

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

CRIMINAL APPEAL NO. 320 OF 2016

Balaji @ Balu Whitener s/o Baliram
Solanke, Age 24 yrs, Occ : Labour,
R/o : ND-41, Rahulnagar, CIDCO,
Nanded.

... Appellant

VERSUS

The State of Maharashtra

... Respondent

...

Advocate for the Appellant : Mr. Sachin S. Panale
APP for the Respondent – State :- Mr. S. J. Salgare

...

**CORAM : SMT. VIBHA V. KANKANWADI &
Y. G. KHOBRAGADE, JJ.**

DATE : 10TH APRIL, 2023.

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JUDGMENT : (Per : Y. G. Khobragade, J.)

01. The present appeal under Section 374(2) of the Code of Criminal Procedure is filed by the appellant / accused challenging judgment and order of his conviction passed by the learned Sessions Judge, Nanded in Sessions Case No. 13/2015 on 18.02.2016 for the offence punishable under Section 302 of the Indian Penal Code, thereby sentencing him to suffer life imprisonment.

02. The prosecution's story is that MLC report was received by the Rural Police Station, Nanded at about 1.10 p.m. on

24.10.2014 from Civil Hospital, Nanded about admission of a patient by name Arun Dilip Sonkamble after he had received burn injuries. Thereafter P.W. 8 Shivaji Mahajan Kondewad went to burn ward No. 14 of Civil Hospital, Nanded and recorded statement of injured after obtaining required endorsement from the Medical Officer. While recording statement, the victim had stated that he was proceeding towards his house from residence of his parental aunt (P.W.3) at about 12.30 p.m., on 24.10.2014. When he reached near flag post, Baudh Vihar at that time appellant /accused Balaji alias Balu Whitener met him and demanded money from him, but he did not give amount. At that time accused No. 3 Barki, accused No. 4 Chandi, accused No. 2 Shantabai and accused No. 1 Balu poured kerosene on his person and set him on fire, due to which he sustained burn injuries on his both hands, back and stomach. Thereafter, he himself extinguished fire by lying in culvert and all the accused persons fled away from spot. Thereafter his mother and brother brought him to Hospital. The said statement was treated as F.I.R. on the basis of which Crime No. 343/2014 was registered against the accused persons for the offence under Section 307 read with 34 of the Indian Penal Code. During the course of investigation, the statement of victim was recorded by the Special Judicial Magistrate. On 29.10.2014, the victim

succumbed due to injuries in Hospital. Therefore, the offence under Section 302 of the Indian Penal Code was added to the said crime. After due investigation, the Investigation Officer filed charge-sheet against accused Nos. 1 to 4 and trial was committed to the Court of Sessions, Nanded.

03. The learned trial Court framed charge against the accused for the offence punishable under Section 302 read with 34 of the Indian Penal Code at Exhibit 31. The plea of accused recorded. The accused pleaded not guilty and claimed for trial.

04. In order to bring home the guilt of accused, the prosecution has examined seven witnesses i.e. P.W. 1 Ravi Uttam Sonkamble at Exhibit 43, P.W. 2, Sandip Dilip Sonkamble at Exhibit 45, P.W. 3 Nirmala Vijay Dhavale at Exhibit 46, P.W. 4 Syd. Shakil Syd. Musa at Exhibit 47, P.W. 5 Maroti Digambarrao Dake at Exhibit 48, Shivaji Balaji Jogdand at Exhibit 52, P.W.7 Dr. Vilas Shantilal Chvan, Medical Officer at Exhibit 59, P.W.8 Shivaji Mahajan Kondewad at Exhibit 62, P.W. 9 Anusaya Dilip Sonkamble at Exhibit 65, P.W.10 Sachin Eknath Godbole, P.W.11 Kisan Gopinath Rakh, A.P.I. at Exhibit 68, P.W. 12 Maroti Dilip

Musale at Exhibit 80, P.W. 13 Motiram Tulsiram Nikam at Exhibit 82.

05. After conclusion of trial, the statement of accused was recorded under Section 313 of the Code of Criminal Procedure. The defence of the appellant / accused is that the informant intended to purchase his house, but he had sold his house to someone else, hence, he has been falsely implicated in the crime. On 18.02.2016, the learned trial Court passed impugned judgment and order holding guilty to the appellant / accused for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer life imprisonment, however, accused Nos. 2, 3 and 4 were acquitted.

06. Heard Advocate Mr. Sachin Panale, the learned Advocate for the appellant and Mr. S.J. Salgare, learned APP for the State. Perused the record and proceedings.

