

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.431 OF 2016

Shaikh Mustafa s/o Shaikh Dastagir,
Age 35 yrs., Occ. Labour,
R/o Nitrud, Tq. Majalgaon,
Dist. Beed.

... Appellant

... **Versus** ...

The State of Maharashtra
Through Police Station Officer,
Police Station, Dindrud,
Tq. Majalgaon, Dist. Beed.

... Respondent

...

Mr. S.J. Salunke, Advocate for appellant

Mrs. V.S. Choudhari, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI
Y.G. KHOBRADE, JJ.

RESERVED ON : 17th APRIL, 2023

PRONOUNCED ON : 04th MAY, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

challenging his conviction under Section 302 of the Indian Penal Code, 1860 by learned Additional Sessions Judge, Majalgaon, Dist. Beed in Sessions Case No.50/2014 on 27.06.2016.

2 The prosecution story, in short, is that one Chunni w/o Mustafa Shaikh came to be admitted in Swami Ramanand Tirth Hospital, Ambajogai on 27.07.2014. PW 4 ASI Mr. Ramakant Thorat attached to Ambajogai City Police Station recorded her statement (Exh.47) between 9.00 to 9.30 a.m. on 27.07.2014. She disclosed that she resides with her husband, three children, mother-in-law and father-in-law at village Nitrud, Tq. Majalgaon. Her husband i.e. present appellant demanded her money for drinking liquor around 7.00 a.m. on 27.07.2014. She refused to give the money. Accused No.1 abused her and poured kerosene from can on her person and thereafter by igniting the match stick set her to fire. When she tried to go out of the house in burning condition, at that time, the in-laws latched the door from inside and prevented her from going out. When she was shouting, her brother, who is also the resident of same village, came along with other persons. He had poured water on her person and extinguished the fire. She was then taken by her brother and mother in private vehicle to Government Hospital, Ambajogai, where she was under treatment. She then gave First Information Report against her husband and in-laws. After recording the said

statement, which was treated as First Information Report, under Section 154 of the Code of Criminal Procedure; offence vide Crime No.69/2014 came to be registered for the offence punishable under Section 307 read with Section 34, 504 of the Indian Penal Code and investigation was undertaken. It is further prosecution story that at the same time a request letter was given to the Executive Magistrate to record the Dying Declaration. Accordingly, PW 5 Balkrishna Wanjerkhedkar, who was serving as Naib Tahsildar, visited the hospital and recorded second Dying Declaration Exh.57 between 11.35 a.m. to 12.00 noon on the same day.

3 During the course of the investigation PW 10 API Mr. Rakesh Choudhari visited the spot and carried out spot panchnama Exh.39 and seized certain articles from the spot. Those articles were sent for analysis to the Chemical Analyzer at Aurangabad. He recorded statements of witnesses under Section 161 of the Code of Criminal Procedure. It was informed to him that Chunni has expired on 02.08.2014 around 3.15 p.m. Therefore, the inquest panchnama was got executed with the help of two panchas and dead body was sent for postmortem. Provisional certificate was collected and supplementary statements were recorded. Accused came to be arrested. After collecting further necessary documents charge sheet was filed before learned Judicial Magistrate First Class, Ambajogai, who committed the case

for trial to the Court of Sessions.

4 After the committal of the case the charge was framed against all the accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. They pleaded not guilty and trial has been conducted. The prosecution has examined in all 10 witnesses to bring home the guilt of the accused. Statements of accused Nos.1 and 3 under Section 313 of the Code of Criminal Procedure were recorded. By that time accused No.2 was reported to be dead and, therefore, case stood abated against him. The accused persons have examined two witnesses in defence.

5 Considering the entire evidence on record and hearing both sides the learned Additional Sessions Judge, Ambajogai held accused No.1 guilty of committing offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and to pay fine of Rs.2,000/- (Rupees Two Thousand only), in default to suffer simple imprisonment for two months. Set off under Section 428 of the Code of Criminal Procedure was granted to him. As aforesaid, the case was abated against accused No.2 and accused No.3 has been acquitted of the charges. Hence, the original accused No.1 has filed the present appeal challenging his conviction. (Therefore, hereinafter accused No.1 is referred as 'accused'

only.)

6 It will not be out of place to mention here that neither the prosecution nor the relatives of deceased have filed appeal challenging the acquittal of accused No.3 Pashabee and this point will have to be borne in mind.

