

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

CRIMINAL APPEAL NO.299 OF 2016

- 1) Sau. Chhaya Bhausahab Bhingardive,
Age-28 years, Occu:Household,
R/o-Mhada Colony, Room No.57,
Tapovan Road, Ahmednagar,
- 2) Smt. Kamal Babanrao Patole,
Age-56 years, Occu:Household,
R/o-Mhada Colony, Room No.91,
Tapovan Road, Ahmednagar.

**...APPELLANTS
(Ori. Accused Nos. 2 and 4)**

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. Saeed S. Shaikh Advocate for Appellants.
Mr. S.D. Ghayal, A.P.P. for Respondent-State.
...

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

DATE OF RESERVING JUDGMENT : 9th OCTOBER 2023

DATE OF PRONOUNCING JUDGMENT : 30th OCTOBER 2023

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

1. Present Appeal has been filed original accused Nos.2 and 4

in Sessions Case No.220 of 2013, who were held guilty for the offence punishable under Section 302, 498-A read with Section 34 of the Indian Penal Code, along with original accused No.1 – Raju @ Rajendra Baban Patole.

2. Before we turn to the disputed facts, there are certain admitted facts which we want to place on record. Original accused Rajendra is the brother of appellant No.1 and son of appellant No.2. Accused No.1 Rajendra was married to one Maya on 18th December 2007. Maya and accused No.1 have daughter by name Shrawani, born on 8th December 2008. Maya had received burn injuries on 14th April 2013 and therefore, she came to be admitted to Civil Hospital, Ahmednagar. After the MLC was given, Special Judicial Magistrate, Ahmednagar Mr. Gorakshnath Ghugarkar was informed and requested to take her dying declaration. He has recorded the dying declaration of Maya between 3.00 to 3.30 p.m. on 15th April 2013. Thereafter, it appears that ASI Abdul Kalim Ibrahim Raje, attached to Tophkhana Police Station, Ahmednagar, recorded second dying declaration of Maya around 4.15 p.m. on 15th April 2013 itself and on the basis of this second dying declaration, Exhibit-38, the offence came to be registered vide Crime No.181 of 2013 for the

offence punishable under Section 307, 498-A, 323, 504, 506 read with Section 34 of the Indian Penal Code.

3. After the offence was registered, the accused came to be arrested. Panchnama of the spot was executed. Statements of the witnesses were recorded. However, thereafter on 30th April 2013 Maya succumbed to the injuries and therefore, inquest panchnama was executed and the dead body was sent for postmortem. Offence under Section 302 of the Indian Penal Code came to be added. The seized articles were sent for chemical analysis. After completion of the investigation, charge-sheet was filed against in all seven accused persons.

4. After committal of the case, the trial was conducted and prosecution has examined in all eleven witnesses to bring home the guilt of the accused. Defence has also examined two witnesses. During the course of trial, original accused No.3 – Sau. Savita Machhindra Salve reported to be dead and therefore, the case abated against her. She was the sister of original accused No.1. The case of the prosecution rested on two dying declarations and the alleged oral dying declaration to PW-1 Santwan Badekar, who is the father of the deceased Maya. Original accused Nos.5, 6 and 7 are the brothers of original

accused No.1, however, they have been acquitted by the learned trial Judge from all the charges. Original accused No.1 Rajendra, original accused No.2 (present appellant No.1) and original accused No.4 (present appellant No.2) were held guilty of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and each one of them were sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.5000/- each, in default, to suffer simple imprisonment for one year. Further, they were held guilty under Section 498-A read with Section 34 of the Indian Penal Code and each one of them was sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.3000/-, in default to suffer simple imprisonment for two months. Out of the fine amount, an amount of Rs.20,000/- was directed to be paid as compensation to PW-1 Santwan Badekar under Section 357(1) of the Code of Criminal Procedure. As aforesaid, present Appeal is by original accused Nos.2 and 4 only.

5. Heard learned Advocate Mr. Shaikh appearing for the appellants and learned APP Mr. Ghayal appearing for the respondent – State.

