appears to be, therefore, a suppression of piece

of evidence. On this count also the dying declaration Exhibit-53 is untrustworthy.

22. Now turning to dying declaration Exhibit-45, Surayya says that there was quarrel between herself and her husband around 11.00 to 11.30 p.m., on 25th February 2014, thereafter her husband went towards his mother, talked with mother for about fifteen minutes and then came back to her, poured diesel on her person. Surayya was running to get out of the house but at that time the husband threw burning match stick on her person which caught fire. In both the dying declarations, Surayya is saying about the presence of her sister-in-law (husband's sister). Surayya has not made any allegations against her nor she has attributed even helpful hand also to her. Her sister-in-law has not been examined by the prosecution. In this dying declaration Exhibit-45, Surayya is silent as to what was the reason for quarrel or how she was treated in the past. Surayya has not stated anything about the demand by accused No.2 or even the allegations of accused No.1. Therefore, definitely there is inconsistency in both the dying declarations. Mere role is not sufficient, there has to be background for the said role. Both the dying declarations are silent, or in other words, the prosecution is not coming with the case that accused No.2 had instigated

accused No.1. At the cost of repetition, it can be seen that Exhibit-53 is silent on the point that there was quarrel between deceased and accused No.1 between 11.00 to 11.30 p.m. and vice-versa Exhibit-45 is silent about the talks between accused No.1 and the brother of the deceased and her own talks with her brother on Mobile phone. In the nut-shell, the reason for the quarrel or talks immediately prior to the incident has not come on record. That is the crux of the matter. As to what had happened just prior to the incident so that such behaviour is alleged, is a question. From where the diesel was procured in a *Bisleri* bottle has not been investigated, because it is not to be sold loose. All these facts create doubt in respect of both the dying declarations and therefore, both the dying declarations are required to be discarded.

23. PW-1 Gajanan Shelke and PW-2 Subhash Trigute, both are panch to the spot panchnama, which is said to have been executed on 27th February 2014. They both have turned hostile and their cross-examination by prosecution has not yielded any positive result. No doubt the said spot panchnama then came to be proved through the Investigating Officer. The spot is said to be a 10 X 12 ft. room. In the said room there is a cot, iron cupboard, wooden chair and iron stove with gas cylinder was

near the chair. Near to that there was one liter *Bisleri* bottle containing 200 ml. Diesel. Except these articles, no other article has been stated. That means it appears to be a bed room, but then for what purpose the iron stove was kept there, is a question. It does not appear to be a kitchen because other household articles required in the kitchen have not been mentioned. Further, it states that there is another room towards eastern side of the said room wherein accused No.2 was residing. That means, accused No.2 was residing in the separate room. There ought to have been investigation, as to where they used to cook food and why the iron stove was kept in that room. Therefore, the said spot panchnama is also not throwing light on the entire story.

24. PW-5 Dr. Haridas is the autopsy surgeon. He has said that Surayya had sustained 49% burns but he says that the burns to head, neck and face were sufficient to cause death and the cause of death as ascertained, was "Septicemia due to thermal burns". In the cross-examination he has admitted that septicemia may be caused by various reasons. Only on the basis of the postmortem report we cannot conclude that it was homicidal death, as the prosecution has not ruled out the possibility of accidental death.

25. PW-3 Mirza – father of deceased has deposed that after fifteen days of marriage Surayya was telling him that both the accused started saying that she had not brought Cooler and Washing Machine. According to him, accused Nos.1 and 2 both were making the said demand and upon the non fulfillment, they were beating Surayya. He used to console her and send her to the house of the accused. Then he says that thereafter Surayya was informing him that accused were taking doubt over her character and he gave understanding to the accused. This is against dying declaration Exhibit-53. The role attributed to accused Nos.1 and 2 separately has been already narrated but here the father is assigning role of demand of the articles as well as alleging suspicion over character to both the accused persons.