7 Heard learned Advocate Mr. S.J. Salunke for the appellant and learned APP Mrs. V.S. Choudhari for the respondent and perused the Record and Proceedings.

8 It has been vehemently submitted on behalf of the accused that the first Dying Declaration, which has been treated as First Information Report (Exh.47), has been taken between 9.00 to 9.30 a.m. on 27.07.2014. Prosecution has examined PW 4 ASI Mr. Ramakant Thorat, who had written Exh.47 to prove the said Dying Declaration. PW 9 Dr. Vishwajeet Pawar is the Medical officer, who conducted the autopsy, but the Medical officer, who had given endorsements on Exh.47, has not been examined by the prosecution. As per the testimony of PW 9, Chunnibee had sustained 98% of the burns. Therefore, it was necessary for the prosecution to bring a positive evidence on record to show that Chunnibee was in a fit state to give the statement. The prosecution has further come with a case that Exh.57 was recorded by

PW 5 Naib Tahsildar Mr. Balkrishna Wanjerkhedkar on the same day i.e. 27.07.2014 between 11.45 a.m. to 12.00 noon. Even the Doctor, who had given endorsements on Exh.47, has not been examined. It is not clear, as to whether the same Doctor had given endorsements on Exh.47 as well as Exh.57. The inconsistency between the two Dying Declarations i.e. Exhs.47 and 57 is required to be considered. In Exh.47 it is stated that Chunnibee told that her husband drinks liquor and, therefore, there used to be quarrel between her and her husband. She has been set to fire by husband. Her husband used to assault her under the influence of liquor. She has absolutely not assigned any role to the in-laws in Exh.47. Rather in Exh.57, though she has stated about the presence of mother-in-law, father-in-law and also the brother-in-law, she states that she is unaware about the fact that who had extinguished her fire. There is no statement that her husband demanded money for drinking liquor. Merely on the basis that role attributed to the appellant is same in Exhs.47 and 57, it cannot be said that there is no inconsistency between the two Dying Declarations. When there are two inconsistent Dying Declarations, then prosecution story cannot be believed.

9 The prosecution has also relied on the evidence of PW 8 Ashma, who is the daughter of deceased and accused. She was aged 16 at the time of deposition. She has been posed as an eye witness, however, in her cross

examination she admitted that she is residing with the parents of her mother since the date of incident. Under such circumstance, possibility of tutoring her cannot be ruled out. She has claimed ignorance about the fact that her father had sustained burn injuries to his both hands and other part of the body. She has also attributed role to the grant parents. But the fact remains is that the grandmother has been acquitted by the learned Trial Judge. The prosecution has failed to examine material witnesses i.e. brother of deceased, who alleged to have extinguished the fire and also the mother of the deceased, who is stated to have accompanied deceased to hospital. The investigation is defective and, therefore, the learned Trial Judge ought to have acquitted the accused by holding that offence has not been proved beyond reasonable doubt.

10 Learned Advocate for the appellant has relied on the decision in State of Gujarat vs. Jayrajbhai Punjabhai Varu [(2016) 14 SCC 151], wherein it has been held that -

“A mechanical approach in relying upon a dying declaration is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye.

The prosecution has to prove guilt of the accused beyond all reasonable doubt and if two views are possible on the evidence adduced in the case, the view which is favourable to the accused

should be adopted.”

10.1 He further relied on the decision in **Amol Singh vs. State of Madhya Pradesh [(2008) 5 SCC 468]**, wherein it has been held that -

“If the deceased had several opportunities of making dying declarations, they should be consistent.”

10.2 He further relied on the decision in **Subhash Ratan Chavan and another vs. State of Maharashtra [2016(2) Bom.C.R. (Cri.) 412]**, wherein it has been held that -

“In view of the large scale inconsistencies in written and oral dying declarations, the dying declarations cannot be relied to form the sole basis of conviction.”

10.3 He further relied on the decision in **Smt. Rashida Abdul Gani Khairadi vs. The State of Maharashtra [2014 ALL MR (Cri.) 244]**, wherein it has been held that -

“All possible efforts should be made by the prosecution to see that there is no room for suspecting veracity of dying declaration and it should inspire the confidence of the Court.

It is necessary that there has to be an endorsement that the contents of dying declaration were read over and admitted to be true and correct. The said exercise cannot be treated as an empty formality.”