6. Learned Advocate for the appellants would submit that the learned trial Judge has not appreciated the evidence properly. The alleged incident is stated to have taken place around 10.00 a.m. of 14th April 2013 and Maya was admitted to Civil Hospital around 12.30 p.m. on the same day. As aforesaid, the defence has also examined two witnesses. Accused No.1 Rajendra has entered the witness box and gave the account as to how the incident took place and it was accidental. DW-2 Kishor Ghodke, who resides in the neighbour-hood, is also supporting DW-1 Raju @ Rajendra. It was also brought on record that accused No.1 himself had received burn injuries to his hands. By entering into witness box, DW-1 Rajendra has stated that he received those burn injuries while extinguishing the fire which accidentally broke due to bursting of stove. The prosecution has not explained the injuries on the person of accused No.1 Rajendra. The case of the prosecution rests on two dying declarations, which have been recorded belatedly and by that time the relatives of the deceased Maya had come to the hospital. Possibility of tutoring her has not been ruled out. No doubt, there appears to be marital discord between Maya and accused No.1 in the past and she had also filed maintenance petition under Section 125 of the Code of Criminal Procedure before the

learned Judicial Magistrate First Class, Ahmednagar but on the day of incident, it appears that after patching up the differences, Maya started residing with the husband. Therefore, these aspects ought to have been considered by the learned trial Judge.

7. Learned Advocate appearing for the appellants would take exception in saying that appellant No.1 is a married sister of accused No.1 and was residing separately, though nearby to the house of deceased and accused No.1. Accused No.4 i.e. mother was residing with accused No.1. But when we consider both the dying declarations, then it can be seen that those were not consistent with each other. It has been tried to be stated that when Maya was in the kitchen, her husband, mother-in-law, three brothers-in-law and two sisters-in-law went there and the mother-in-law and sisters-in-law caught hold of her. Present appellants had poured kerosene on her person and then accused No.1 had ignited the match stick and set Maya to fire. If we consider the spot panchnama and the testimony of PW-2 Shamrao Gaikwad, the panch to the spot panchnama, he says that the open space in the kitchen was hardly 1 ft. How seven persons could have occupied the said area, is a question. The prosecution is not explaining the delay in recording the dying

declaration and the hospital record would show that injection Fortwin was given to Maya. As per the testimony of PW-9 Dr. Gorakhnath Gaikwad, who conducted the autopsy, Fortwin is a heavy sedative drug and after giving it to the patient, it will have effect of drowsiness for about twelve hours. Maya had received 70% burns. Therefore, the dying declarations are doubtful. Both the scribes of the dying declarations have not explained as to why they have taken the toe impression of right toe of Maya and why there was necessity of consecutive dying declarations, one after the other. The dying declarations being doubtful, the learned trial Judge ought not to have relied upon the same. The defence that was raised by accused No.1, was the probable defence and it ought to have been accepted. Learned Advocate for the appellants, therefore, prays for setting aside the impugned Judgment by holding that it is perverse. He relied on the decision in ***Sampat Babso Kale and another vs. The State of Maharashtra***, Criminal Appeal Nos. 694-695 of 2011 decided by the Hon'ble Supreme Court on 9th April 2019, wherein it has been held that "No doubt, a dying declaration is an extremely important piece of evidence and where the Court is satisfied that the dying declaration is truthful, voluntary and not a result of any extraneous influence, the Court can convict the accused only on the basis of a dying declaration..... However when grave doubts are raised over the

prosecution story, then such factors are required to be considered.” Learned Advocate for the appellants has also submitted that the prosecution has not examined any neighbouring person to state about the exact happenings and therefore, when important witnesses have not been examined, the learned trial Judge committed wrong in relying only on the dying declarations.

8. Learned APP strongly supported the reasons given by the learned trial Judge for convicting original accused Nos.1, 2 and 4. He submitted that both the dying declarations are consistent and voluntary. In the evidence of PW-1 Santwan Badekar, the father of deceased, it has come on record that after the marriage of Maya with accused No.1, all the accused used to demand money from her for purchasing house. They used to ask her to bring money from her father. Accused No.1 used to quarrel with Maya under the influence of liquor. On 28th January 2010, accused No.5 – Asaram had informed father that Maya was badly beaten by accused No.1 and other family members. Therefore, after going to the matrimonial home and witnessing and hearing what has happened to Maya, father had brought Maya to his house. For about 1 ½ years she was residing with PW-1 Santwan Badekar and at that time accused No.1 had not visited for a single day. Then notice was sent through Advocate.