07. Advocate Mr. Sachin S. Panale, the learned counsel appearing for the appellant submitted that, case of the prosecution is based upon Exhibit 64 first Dying Declaration of the victim recorded by P.W. 8 Shivaji Mahajan Kondewad, the Police Head Constable and Exhibit 57 second Dying

Declaration of the victim recorded by P.W. 6 Shivaji Balaji Jogdand, Special Magistrate / Naib Tahsildar. It has been submitted that while giving declaration Exhibit 64, the victim Arun stated that, the appellant / accused poured kerosene and set ablaze to him, whereas in declaration (Exhibit 57), the victim Arun stated that, all the accused including the appellant came from his backside and poured something on his person and set ablaze. Therefore, there is much variance in both the dying declarations and both declarations are not in corroboration. The defence of the appellant / accused is that the family members of deceased had insisted his family members for selling his house. But when the appellant / accused had sold his house to someone else, the appellant / accused had falsely implicated him in the crime. Accused had no knowledge as to how the deceased had caught fire.

08. The learned counsel appearing for the appellant further submits that, the alleged incident of homicidal death of deceased, due to burning, is stated to have occurred in broad day light in the middle of residential colony, however, the prosecution failed to examine any independent witnesses. The oral dying declarations allegedly given by the deceased to the P.W. 2 -Sandip, P.W. 3 -Niramalabai and P.W. 9 - Anusayabai are not in corroboration. P.W.2 has deposed

that, one boy came to his house at about 12.30 p.m., on 24.10.2014 and told him about pouring kerosene on person of Arun and setting him on fire by some persons from his locality. Thereupon he and his brother rushed towards the spot near Boudh Vihar. By that time, Arun had extinguished the fire by lying in the nearby Nali (culvert) and had come out from it. Arun told him that, the appellant / accused Balu Whitener, his mother and sister (original accused Nos. 2 and 3) had poured kerosene on his person and set him on fire by igniting match-stick. It can be seen from the said deposition that even at that time Arun had not disclosed motive behind the alleged act of accused persons.

09. It has been canvassed that, P.W. 3 Nirmalabai deposed that at around 12.30 p.m. she heard noise and she came out from her house. She saw that, Arun was shouting as “Wachwa Wachwa” (“Save, Save”) and then Arun extinguished fire himself by lying in culvert (nali). Shakil (P.W.4) and Vikram Singh had poured water on the person of Arun. Thereafter Arun was taken out of culvert. Thereafter, Arun told her that Balu Whitener (accused No.1), his mother and sisters (original accused Nos. 2 and 3) poured kerosene on his person and set him on fire. She has also not stated that Arun had told about the motive behind the act. She has not

disclosed the presence of Sandip, when Arun had allegedly given oral dying declaration. P.W.9 Smt. Anusayabai Sonkamble, the mother of deceased has deposed that, at about 12.30 p.m., when she was at her house at that time one boy from her locality visited at her house and told her son Sandip (P.W.2) that Arun has been set to fire. The evidence of P.W. 2, P.W. 3 and P.W.9 is not in corroboration with each other, hence oral dying declarations ought to have been discarded by the learned trial Court.

10. It further canvassed that the learned trial Court wrongly relied dying declaration Exhibit 64 recorded by Police Head Constable Shivaji Mahajan Kondewad (P.W.8), which is not in corroboration with Exhibit 57 dying declaration recorded by Special Executive Magistrate (P.W. 6). Therefore, the impugned judgment and order passed by the learned trial Court is perverse, illegal, bad in law. Learned trial Court failed to appreciate the evidence properly and wrongly held the accused guilty for the offence punishable under Section 302 of the Indian Penal Code. The trial Court has wrongly considered the hearsay evidence as well as oral dying declarations and passed impugned judgment and order. It deserves to be set aside.