26. PW-3 Mirza states that on 25th February 2014 around midnight accused No.1 had given a phone call to him and stated that Surayya sustained some burns to her finger and abdomen. He says that he gave advice to accused No.1 to give treatment to her. Mirza does not say that he had tried to extract information from Surayya or some other way as to how much she has received burn injuries and had not tried to go to the help of accused No.1 when he was making call in the midnight. He

then says that in the morning he received phone call of accused No.1 again, who then stated that Surayya had sustained 40% burns and admitted to Ghati Hospital. He himself and his wife went to Ghati Hospital around 9.00 a.m. to 10.00 a.m. He made inquiry with Surayya, as to how incident had happened. She told him that accused No.1 had poured diesel on her person and both the accused had set her to fire. He has then corrected himself by saying that only accused No.1 had set her to fire. Accused No.2 has not cared to extinguish the fire and the tenant extinguished the fire by pouring water on her person. He then says that Surayya told him that due to instigation of accused No.2, accused No.1 had set Surayya on fire. Thus, it can be seen that he is giving totally different version than dying declarations Exhibit-53 and Exhibit-45. In his cross-examination, PW-3 Mirza has stated that his daughter disclosed him about the incident around 10.00 a.m. to 10.30 a.m. and he felt it necessary to inform the Police about the same. He has not taken any pains to lodge the FIR or contact the Police persons in the Chowki in the same hospital. In his cross-examination, he has further stated that his daughter had not stated to him that both the accused had set her to fire. Surayya told him that after hearing hue and cry, accused No.2 came there and after the incident had taken

place, accused No.1 had gone to the house of accused No.2. Thus, he gives a different version than the two dying declarations. Therefore, the alleged oral dying declaration to PW-3 Mirza; which by itself a very weak piece of evidence, cannot be relied upon.

27. PW-4 Sheshrao Chavan is said to be the person from the same village of PW-3 Mirza. He says that he was knowing deceased and accused. According to him, deceased had told him that both the accused were demanding her Washing Machine and Freeze and then he volunteers to say that they were demanding Cooler. When this was communicated to him, is not explained by this witness. Further, in order to bring it within the ambit of Section 498-A of the Indian Penal Code, mere demand is not sufficient. The married lady should be subjected to cruelty on account of said illegal demand, then only the husband or his relatives can be convicted for the offence punishable under Section 498-A of the Indian Penal Code. PW-4 Sheshrao then says that in the winter season of 2014 he came to know that Surayya has consumed poison, therefore, he went to Ghati Hospital to see her and on reaching there, he found that Surayya had sustained burns. That means the initiation was wrong, but then further he says that when he asked her the reason behind

burns, Surayya stated that both the accused always demanded Washing Machine and Cooler, accused No.1 always suspected her character and set her to fire on the instigation of his mother. Interesting point to be noted is that he is not giving the date on which he visited the hospital. As aforesaid, the version in Exhibit-53 and Exhibit-45 are inconsistent and therefore the inconsistency is percolating in the alleged oral dying declaration to this witness also. The cross-examination of this witness shatters his examination-in-chief, because it has been extracted from him that he is not well conversant with the family. If he was not well conversant with the family, whether he would have gone to the hospital to see Surayya, itself is a question. He was not even living in the vicinity where PW-3 Mirza is staying. Further, he says that parents of Surayya were present near her when he visited Ghati Hospital. Therefore, even the possibility of oral dying declaration being tutored, cannot be ruled out. Further, he says that he had not talked with the doctor about the incident and at the time of his visit Surayya was found sleeping and was on the verge of death bed. Therefore, it creates doubt as to whether she was in a fit state to give statement.

28. Thus, from the re-assessment and re-appreciation of entire evidence, it can be certainly said that the yardstick that was

applied by the learned trial Judge for the scrutiny, was wrong. Both the dying declarations ought not to have been relied upon. The learned trial Judge has not followed the law laid down by the Hon'ble Supreme Court as well as this Court on the point of dying declarations. When the appreciation of evidence is perverse, then definitely interference by this Court is necessary and therefore, we conclude that the prosecution had failed to prove the guilt of the accused No.1 also beyond reasonable doubt. Learned trial Judge ought to have acquitted the accused – appellant. The Appeal deserves to be allowed. Hence the following order:-

ORDER

(I) Criminal Appeal stands allowed.

(II) Conviction awarded to the appellant – Sk. Javed Sk. Gulam Rasul in Sessions Case No. 162 of 2014 by holding him guilty of committing offence punishable under Sections 302, 498-A of the Indian Penal Code by the learned Additional Sessions Judge, Aurangabad on 22nd November 2016, is hereby set aside.

(III) The appellant stands acquitted of the offence punishable under Sections 302, 498-A of the Indian Penal Code.

(IV) The appellant be set at liberty, if not required in any other case.

(V) Fine amount deposited, if any, be refunded to the appellant after the statutory period is over.

(VI) It is clarified that there is no change in the order passed by the learned Additional Sessions Judge, Aurangabad regarding disposal of Muddemal.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/AUG23