It was replied by accused No.1 Rajendra. When accused No.1 had not taken Maya for cohabitation, proceeding for maintenance under Section 125 of the Code of Criminal Procedure was filed. Thereafter on 12th May 2012, accused No.1 with his relatives went to the house of PW-1 Santwan Badekar, gave assurance that he would not trouble Maya and then Maya resumed cohabitation. However, after about 2 to 3 months thereafter, similar treatment continued to Maya. When the said demand of money was not fulfilled, all the accused persons have set Maya to fire. Cross-examination of PW-1 Badekar has not shattered his evidence. It has come on record that both the upper limbs of Maya had received 9% burns and therefore, the thumb impressions of the hands were not taken. PW-5 Dr. Surekha Gaulkar is the medical officer who had certified that Maya was in a fit state of mind to give statement and accordingly both the dying declarations came to be recorded, may be within few minutes, but there is consistency in both the dying declarations. The learned trial Judge was right in convicting the appellants who had played active role. The acquittal of original accused Nos. 5, 6 and 7 has no effect as it has been observed by the learned trial Judge that no specific role was attributed to them in the dying declarations.

9. As aforesaid, the prosecution has examined in all eleven witnesses to bring home the guilt of the accused. PW-1 Santwan Badekar, father is the only relative who has been examined by the prosecution who could have thrown light in respect of the offence under Section 498-A of the Indian Penal Code. PW-11 Advocate Mr. Babaji Sangale was the Advocate engaged by Maya for filing application for maintenance before the learned Judicial Magistrate First Class, Ahmednagar. However, it is to be noted that Exhibit-68, which is Exhibit-1 of the said Petition, appears to have been filed on 6th June 2011 and at that time Maya was residing with PW-1 Santwan Badekar. As per his own version, PW-1 Santwan Badekar says that accused No.1 along with relatives had come to his house on 12th May 2012 and took Maya for cohabitation. On the day of incident, Maya was in the house of accused No.1. Therefore, there is room to believe that whatever differences were there, those were settled and even for Section 498-A of the Indian Penal Code, the alleged acts of cruelty prior to 12th May 2012, then cannot be considered. PW-1 Santwan Badekar has then stated that after Maya was taken for cohabitation, she was treated properly for about 2 to 3 months and thereafter again the similar treatment was given to her.

According to him, the accused persons were demanding money from Maya for purchasing house, to be brought from her father. At this stage, it can be certainly considered that PW-1 Santwan Badekar has not stated as to how much amount was demanded and exactly by whom. He then says that accused No.1 Rajendra demanded money from him as a help for purchasing house. We want to underline this statement and say that 'help' for purchasing house cannot amount to illegal demand. Further PW-1 Santwan Badekar has not stated what was the act of cruelty committed by the accused when the amount was not given. He has stated in Para No.5 of his deposition that when he told accused No.1 that he is not having money and has to perform marriage of his other daughter and two sons, then the accused were not sending Maya to the house of PW-1 Santwan Badekar. Here also not sending Maya to meet her parents, *per se* will not amount to cruelty unless it is coupled with some further overt-act. He has not stated that accused were not allowing to meet Maya in the house of accused. There might be some reasons for not allowing Maya to go to her parental house and those reasons have not come on record. His said statement is contradicted by him in the further Paragraph when he says that on the occasion of *Diwali Bhaubij*, Maya visited his house.

Accused No.1 had dropped her at about 11.00 a.m. and in the evening around 7.00 p.m. he took her away. According to PW-1 Santwan Badekar, accused No.1 had not allowed Maya to take dinner on that day. This is only one day's alleged act but certainly Maya was allowed to meet her parents. He has not stated that on that day Maya had told the acts of cruelty by each and every accused. Thereafter he speaks about the incident which he came to know when he was at Pune. He then says that on the same day around 3.30 p.m. i.e. of 14th April 2013 he visited Civil Hospital and met daughter Maya. He found that Maya was seriously injured due to burn injuries and she gave oral dying declaration. If that oral dying declaration, allegedly given by Maya to PW-1 Santwan Badekar is perused, then it states that:-

"Prior to 2-3 days quarrel took place between all other accused and herself. She was badly beaten by her husband. In that night they all had meals. In the morning of next day her husband, mother-in-law and sister-in-law namely Chhaya badly beaten her, they locked her in house and all of them had gone to the house of Savita Salve, her another sister-in-law. They all returned back in the morning of next day at about 9.30 - 10.00 p.m. At that time she was cleaning floor of kitchen. Her mother-in-law caught hold her from back side Her both sisters-in-law poured kerosene on her body from one drum which was already in their house.