10.4 He further relied on the decision in **Surinder Kumar vs. State of Haryana [2012 AIR SCW 494]**, wherein it has been held that -

“Patients suffered 95-97% burn injuries, it is highly doubtful whether it would be possible for the patient to have her thumb impression below her statement. It is also not clear in the whole body is burnt, how the deceased thumb impression was obtained.”

10.05 He further relied on the decision in **Gajanan Hanmantu Jiddewar vs. The State of Maharashtra [2016 ALL MR (Cri.) 4919]**, wherein it has been held that -

“There was absence of explanation as to the manner in which the thumb impression of the deceased was obtained when her entire body was burnt, dying declaration cannot be relied upon to support conviction.”

10.6 He further relied on the decision in **Bapu (Nandu) Prabhu Koli @ Raut vs. State of Maharashtra [2018(3) ABR (Cri) 497]**, wherein it has been held that -

“Non examination of crucial witness, creates a dent in the prosecution story.”

11 Per contra, the learned APP supported the reasons given by the learned Trial Judge and submitted that there is ample evidence available to

come to the conclusion that the accused is the author of the crime. The acquittal of accused No.3 is no bearing as her role was different and since it was observed that the Dying Declarations are inconsistent to the extent of the role attributed to the mother-in-law, the benefit was given to her. As regards the role of the accused/appellant is concerned, it is consistent in both the Dying Declarations. Further, the testimony of PW 8 Ashma – the daughter of the accused and deceased has strengthened the evidence of the prosecution. There was no reason for the girl to speak against the father. The defence that even accused had tried to extinguish the fire and sustained injuries is not believable. Though it appears that he had sustained injuries, but the evidence of defence shows that accused was referred by Medical Officer, Majalgaon to Civil Hospital, Beed and he has taken treatment from 28.07.2014 to 11.08.2014. The incident in question has taken place on 27.07.2014 and, therefore, the said evidence was not sufficient. Accused himself has examined as DW 1 and he has tried to say that as he had gone to the house after consumption of liquor in the month of *Ramzan*, his wife got annoyed with him. He was out of the house and wife was cooking food in the morning and thereafter in anger she had poured kerosene on her person and ablazed herself. This defence is unbelievable. How deceased could get so much of anger and would think of committing suicide when she had three children to support. Both the Dying Declarations have been proved properly.

Non examination of the Medical Officer, who gave endorsement about the consciousness and fitness of deceased, was not fatal. The satisfaction of the writer of the Dying Declaration regarding fact that the maker is in fit state to give statement is sufficient. Both the witnesses have stated that independently also they had made preliminary inquiry with deceased Chunnibee and after getting the satisfaction that she was in a fit state to give the statement, they have recorded the statements. The learned Trial Judge has rightly believed the testimony of both the authorities who had recorded Dying Declarations Exhs.47 and 57 and also the direct evidence of PW 8 Ashma. The conviction is appropriate and does not require any interference.

12 It is to be noted that the prosecution case is based on the two Dying Declarations Exhs.47 and 57 as well as the direct evidence in the form of PW 8 Ashma, who had seen the incident. Under such circumstance, we would like to consider the direct evidence first. PW 8 Ashma was 16 years old girl. Practically she was not a child witness; yet, preliminary questions were asked by the Presiding Officer to confirm, as to whether she can be said to be a competent witness within the purview of Section 118 of the Indian Evidence Act. After getting it confirmed, oath has been administered to her. In her examination-in-chief PW 8 has deposed that on the day of incident she woke up in the morning and noticed that there was quarrel between her

parents. Her father had beaten her mother. Thereafter the grandfather – accused No.2 came there. He took out one cloth and one stick and then prepared a lamp (in local language it is called ‘temba’). He handed it over to accused. Here, they would point out that there appears to be some mistake in the English deposition and, therefore, Marathi deposition is considered, which says about preparation of temba by accused No.2 and by handing it over to accused No.1 without doing anything more. Then PW 9 says that her father had then poured kerosene on the person of mother and then the father set deceased at fire. Thereafter accused No.3 grandmother closed the door and they went to the house of their maternal uncle. Thereafter, maternal uncle went to the house of deceased and extinguished the fire from the person of mother. Thereafter the mother was shifted to hospital. Before considering her cross-examination, we can take a note of the fact that PW 8 Ashma is not disclosing where her brother and sister were at the relevant time, and the examination-in-chief of PW 8 Ashma appears to be not corroborating the Dying Declaration Exh.47. Exh.47 and even Exh.57 does not give active role to father-in-law. It is absolutely not mentioned in both the Dying Declarations that father-in-law had supplied temba to accused. In Exh.47, it is rather mentioned that accused had ignited the match stick and with the help of burning match stick Chunnibee was set to fire. Exh.57 is silent on the point, as to how the fire was put on the person of Chunnibee, so