11. In support of this submission, the learned counsel appearing for the appellant placed reliance on case of ***Uttam Vs. The State of Maharashtra, 2022 ALL MR (Cri) 3069 (S.C.)***, wherein the Honourable Apex Court considered the provisions of Section 32 of Indian Evidence Act as well as cases i.e. ***Kundula Bala Subramanyam and another Vs. State of Andhra Pradesh (1993) 2 SCC 684, Shudhakar Vs. State of Madhya Pradesh (2012) 7 SCC 569, Paniben (Smt.) Vs. State of Gujarat, (1992) 2 SCC 474, Lakhani Vs. State of Madhya Pradesh (2010) 8 SCC 514, Amol Singh Vs. State of Madhya Pradesh (2008) 5 SCC 468, Sher Singh and another Vs. State of Punjab (2008) 4 SCC 265.***

12. In the case of ***Shersingh and another Vs. State of Punjab (2008) 4 SCC 265***, it is held that,

“in cases where the Court finds that there exist more than one dying declarations, each one of them must be examined with care and caution and only after satisfying itself as to which of the dying declarations appears to be free from suspicious circumstances and has been made voluntarily, should it be accepted. As observed in the judgments quoted above, it is not necessary that in every case, a dying declaration ought to be corroborated with material evidence, ocular or otherwise. It is more a rule of prudence that courts seek validation of the dying declaration

from attending facts and circumstances and other evidence brought on record. For the very same reason, a certificate by the doctor that the declarant was fit to make a statement, is treated as a rule of caution to establish the truthfulness of the statement made by the accused”.

13. Further reliance has been placed on the decision of Coordinate Bench of this Court in case of ***Subhash s/o Ratan Chavan & Anr. Vs. The State of Maharashtra, 2016 ALL MR (Cri) 735***, wherein it has been held that,

"In order to pass the test of reliability, a dying declaration has to be subject to a very close scrutiny. While appreciating credibility of the evidence produced before the Court, the Court has to view evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The Court has to satisfy that the dying declaration is truthful. If there are multiple dying declarations giving two different versions a serious doubt is created about truthfulness of the dying declaration. If after examining the dying declarations in all its aspects and testing its veracity, if the Court comes to the conclusion that, it is not reliable by itself and that it suffers from infirmities, then without corroboration it cannot form the basis of conviction. In view of largescale inconsistencies appearing in written dying declarations recorded by police officer and Awwal Karkun of Tahsil office and oral dying declarations made to father and mother and the same being not

corroborated by any evidence, the said dying declarations in itself would not be sufficient to form the basis of conviction."

14. In the case of ***Shri Rajendra Madhukar Kadam Vs. The State of Maharashtra, 2016 ALLMR (Cri) 1022***, the Co-ordinate Bench of this Court observed that when there are three oral and two written dying declarations of the deceased, but not consistent with each other in respect of material aspects of the incident, the acceptance of one dying declaration would falsify another, then such dying declarations cannot be relied, but they will have to be rejected.

15. In the case of ***State of Gujarat Vs. Jayrajbhai Punjabhai Varu, 2016 ALL MR (Cri) 3567 (S.C.)***, Honourable Supreme Court held that,

"The courts below have to be extremely careful when they deal with a dying declaration as to maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and

without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. In the present case, there are two sets of evidence, one is the statement / declaration made before the police officer and the Executive Magistrate and the other is the oral dying declaration made by the deceased before her father who was examined as P.W.1. On a careful scrutiny of the materials on record, it cannot be said that there were contradictions in the statements made before the police officer and the Executive Magistrate as to the role of the respondent in the commission of the offence and in such circumstances, one set of evidence which is more consistent and reliable, which in the present case being one in favour of the respondent herein, requires to be accepted and conviction could not be placed on the sole testimony of P.W.-1. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will

be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful."

16. Per contra, the learned APP supported the findings and reasons recorded by the learned trial Court. He submits that the dying declarations Exhibit 64 recorded by the police personnel (P.W. 8) and dying declaration Exhibit 57 recorded by the Special Executive Magistrate (P.W.6) are in corroboration with each other. Both the dying declarations have been properly proved. Deceased was conscious and in a fit state of mind to give statement. Those dying declarations are further supported by oral dying declarations to informant, mother and other eye-witnesses. The post mortem report shows the cause of death as burn injuries. The accused persons had set the deceased to fire as accused No. 1 had not given the money. It might have been asked as loan. The defence taken by accused persons about false implication is unbelievable. Learned trial Court had considered the evidence available on record and rightly held guilty to the appellant / accused for the offence under

Section 302 of the Indian Penal Code, but acquitted the accused Nos. 2 to 4. Hence, prayed for dismissal of the appeal.

17. The learned APP for the State has relied on the case of *State of Uttar Pradesh Vs. Veerpal and another reported in (2022) 4 SCC 741*.