Her husband was saying not to leave her and to caught her. Her husband brought match box and ablazed her by burning match stick. She was burning. In the same condition she came out of house. Her brothers-in-law and all other accused were present there but no one tried to save her. They brought her inside house and poured water on her body and also rubbed aloe vera on her injuries. They covered her under one quilt. Then in one rickshaw they brought her to Deepak Hospital, near Zopadi Canteen but staff of Deepak Hospital refused to admit her after noticing her condition. Therefore, all accused brought her in Civil Hospital and admitted there."

10. This oral dying declaration is then required to be considered with the contents of both the written dying declarations to see, whether there was consistency. However, one aspect still remains is that when PW-1 Santwan Badekar had come to know about the story as to how Maya received burn injuries about about 3.30 p.m. of 14th April 2013, yet he had not approached the Police Station or Police Chauki in Civil Hospital to lodge a complaint or with a request that her dying declaration should be recorded immediately. This conduct on his part has not been considered by the learned trial Judge. PW-1 Santwan Badekar then says that on 16th April 2013 after considering that Maya was in serious condition, he shifted Maya to Vikhe Foundation Hospital, where she was admitted for about 15 days

and then she expired at about 4.00 a.m. on 30th April 2013. Here it is to be noted that both the dying declarations came to be recorded on 15th April 2013 when Maya was in Civil Hospital. There is no attempt by PW-10 API Sanjay Gogawale, to have any other dying declaration recorded and when he was specifically asked with the said question, he says that when two dying declarations were already there, he did not feel it necessary to have one more dying declaration.

11. Testimony of PW-9 Dr. Gorakhnath Gaikwad who conducted the autopsy on 30th April 2013, would show that Maya had received about 70% burn injuries and after examination, he concluded that the cause of death is "Shock due to septicemia due to infected burns of 70%". This *per se* will not conclude that the death is homicidal in nature. In all cases of burn injuries, initially three possibilities would arise - (1) accidental (2) suicidal and (3) homicidal. When prosecution has specifically come with the theory of homicidal death, then it should eliminate the possibility of accidental and suicidal burn injuries and death. In the cross-examination, this medical officer admits that after administering pain killer, the sensation of pain reduces and healing process also starts after 2-3 days. Initially Fortwin

injection was not administered as it affects on patient in sedition. Fortwin is a heavy sedative drug and after administering the said injection the patient remains in sleepy stage and not in a fit state of mind for about twelve hours. Now, it is required to be seen, whether before twelve hours of dying declarations, Fortwin was given and whether Maya could have been in the sleepy state because of the administration of Fortwin.

12. Before proceeding to ascertain whether dying declarations are voluntary and inspiring confidence, we wish to state in brief, law on manner of appreciation of evidence in the form of dying declaration as well as settled principles which are culled out by the Hon'ble Apex Court from the various landmark cases like ***Khushal Rao vs. State of Bombay; AIR 1958 SC 22, Paniben vs. State of Gujarat; (1992) 2 SCC 774, Laxman vs. State of Maharashtra; (2002) 6 SCC 710, Ganpat Bakaramji Lad vs. State of Maharashtra; 2011 ALL MR Cri. 2249. Surendrakumar vs. State of Punjab; (2012) 12 SCC 120, Jagbir Singh vs. State (NCT of Delhi); (2019) 8 SCC 779, Madan vs. State of Maharashtra; (2019) 13 SCC 464.***

13. Off late in the case of ***State of Uttar Pradesh vs. Veerapal and another; (2022) 4 SCC 741*** while deciding

Criminal Appeal No.34 of 2022 on 01-02-2022, the Hon'ble Apex Court has reiterated the principles to be borne in mind while analyzing and accepting dying declaration. The settled principles are as under:

- "1. *It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;*
2. *Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;*
3. *It cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;*
4. *A dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;*
5. *A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character : and*
6. *In order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the*

statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."