that the flames could broke. Another glaring fact is that after deceased Chunnibee was set to fire, as per the testimony of PW 8, the grandmother closed the door and all of them went to the house of her maternal uncle. This fact is not supported in Exhs.47 and 57. Rather Exh.47 says that the parents-in-law had closed the door from inside after husband had put deceased to fire. The testimony of PW 8 Ashma does not reveal the distance between her house and the house of her maternal uncle. That distance ought to have been brought on record. She states that all of them went to maternal uncle's home and then maternal uncle came and extinguished the fire on the person of mother. If this is to be accepted, then, said maternal uncle of PW 8 ought to have been examined. Further, PW 8 does not say that after they went to the house of maternal uncle, anybody of them had told about the incident or misguided the maternal uncle by developing a story. How maternal uncle could have gone to the matrimonial home of Chunnibee without taking the accused persons with him, is a question. If PW 8 Ashma is to be believed, then after all of them went to the house of maternal uncle and maternal uncle thereafter went to the house of deceased, how much time got elapsed, is a question. But the guess work also cannot be in this case as the distance has not come on record. Still PW 8 Ashma manages to say that after her maternal uncle came, he extinguished the fire from the person of the mother. That means, still Chunnibee was under the flames of fire. In that

case her burn injuries would have been 100% and even the possibility of instantaneous death cannot be ruled out. Here, interestingly the treating Doctor has not been examined. Prosecution has not bothered to produce on record the bed-head ticket, who had admitted the deceased to hospital, what history was given etc., is totally kept silent. Therefore, it is not even necessary to go to the cross-examination of PW 8 Ashma as from her examination-in-chief itself we could get an idea that she is deposing contrary to the Dying Declarations Exhs.47 and 57 in material particulars, either she is tutored or she was not at all present in the house.

13 Even if we consider the cross-examination of PW 8 Ashma we could get the fact that the incident had taken place during *Ramzan* and, therefore, Ashma was preparing food in the early morning. She has admitted that her father used to consume liquor. She denied the suggestion that on the day of incident her father had consumed liquor and, therefore, the mother had poured kerosene upon herself and set herself to fire. The girl does not say that the father had demanded amount to mother for consuming liquor and then the quarrel started. PW 8 Ashma denied the suggestion that father had taken the part in extinguishing the fire. But then she claims ignorance, as to whether the father had sustained the burn injuries to his both hands and parts of body. Here, at this stage, we would like to consider

the defence witness. The accused himself has entered the witness box and has said about catching of fire while extinguishing the same. His testimony was tried to be supported by DW 2 Dr. Majid Shaikh. According to him, accused No.1 was admitted in Civil Hospital, Beed on account of sustaining injury around 5.20 p.m. on 28.07.2014. He says that accused No.1 was referred by Medical Officer from Rural Hospital, Majalgaon to Civil Hospital, Beed, but at Civil Hospital, Beed accused was treated between 28.07.2014 to 11.08.2014. According to him, accused had sustained 29% burns. Here, we could see that the accused has not led evidence by examining Medical Officer from Rural Hospital, Majalgaon, where he was admitted first. The cross conducted on behalf of the prosecution of DW 2 Dr. Majid is not satisfactory, however, the fact remains is that he could prove that the accused has sustained 29% burns when he was admitted on 28.07.2014. The learned Advocate for the defence has not tried to bring on record as to what was the age of burn injuries sustained by the accused. It was important, because unless the age of the injury would have been around 6.00 to 7.00 a.m. on 27.07.2014, it could not have been stated that he had sustained burn injuries while extinguishing the fire. Under the said circumstance, we do not find any substance in the defence and, therefore, PW 8 Ashma was not required to explain the injuries on the person of her father. Further, in her cross-examination she has stated that she is unable to remember as to whether she