18. Having regard to the submissions canvassed on behalf of both sides. We have gone through the record.

19. It has come on record that, the deceased Arun Dilip Sonkamble was admitted in Burn Ward of Civil Hospital, Nanded at about 1.10 p.m. on 24.10.2014, due to burn injuries. The Medical /hospital authority issued MLC Exhibit 63 to Police Inspector of Vajirabad Police Station, Nanded. Accordingly, P.W. 8 P.H.C. visited the patient in Burn Ward No.14 and met with Medical Officer -P.W. 7 Dr. Vilas S. Chavan. After obtaining opinion Exhibit 60 from P.W. 7 about mental and physical condition of the patient, he recorded dying declaration / statement of victim at Exhibit 64. After reducing statement / declaration, P.W. 8 also obtained endorsement of Medical Officer at Exhibit 61 certifying that while recording statement, the victim was conscious,

oriented and mentally fit. P.W.8 recorded Exhibit 64 which was first dying declaration of the deceased at 3.30 p.m. on that day.

20. In his dying declaration Ex.64, the deceased has stated that, when he was proceeding towards his house from house of his aunt (P.W.3) at about 12.00 to 12.30 p.m., on 24.10.2014; the appellant /accused Balu Whitener Bali Solanke from his lane met him near flag post of Boudha Vihar and demanded him money. He had not given the money to him. Still, the accused followed him and was forcing him to give money but he had not given money. Therefore, appellant and his companion mother and both sisters (accused Nos. 2 to 4) decided to commit his murder. The appellant / accused poured kerosene on the person of deceased and set him to fire. Deceased had sustained burn injuries to his both hands, stomach, back. Then deceased himself went and jumped in drainage water in culvert and extinguished the fire.

21. It is further evident that P.W. 8 Police Head Constable had issued a request letter (Exhibit 54) to the Special Executive Magistrate for recording statement of injured. P.W. 6 Special Executive Magistrate recorded dying declaration (Exhibit 56) at about 08.30 p.m. on 24.10.2014, after obtaining

opinion (Exhibit 55) from the Medical Officer, P.W. 7 Dr. Vilas Chavan. On consideration of Exhibit 57 which is 2nd dying declaration given by the deceased to the P.W. 6, Special Executive Magistrate it appears that, the victim / deceased started proceeding towards his house from house of his parental aunt (P.W.3) at about 11.00 a.m. on 24.10.2010. At that time the present appellant -accused, his two sisters Barki Badi Solanke (accused No.3), Chanda Badi Solanke (accused No.4), and their mother Shantabai Badi Solanke (accused No.2), brother-in-law Lakhan, Arya came from his backside and poured some substance on his person and set him on fire. Thereafter he himself laid down in culvert (Nali) and extinguished fire. Then, all the accused persons fled away from the spot. Thereafter his mother and brother brought him to Government Hospital. Therefore, it is evident that there is variance in both dying declarations Exhibit 64 and Exhibit 57. The variance is in respect of time, the persons involved as well as reasons for setting him to fire. It cannot be said that as role attributed to accused No. 1 is same in both the dying declarations, they should be accepted. When the purpose itself was not stated, role will not suffice.

22. It appears that, the deceased was admitted in Hospital at about 01.10 p.m. on 24.10.2014. He expired at about 22.30

hours on 29.10.2014. There was no attempt to record any further statement of the deceased after 24.10.2014. The prosecution has proved seizure-cum-spot panchanama (Exhibit 44) in evidence of P.W.1. As per spot panchanama, the place of incident is open space near flag post at Boudha Vihar. The spot panchanama does not reveal distance between house of deceased's parental aunt and house of the deceased. So also, the distance between house of accused and spot of incident. The evidence of P.W. 1 Ravi Uttam Sonkamble appears that the Investigation Officer seized match box article 2 and two burned match sticks article -3 and burned clothes article 1 from the spot of incident. There is no mention of any Nali nearby the spot. The question therefore arises as to how the deceased would have extinguished the fire. Non-mentioning of existence of Nali therefore, does not corroborate both the dying declarations as well as testimony of all the witnesses who had allegedly gathered at the spot after the incident.