14. Similarly, in the case of ***Uttam vs. State of Maharashtra; (2022) 8 SCC 576***, again certain principles are enunciated which are to be borne in mind in a case wherein the evidence is in the form of dying declaration. These principles are as under :

"(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 Supreme 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 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."

15. Very recently certain principles of law with regard to case involving multiple dying declarations are spelt out in the case of ***Abhishek Sharma vs. State (Govt. of NCT of Delhi)*** [Criminal Appeal No.1473 of 2011, decided on 18-10-2023].

These principles read thus :

"9.1 The primary requirement for all dying declarations is that they should be voluntary and reliable and that such statements should be in a fit state of mind;

9.2 All dying declarations should be consistent. In other words, inconsistencies between such statements should be 'material' for its credibility to be shaken;

9.3 When inconsistencies are found between various dying declarations, other evidence available on record may be considered for the purpose of corroboration of the contents of dying declarations.

9.4 The statement treated as a dying declaration must be interpreted in light of surrounding facts and circumstances.

9.5 Each declaration must be scrutinized on its own merits. The court has to examine upon which of the statements reliance can be placed in order for the case to proceed further.

9.6 When there are inconsistencies, the statement that has been recorded by a Magistrate or like higher officer can be relied on, subject to the indispensable qualities of truthfulness and being free of suspicion.

9.7 In the presence of inconsistencies, the medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as the possibility of tutoring by relatives, etc."

16. The ratio that is settled is that dying declaration must be firstly voluntary, truthful and secondly it should not be tutored and further the same should inspire the confidence of the Court.

These are the basic principles which are to be borne in mind while appreciating dying declarations.

17. After taking note of legal position, now we would consider the dying declaration Exhibit-29 and 38. Though PW-6 ASI Abdul Kalim Ibrahim Raje has recorded the second dying declaration / FIR Exhibit-38, his evidence is required to be considered for the background under which the dying declarations came to be recorded. He says that he resumed his duty at Civil Hospital, Ahmednagar around 10.00 a.m. on 15th April 2013 and it appears that he had duty of twenty four hours. The Police person who was on duty prior to him, Shri Barahate, informed him that patient by name Maya has been admitted in burn ward on 14th April 2013 at about 12.30 p.m. Thereafter PW-6 Abdul Kalim wrote letter Exhibit-28, to Special Executive Magistrate, requested him to take statement and thereafter at about 3.30 p.m., he proceeded to record statement of Maya. In his examination-in-chief explanation has not been given but by way of cross-examination it has come on record that Barahate had given letter Exhibit-44 to medical officer on 14th April 2013 itself requesting for the permission to record dying declaration of Maya, however, it was certified at about 1.15 p.m. on 14th April

2013 by Dr. Ms. Jagtap that Maya was not in a fit state to give statement. Here, the first dying declaration Exhibit-29 recorded by PW-4 Ghugarkar, Special Executive Magistrate is between 3.00 to 3.30 p.m. Therefore, the question arises that, as to when after 1.15 p.m. of 14th April 2013 to 3.00 p.m. of 15th April 2013 Maya regained consciousness or became fit to give statement. Dr. Ms. Jagtap who gave endorsement on Exhibit-44 has not been examined by the prosecution and why she was saying that Maya was not in a fit state to give statement, has not been brought on record. The said reasons ought to have been given or brought on record by the prosecution. The promptness in recording the dying declaration is the key factor to see whether the said dying declaration is voluntary or is the outcome of tutoring. At the cost of repetition it is to be noted that PW-1 Santwan Badekar had stated that he had reached Civil Hospital at 3.30 p.m. on 14th April 2013 itself. Therefore, the near relatives of Maya had already met her, as per his version, before the dying declarations came to be recorded on 15th April 2013.