had told to the police about the fact that the grandfather had prepared temba and handed it over to father. Interesting point to be noted is that in the spot panchnama Exh.39 a burnt match stick as well as a temba (cloth wrapped at one end of stick) was found in half burnt condition. If match stick was there which was ignited, then why there was necessity for temba, is a question. But in order to match with the spot panchnama it appears that PW 8 Ashma has improved her testimony and say that the said temba was prepared by grandfather. The fact, therefore, raises further question – when the grandfather was still preparing the temba, why Chunnibee had not made any attempt to escape. At the costs of repetition, it can be said that as per testimony of PW 8 Ashma, the closure of the door is by accused No.3, that too from outside, whereas in Exh.47 the door was closed by accused Nos.2 and 3 from inside. Maternal uncle has not been examined, who could have thrown the light on the fact that when he came to the matrimonial home after the witness PW 8 Ashma and others had come to his house, he removed the latch from outside and then entered the house of deceased. Further, it is to be noted from the testimony of PW 8 Ashma that on the day of incident she herself, her parents, one sister and one brother were residing in their house and since long the grandparents were residing separately from the parents. The house of deceased and accused consists of only one room. The room of grandparents is in front of the room of the witness. Again going

back to the spot panchnama, it is to be noted that the said house consists of one room. The dimensions of the room have not been stated in the spot panchnama. There is absolutely no mention of other bed room or partition in the spot panchnama. The spot is shown in the Eastern side room and thereafter towards it's West there is open space and there was also one pomegranate tree. Beyond the said pomegranate tree towards West, pieces of burnt sari were found. How the said pieces went there, has not been explained. But it is then stated that in the room itself and towards the West of spot and beyond two chairs burnt pieces of shirt were found. There was also match box at the spot and the temba was also seized. The question would be then – where the siblings of Ashma were at that time. She was not explaining about their presence or absence. If she herself, her sister and brother were present in the house, how the three persons could not have resisted the father from doing such act, is also a question. Therefore, the testimony of PW 8 Ashma is untrustworthy.

14 Now, turning towards the Dying Declarations, the ratio in respect of all the citations relied by the learned Advocate for the appellant would be relevant. In addition to that we would also like to 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.”

14.1 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.”

14.2 Further, we may also rely on the decision in **Jagbir Singh vs. State (NCT of Delhi) [(2019) 8 SCC 779]**, wherein the law has been crystallized thus -

“31. A survey of the decisions would show that the principles can be culled out as follows :

31.1 Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

31.2 If there is nothing suspicious about the declaration, no corroboration may be necessary;

31.3 No doubt, the court must be satisfied that there is no tutoring or prompting;

31.4 The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

31.5 Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

31.6 However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable.

31.7 In such cases, where the inconsistencies go to some matter of detail or description but is inculpatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

31.8 The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the

doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

31.9 In the third scenario, what is the duty of the court ? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon ?”

The ratio in **Jagbir Singh** (supra) is again reiterated in **Rajaram vs. State of Madhya Pradesh [AIR 2023 SC 94]**. Therefore, from **Laxman** (supra) it can be said that certificate by a medical expert is by way of precaution, but the satisfaction of the writer of the Dying Declaration regarding the evidence of the maker is important; yet, in this case we have every kind of doubt regarding the mental and physical condition of Chunnibee. We have already expressed that if as per the testimony of PW 8 Ashma, it had taken so much of time to extinguish the fire, then chances of survival were very meagre. The prosecution has failed to examine Shahamad

– brother of Chunnibee and Rashedbee – mother of deceased, who appeared to be the two persons, who extinguished the fire as per Exh.47. Prosecution has not come with a case of oral Dying Declaration. It appears from the record, the endorsement was by Dr. Sanjay. The report of summons issued to him filed by the concerned Police Station on 04.04.2016 states that his place of posting could not be gathered and, therefore, he could not be served and thereafter by Exh.80 summons was prayed on behalf of prosecution to Dr. Sanjay Dange and by report dated 19.05.2016 it was submitted that he has been served. If he was served and his mobile number was also fetched, still why he was not examined, is a mystery, because the entire record is silent on that point. Further, the prosecution has not examined the treating Doctor and the papers of indoor patient in respect of Chunnibee have not been produced. No doubt, both, i.e. PW 4 Thorat and PW 5 Balkrishna have stated that they have ascertained the fitness of Chunnibee in giving statement; yet, both the Dying Declarations cannot be held to be genuine. Exh.47 bears the impression of left toe and PW 4 Thorat has not given any explanation, as to why instead of obtaining thumb impression of left hand or right hand he had obtained the impression of left toe. We may get answer to the same in the testimony of PW 9 Dr. Vishwajeet. He has noticed 9% burns to the right upper limbs and 9% to the left upper limbs. That means, it was 100% as regards the upper limbs are concerned, whereas Exh.57 states that PW 5