23. As per the testimony of P.W. 2 Sandip Dilip Sonkamble on 24.10.2014 at about 12.30 p.m., he came to know from one boy who had come to his house, that his brother (deceased) has been set to fire. Thereafter he himself, his mother (P.W.9) Anusayabai rushed to the spot. However, neither the P.W. 2

nor the P.W. 9 disclosed name of the said boy who disclosed fact of pouring kerosene and setting fire to the deceased. The prosecution has not examined said boy to prove the fact of giving information of incident to the P.W.2. As per the testimony of P.W. 2, his brother (deceased) had disclosed him after he had come out of culvert that, the appellant-accused Balu Whitener, his mother accused No.2 and his both sisters accused Nos.3 and 4 had poured kerosene on person of his brother and set him on fire by igniting match-stick. Deceased had also disclosed him that while he (deceased) was returning from the house of his parental aunt Nirmala -P.W.3 towards his house at that time accused No. 1 Balu Whitener asked him money, but he had not given the same. Thereafter the accused persons raised quarrel with him. Accused No.1 Balu went to his house, brought kerosene Can and poured kerosene on his person, ignited match-stick and set him on fire. Then all the accused fled away. The said oral dying declaration is not corroborating written dying declarations. Both the written dying declarations are silent on the point that accused No. 1 had gone to his house and then brought kerosene can. If this is to be accepted, then it is hard to believe that deceased might have been waiting at the same spot, till accused No. 1 had brought the can. Therefore, the distance between the house of accused and spot was

necessary; which prosecution has failed to bring.

24. To prove another oral dying declaration, the prosecution has examined P.W. 7 Nirmalabai Dhavale - deceased's parental aunt at Exhibit 46. P.W. 3 has deposed that on the day of incident, the deceased left her house at about 12.30 p. m. and then she had heard some noise, hence, she came out from her house and heard shout 'Save, Save' ("Wachwa Wachwa"). The deceased himself extinguished fire by falling himself in culvert (Nali). One Syd. Shakil (P.W. 4) and Vikram Singh were pouring water on his person and then he was taken out of culvert (Nali). Thereafter the deceased told her that the accused persons had poured kerosene on his person and set him on fire. This witness does not say about presence of PW 2 and 9 when the oral dying declaration was given. She has not stated the same contents, as have been told by PW 2. Therefore, alleged oral dying declaration to her cannot be relied.

25. The prosecution examined P.W. 4 Syd. Shakil Syd. Musa, who allegedly extinguished fire of deceased by pouring water from bucket and to whom oral declaration was given by the deceased. P.W. 4 stated that, he knows Sandip (P.W. 2) and Arun, who are residing in his lane. Incident was occurred on

24.10.2011. At that time he was taking meals and after hearing shouts he rushed at the spot of incident and poured out bucket full of water on person of deceased. Another person Vikram Singh has also poured one bucket water on deceased's person. Then deceased's aunt (P.W.3), his mother (P.W.9) and brother (P.W.2) came there. The deceased was saying "Save-Save" (Wachva-Wachva). The deceased told him that, whitener (Accused) set him on fire. Thus, he is giving a different version than told by PW 2, 9 and 3.

26. P.W.9 – Anusayabai Dilip Sonkamble, the mother of deceased has deposed at Exhibit 65 that on the day of incident at about 12.30 p.m., when she was present at her house with her husband and children at that time one boy from her locality visited at her house and told her son (P.W.2) about setting the deceased on fire. Thereafter, she and her son (P.W.2) rushed to the spot and found the deceased was lying in culvert (nala) and had extinguished fire. Thereafter, the deceased told that the appellant-accused Balu Whitener poured kerosene on his person and set him on fire. The P.W. 9 has not disclosed name of said boy, who had disclosed about incident to her son P. W.2. She has not stated that deceased had disclosed the presence of other accused at the spot and their alleged involvement.

27. In order to prove homicidal death of deceased Arun, the prosecution has examined P.W. 5 Dr. Maruti Date at Exhibit 48. P.W. 5 deposed that, he has conducted post mortem on dead body of Arun Dilip Sonkamble on 30.10.2014, and found following external and internal injuries. :-

External injuries

1. Dermo Epidermal burns with blackish ischar present, yellow pus pockets present at places, peeling of skin and redness present over burns at places.

Area	Percentage	Area spared
Head, neck & face	2%	Except back and right side of neck right ear and right cheek
Right upper limb	5%	Elbow
Left Upper limb	9%	-
Anterior of trunk	8%	Lower part of abdomen
Posterior of trunk	17%	Sacral area
Right lower limb	3%	Except medial and posterior of thigh
Left Lower Limb	5%	Except medial and Posterior of thigh
Perinium & genitals	0%	-
Total	49%	Fourty Nine percentage

2. Multiple, parallel, multidirection, healed-old incision marks with pale scar present on front of chest left side and upper part of abdomen and front of left forearm, over left

arm lateral aspect.

3. Venesection marks present on both ankles 2 cm. above medial malleolus.

Those injuries were antemortem in nature.