18. The glaring fact from the testimony of PW-6 Abdul Kalim is that after he resumed his duty at 10.00 a.m., when Barahate told him about the admission of Maya on the earlier day, he says that he addressed a letter to the Special Executive Magistrate on

15th April 2013, which is at Exhibit-28. If we read Exhibit-28 with the testimony of PW-4 Ghugarkar, Special Executive Magistrate, it can be seen that said Exhibit-28 was received by him at about 1.30 p.m. Then again question arises, what PW-6 Abdul Kalim had done from 10.00 a.m. to 1.30 p.m. Why he took so much of time and why he himself had not gone in the ward to check whether Maya was in a fit state to give the statement. He gave preference to giving letter to the Special Executive Magistrate than to go and record the dying declaration and further surprising fact is that after dying declaration Exhibit-29 was recorded by PW-4 Ghugarkar, PW-6 Abdul Kalim allegedly went to the ward and recorded dying declaration Exhibit-38, which was treated as FIR. All these acts are suspicious.

19. Now turning towards the first dying declaration i.e. Exhibit-29 recorded by PW-4 Ghugarkar, he says that he had gone to the hospital at about 2.30 p.m. and made inquiry with PW-6 Dr. Surekha Gaulkar, took the endorsement and after the medical officer certified that Maya was in a fit state to give statement, he recorded the statement. If we consider Exhibit-29, in the upper part he has given the timing that he reached the hospital at 2.30 p.m. and then there is endorsement by Dr. Surekha Gaulkar stating that the patient is conscious and

oriented to give statement at 3.00 p.m. Here also it is hard to believe that for the said endorsement it would require half an hour. But then it is said that the entire statement was over by 3.30 p.m. If we consider Exhibit-29, as regards the day of incident is concerned, it is stated as follows, of which translated version is given:-

"Yesterday morning around 10.00 O'clock I was in the kitchen. At that time my three brothers-in-law namely Ashok, Asaram and Sunil Patole, mother-in-law, two sisters-in-law (namely) Chhaya Bhingardive and Savita Salve came close to me in the house. Mother-in-law and two sisters-in-law caught hold me tightly. Chhaya and Savita, sisters-in-law have poured kerosene on my person. My husband pulled a match stick and put the ignited match stick on my kerosene doused saree and set me on fire."

20. The aforesaid part of the dying declaration Exhibit-29 shows that Maya has not attributed any role to her three brothers-in-law and in next question she says that she has complaint to make against, husband, mother-in-law and both the sisters-in-law. As regards brothers-in-law are concerned, she says that they were only watching but then says that they were also involved in the incident. Now, at the end it is said that the thumb impression of right toe has been taken. But there is

absolutely no mention that as to why it was decided to have the toe impression and in his cross-examination PW-4 Ghugarkar has admitted that he has not mentioned in the statement that fingers and thumb of both the hands were in burnt condition and therefore, he obtained impression of right toe of Maya on the statement.

21. As compared to the same, if we consider dying declaration Exhibit-38, it states as follows, of which translated version is given:-

" I was sitting down in the kitchen while I was mopping. So suddenly from behind around 10.00 O'clock mother-in-law Kamalbai has came and caught hold me as it is and sister-in-law Chhaya Bhingardive has brought the Plastic canister of kerosene, while she was pouring kerosene from canister on my person my another sister-in-law (namely) Savita Salve, was also came there and took the canister from her hand and poured kerosene on my person. At that time my husband was standing there only and by saying, do not leave her and took a match box from the kitchen and pulled a match stick from it and set fire border of my saree."

22. Thus, in the second dying declaration, Maya has stated that three brothers-in-law had not entered the house. When she came outside, they were present but did not try to extinguish the fire. Here important point to be noted is that in the cross-

examination of PW-1 Santwan Badekar, it has come on record that each brother is residing separately and some of them are residing at a distance. Both these dying declarations do not match to the oral dying declaration given to PW-1 Santwan Badekar as regards the earlier incident is concerned (stated in Paragraph No.9). In both the dying declarations it is not disclosed as to how much amount was demanded. In dying declaration Exhibit-38 at first page endorsement given by PW-5 Dr. Surekha Gaulkar would show that it was given at 4.15 p.m. and in the said endorsement itself it is stated, "Patient conscious & oriented (time, place & person) to give statement & **throughout the statement.**" (Stress supplied). The stressed terminology would not appear in the beginning. On page No.2 again she has made the same endorsement by giving same time i.e. 4.15 p.m. There is no explanation in the testimony of PW-5 Dr. Surekha Gaulkar as to why same endorsement was given twice. If we consider her testimony, she has initially stated about the endorsement given on first dying declaration Exhibit-29, wherein she says that the date and time was mentioned below the endorsement. At 3.30 p.m. the first dying declaration was completed. Then she says that within five minutes Police Constable Raje came and requested her to examine the patient