Balkrishna has taken thumb impression of right hand. In fact, Dying Declaration Exh.57 is subsequent to Dying Declaration Exh.47. It is the usual practice that thumb marks of the hands are taken on any document if the person is unable to sign. If those marks are not available, then only there is possibility of taking impression of the toe marks. Therefore, if right hand thumb was available for impression (when it is taken on Exh.57) why it was not taken. In Exh.47, it ought to have been explained by the prosecution and, therefore, it creates doubt. The inconsistency in both the Dying Declarations is already narrated in the aforesaid paragraphs as it was pointed out by the learned Advocate for the appellant and, therefore, we do not want to reproduce the same. Suffice it to say that though broadly the role is attributed to accused; yet, the purpose for which Chunnibe was set to fire had been given differently in both the Dying Declarations. Again, at the costs of repetition, both these Dying Declarations are then inconsistent with the direct evidence and, therefore, the evidence of Dying Declarations Exhs.47 and 57 is required to be discarded.

15 The prosecution has proved that Chunnibee had sustained 98% burns and as per the testimony of PW 9 Dr. Vishwajeet, the cause of death was - “septicemia due to 98% of superficial to deep burns of total body surface area”. When it is a case of burn injuries, then three possibilities arise

– 1) accidental, 2) suicidal and 3) homicidal. In order to prove the homicidal death; prosecution has to rule out the possibility of accidental as well as suicidal nature of the burn injuries. As aforesaid, the Dying Declarations are untrustworthy, so also, the testimony of PW 8 Ashma and, therefore, we conclude that prosecution had failed to prove that Chunnibee's death was homicidal in nature.

16 The testimonies of PW 1 Syed Sheru, who proved the spot panchnama, PW 2 Syed Alam – father of deceased Chunnibee, PW 3 Syed Ruksana – sister-in-law of Chunnibee and PW 10 API Mr. Rakesh Choudhari – the Investigating Officer are not sufficient to bring home the guilt of the accused. PW 2 Syed Alam has stated about oral Dying Declaration to him by Chunnibee when he had gone to meet her in Government Hospital. Interesting to be noted is that he says that he had gone to meet her on the fourth day of incident. The prosecution has kept the brother and the mother of deceased away from the witness box, who had gone to the spot immediately as per the prosecution story itself and keeping them away appears to be intentional. Under such circumstance, the alleged oral Dying Declaration given on the fourth day cannot be acted upon. Same is the case with PW 3 Syed Ruksana. She is the wife of brother of deceased. Though she has stated about oral Dying Declaration by Chunnibee on the day of

incident; yet, preference would have been given to the testimony of her husband, who had gone to the spot and extinguished the fire than PW 3 Ruksana herself. Further, in her cross-examination, she has admitted that she is unable to remember whether all those things which she had told in her examination-in-chief was told by her to Police or not. That means, all the facts about oral Dying Declaration are by way of an improvements.

17 After churning of evidence and taking into consideration the submissions, we hold that prosecution had miserably failed to prove the guilt of the accused beyond reasonable doubt. Merely because there is some evidence, that does not mean that it is of such a degree that it would prove the offence beyond reasonable doubt. Learned Trial Judge ought to have considered the facts minutely. Therefore, the findings arrived at by the learned Trial Judge are perverse and not based on the proper appreciation of evidence. Hence, interference is required. The learned Trial Judge ought to have acquitted the accused and, therefore, the impugned Judgment deserves to be set aside. Hence, following order.

ORDER

1 The Criminal Appeal stands allowed.

2 The conviction awarded to the appellant Shaikh Mustafa s/o

Shaikh Dastagir by learned Additional Sessions Judge, Majalgaon, Dist. Beed on 27.06.2016 in Sessions Case No.50/2014 by holding him guilty of committing offence punishable under Section 302 of the Indian Penal Code is hereby set aside.

3 The fine amount, if any, deposited, be refunded to the appellant after the statutory period.

4 The appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code. He be set at liberty, if not required in any other case.

5 We clarify that there is no change as regards the order of disposal of muddemal.

6 Pending application, if any, stands disposed of.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)

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