Internal injuries :-

1. Meninges were intact and congested, brain was congested and oedematus, cerebro spinal fluid was turbid.

2. Both lungs were congested and oedematus, patchy consolidation was present.

3. About 200 ml yellowish liquid material was present in stomach, no abnormal smell perceived, mucosa was congested.

4. Spleen was soft, enlarged, friable with subcapsular pus pockets were present at places.

5. Both kidneys were intact, congested, subcapsular pus were present at places.

28. Accordingly, P.W.5 issued Post Mortem report (Exhibit 50). As per opinion of P.W.5, death of deceased was caused "due to septicemia due to Burns" injuries and injuries described in column No.17 were sufficient to cause death in ordinary course.

29. In cross-examination P.W. 5 - Medical Officer admitted that in inquest panchanama Exhibit 51 burn injuries on right ear, neck, chest, on stomach, burns on both hands and legs are described. He admitted that the flames go from downward to upward directions and whatever part of body

comes in contact of flame, it may burn. He mentioned in Post Mortem Report about congestion of brain and internal organs. The P.W.5 denied that due to congestion, co-ordination and control of speech affects. P.W. 5 admitted that injury No.2 in column No.17 have multiple healed incisions as old healed injuries which may cause by sharp edge weapon.

30. The inquest panchanama (Exhibit 51) and Post Mortem Report (Exhibit 50) are in corroboration about death of deceased Arun due to burn injuries described in column No. 17 of Post Mortem Report and death of deceased due to septicemia due to burns. These two documents were not sufficient to prove homicidal death. Prosecution should rule out the possibility of accidental or suicidal burn injuries. For that purpose, other evidence will have to be considered.

31. As afore-said both the written dying declarations are not corroborating with each other on material particulars. Even if we consider that they are properly proved, yet other circumstances discussed earlier falsify the story. Though P.W. 3 Nirmalabai and P.W. 4 Syd. Shakil and P.W.9 Anusayabai Sonkamble deposed about pouring water by one Vikram Singh and Sayyad Shakil (P.W.4), however, victim / deceased has not disclosed presence of P.W. 4 Sayyad Shakil and Vikram Singh while recording his dying declarations Exhibit 64 and

57. The oral dying declarations which allegedly been made to P.W. 2 Sandip Dilip Sonkamble, P.W. 3 Nirmalabai Dhavale, P.W.9 Anusayabai Sonkamble also suffer from material omissions and contradictions. The multiple oral dying declarations as well as written dying declaration are not in corroboration with each other. At the cost of repetition, we would say that there is material variance in written as well as in oral dying declarations. None of them disclose as to for what purpose, accused No. 1 was demanding money from deceased. Prosecution has not come that it was an attempt to extort money. Therefore, none of them are trustworthy. Another fact to be noted is that the incident is alleged to have taken place in day time, at a place surrounded by houses; yet no independent witness has not been examined. We may not go into the defence that has been put, but suffice it to say that there appears to be a reason for deceased to implicate accused persons. Therefore, it will have to be concluded that prosecution had failed to prove the guilt of the appellant beyond reasonable doubt. However, the learned trial Court passed the impugned judgment and order on 18.02.2016, holding only the appellant-accused guilty for the offence punishable under Section 302 of the Indian Penal Code though on the same oral, documentary evidence other accused Nos. 2 to 4 have been acquitted. Therefore, the

learned trial Court was not justified while convicting the appellant / accused, hence, the impugned judgment and order is liable to be quashed and set aside. Present appeal needs to be allowed. It is not the case that merely because two views are possible, this Court is taking another view than taken by learned Trial Judge. Since, the learned Trial Judge has failed to appreciate the evidence properly, we need to interfere.

32. Accordingly, we proceed to pass the following order :

ORDER

- (I) Criminal Appeal stands allowed.
- (II) The conviction awarded to the appellant – Balaji @ Balu Whitener S/o Baliram Solanke in Sessions Case No. 13 of 2015 by the learned Sessions Judge, Nanded on 18th February 2016 for the offence punishable under Section 302 of the Indian Penal Code, stands set aside.
- (III) Appellant – Balaji @ Balu Whitener S/o Baliram Solanke stands acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- (IV) The fine amount, if any, paid / deposited by the appellant be refunded to him after the statutory period.
- (V) Appellant be set at liberty, if not required in any other case.

(VI) We clarify that there is no change in the order passed by the learned Sessions Judge, Nanded, regarding disposal of Muddemal.

(Y.G.KHOBRADE,J.)

(SMT.VIBHA V. KANKANWADI,J.)

shp/-