and then she again examined Maya and opined about the consciousness and orientation of Maya. According to her, said endorsement was given by her at 4.15 p.m. but still the examination-in-chief lacks any clarification as to why two endorsements at 4.15 p.m. were required to be given. In her cross-examination PW-5 Dr. Surekha says that PW-6 Raje arrived at about 3.35 p.m. The question therefore, arises as to why there was necessity to have the second dying declaration, that too, within a span of five minutes. As per PW-6 Abdul Kalim Ibrahim Raje, he went to burn ward at 3.30 p.m. That means there was every possibility that he would have met PW-4 Ghugarkar. In his examination-in-chief, PW-6 Abdul Kalim says that when he visited nurse staff office, he came to know that statement of Maya has been recorded by PW-4 Ghugarkar prior to his visit. Under the said circumstance it was his duty to explain as to why then he decided to have second dying declaration. These are the suspicious circumstances and therefore, both the dying declarations do not appear to be voluntary and those are the outcome of possibility of tutoring by the relatives. Both the dying declarations i.e. Exhibit-29 and 38 do not fulfill the criterias mentioned at Sr. Nos. 9.1, 9.2, 9.7 in the case of ***Abhishek Sharma vs. State (Govt. of NCT of***

Delhi) (supra). Here we cannot give more weightage to the dying declaration Exhibit-29 as compared to Exhibit-38 for the aforesaid reasons which are given while assessing the testimony of PW-4 Ghugar, the Special Executive Magistrate.

23. Another aspect that is required to be noted is that dying declaration Exhibit-29 states that all the accused persons had allegedly gone to the kitchen where the deceased was and then the acts of catching hold of her, pouring kerosene on her person and setting her to fire, had taken place. But if we consider the spot panchnama Exhibit-24 which came to be proved through a panch, PW-2 Shamrao Gaikwad, together with his cross-examination, then it can be seen that there is barely 1 ft. open space available in the kitchen taking into consideration the articles and the cupboard. The inconsistency is that in dying declaration Exhibit-38 there is absence of three brothers-in-law from the said 1 ft. open space in the kitchen. Therefore, on the ground of probability also the contents of both the dying declarations do not prove to be believable.

24. The testimony of PW-2 Shamrao Gaikwad, the panch to the spot panchnama would show that the spot panchnama was executed on 16th April 2013 i.e. two days after the incident. It is

said that accused No.2 was present at the time of panchnama and she has signed on the panchnama. But then he also states that PW-1 Santwan Badekar was present and he had opened the said house. The spot panchnama came to be executed between 9.00 to 9.45 a.m. of 16th April 2013 whereas all the accused came to be arrested around 19.45 hours of 16th April 2013. That means when the spot panchnama was executed, the accused were not arrested, still how PW-1 Badekar opened the door of the said house, is a question. When incident had taken place at about 10.00 a.m. on 14th April 2013 and the spot panchnama came to be executed two days thereafter, still the Police could find a plastic can having kerosene smell, of which lid was open. The description also shows that the stove was in between the room and aluminum utensil was on the stove. There were partly burn match sticks near the stove. The match box was wet because of kerosene. Again we will have to express that the said situation noted in the spot panchnama creates doubt, how even after two days the match box can be said to be wet with the kerosene.

25. The testimony of PW-10 API Sanjay Gogawale does not show that what precaution was taken or would have been taken

to protect the scene of offence for two days, was inquired into.

26. It appears that the learned trial Judge has not considered the testimony of defence witnesses. It is sufficient for the accused to probabalize the defence. It is specifically stated by DW-1 Rajendra (accused No.1) that he had sustained burn injuries to his hand and it was at the time of extinguishing the fire. PW-1 Santwan Badekar and PW-10 Sanjay Gogawale admit that accused No.1 Rajendra had sustained burn injury to his hand, but still it appears that there is no investigation on the point of probable defence. If we consider the suggestions given by the learned APP in cross-examination to accused No.1 Rajendra together with the testimony of PW-2 Ramrao, the spot panch and the spot panchnama, then again it creates a doubt, as to whether 1 ft. open space area in the kitchen was sufficient to accommodate all the accused persons. The testimony of DW-2 Kishor Ghodke, the neighbouring person has been discarded by the trial Court by saying that he had no idea as to what had happened inside the house of the accused. In fact DW-2 Kishor was the person who had gone to the spot immediately after the incident and the prosecution has not come with the case that

oral dying declaration was given to him also by deceased Maya. None of those persons have been examined who extinguished the fire, though it is on record that the house of the accused is in thickly populated area and several people had gathered. There is also evidence on the point that accused persons extinguished the fire and had applied aloe vera on the burn injuries of Maya. This indicates that they had an intention to save Maya and not to kill her. The defence taken by the accused appears to be probable.

27. The medical papers are on record i.e. bed-head ticket. It shows that Maya was admitted by her brother-in-law Asaram who has been now made as accused. No history appears to have been taken by the doctor who admitted Maya at about 12.15 p.m. on 14th April 2013. It is also having noting that the patient was irritable with 60 to 64% burns and at 10.15 p.m. on 14th April 2013 and at 10.15 p.m. on 15th April 2013 injection Fortwin was given. No doubt it is not within twelve hours span prior to recording of dying declarations Exhibit-29 and 38. But for aforesaid reasons, both the dying declarations are unbelievable.

28. At the end, one more point we would like to consider is that if we want to believe or rely upon both the dying

declarations, then as per dying declaration Exhibit-29 accused Nos.5 to 8 were inside the kitchen and as per dying declaration Exhibit-38 they were outside the kitchen, which has been taken as variance earlier. But accused Nos.5 to 7 have been acquitted by the learned trial Judge on the ground that no role has been attributed to them in both the dying declarations. We are of the opinion that such facts should be considered at the time of framing of charge itself by the Courts of law. If there is inconsistency and no role is attributed then the Court should not proceed with framing of charge. Now after the evidence is adduced and for prosecuting accused Nos. 5 to 7 also as Section 34 of the Indian Penal Code was invoked by the prosecution with Section 302 of the Indian Penal Code, reliance was placed on both the dying declarations. The same dying declarations were considered to be proved and sufficient to convict accused Nos.1, 2 and 4, but relying upon those dying declarations accused Nos. 5 to 7 have been acquitted. In ***Phulel Singh vs. State of Haryana, Criminal Appeal No.396 of 2010*** decided by the three Judge Bench of the Hon'ble Supreme Court on 27th September 2023, it has been held that, when by the same dying declaration one accused is convicted, then how another accused can be acquitted by saying that the said dying declaration is not

believable. Under the said circumstance, the conviction awarded to the present appellants cannot be allowed to withstand. Because of the wrong appreciation of the evidence, the findings are wrong and therefore, the Judgment is perverse, which needs to be set aside, so far as the present appellants are concerned. Hence the following order:-

ORDER

(I) The Criminal Appeal stands allowed.

(II) The conviction awarded to appellant No.1 – Sau Chhaya Bhausahab Bhingardive and appellant No.2 – Smt. Kamal Babanrao Patole in Sessions Case No. 220 of 2013 by the learned Additional Sessions Judge, Ahmednagar for the offence punishable under Sections 302, 498-A read with Section 34 of the Indian Penal Code, stands quashed and set aside.

(III) Both the appellants stand acquitted of the offence punishable under Section 302, 498-A read with Section 34 of the Indian Penal Code.

(IV) Both the appellants be set at liberty, if not required in any other case.

(V) We clarify that order regarding payment of compensation to PW-1 Shantwan Badekar is also quashed and set aside.

(VI) The fine amount deposited, if any, be refunded to the appellants after the statutory period.

(VII) We further clarify that there is no change as regards the order in respect of disposal of Muddemal passed by the learned Additional Sessions Judge, Ahmednagar.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE