

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.530 OF 2016

Bhagwan Ramdas Tupe,
Age 66 yrs., Occ. Labour,
R/o near A.B. High School,
Shivaji Chowk, Chalisgaon,
Tq. Chalisgaon, Dist. Jalgaon.

... Appellant

... **Versus** ...

The State of Maharashtra
Through Police Station, Chalisgaon,
Tq. Chalisgaon, Dist. Parbhani.

... Respondent

...

Mr. A.B. Girase, Advocate (appointed) for appellant

Mrs. V.S. Choudhari, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI
S.G. CHAPALGAONKAR, JJ.

RESERVED ON : 05th JULY, 2023

PRONOUNCED ON : 28th JULY, 2023

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

his conviction in Sessions Case No.220/2012 dated 10.02.2016 by learned Additional Sessions Judge, Jalgaon after holding him guilty for the offence punishable under Section 302 of the Indian Penal Code, 1860. The appellant has been sentenced to suffer imprisonment for life and pay fine of Rs.5,000/- (Rupees Five Thousand only), in default to suffer rigorous imprisonment for six months. He was not on bail throughout the trial and, therefore, set off under Section 428 of the Code of Criminal Procedure has been granted.

2 The prosecution story, in short, is that – deceased Vithabai Bajirao Patil is the mother of PW 2 Anita Sanjay Adhav and grandmother of PW 1 Vaishnavi Sanjay Adhav. Vithabai and Anita were residing adjacent to each other. The accused was also residing adjacent to them. Vithabai was admitted in Bapji Rural Hospital, Chalisgaon on 08.09.2012 after she sustained burn injuries. MLC was given to Chalisgaon Police Station and, therefore, PW 10 then Police Sub Inspector Mr. Suresh Deshmukh went to the hospital and recorded her statement as per her say. On the basis of the said statement, offence vide Crime No.294/2012 was registered for the offence punishable under Section 307 of the Indian Penal Code. Panchnama of the spot was executed and articles were seized. Vithabai was then shifted to Civil Hospital, Dhule for further treatment. Statements of witnesses were recorded. Vithabai expired on 10.11.2012 and, therefore, Section 302 of the

Indian Penal Code came to be added. In the meantime accused was arrested. After death of Vithabai inquest panchnama was prepared and dead body was sent for postmortem. Postmortem Reports were collected. After the completion of investigation charge sheet was filed.

3 After the committal of the case, charge was framed and trial was conducted. The prosecution has examined in all 10 witnesses to bring home the guilt of the accused, whereas the accused has examined two witnesses in defence. After considering the evidence on record and hearing both sides the learned trial Judge has convicted the accused, as aforesaid. Hence, the present appeal.

4 It is to be noted that the accused had sought for legal aid and, therefore, the legal aid was given vide letter dated 07.06.2016 issued by High Court Legal Services Sub Committee, Aurangabad. Further, the fact is that the concerned Panel Advocate was elevated to this Bench and, therefore, once again by communication dated 13.03.2020 another Panel Advocate came to be appointed to represent the appellant. It appears that said Panel Advocate remained absent and, therefore, by order dated 20.10.2020 the earlier Bench had appointed Advocate Mr. A.B. Girase to represent the appellant. We have heard learned Advocate Mr. A.B. Girase for the appellant

and learned APP Mrs. V.S. Choudhari for the respondent and perused the record.

5 It has been vehemently submitted on behalf of the appellant that the case of the prosecution is resting on the two dying declarations and testimony of two alleged eye witnesses PW 1 Vaishnavi and PW 2 Anita. The two dying declarations are – Exh.69 recorded first in time by PW 10 PSI Mr. Suresh Deshmukh – Investigating Officer and the second dying declaration is by PW 3 Somnath Bagul Exh.41. Though it appears from the record that there was one more dying declaration recorded by one Khairnar, but said Khairnar has not been examined by the prosecution, therefore, we cannot consider the same. If we consider the testimony of PW 10 PSI Suresh, it can be seen that he had gone to Bapji Rural Hospital, Chalisgaon after receipt of MLC Exh.46 on 08.09.2012. In his cross-examination he has stated that he had gone to hospital around 8.00 a.m., stopped there for about ½ to 1 hour and at that time the medical treatment was going on to Vithabai and then he has recorded the said dying declaration Exh.69. However, he has not stated that whether he had got confirmed as to whether any sedative was given to Vithabai or not. There is no endorsement on Exh.69 by Dr. A.U. Rathod stating that the patient was in a conscious condition. He further admits that Vithabai was admitted to Bora Hospital, Dhule also, but he has not collected

the papers from Bora Hospital. The impugned dying declaration Exh.69-cum-First Information Report is totally unreliable. Even if the said dying declaration is considered, it says that due to old quarrel the accused had set her to fire, but what was that old dispute has not been proved. PW 2 Anita does not say in clear words what was the dispute. If we consider testimony of PW 3 Somnath and the dying declaration he had recorded, then it can be seen that it is on a printed proforma which cannot be said to be an approved form. Further, it is stated that accused had brought kerosene in a steel utensil and tembha (locally made instrument for burning – made up by tying cloth on wooden stick). The cross-examination of PW 3 Somnath would show that he was not on duty at Dhule, but another Tahsildar was on duty. Still PW 3 says that he was contacted by police and then he has recorded the dying declaration. His presence in the city of Dhule itself is doubtful. The medical papers from Civil Hospital have not been produced and proved as to what was the history that was given at the time of admission. The testimony of the alleged eye witnesses is also not believable as PW 1 was 11 years old when his testimony was recorded. Possibility of tutoring her cannot be ruled out and PW 2 Anita had not tried to lodge report with the police. Both of them are interested witnesses. PW 2 admits that there is Baliram Gymnasium in front of their house and people used to come early in the morning in that gymnasium. Possibility of having independent witness at the spot was

created, but no such independent witness has been examined by the prosecution. The story that has been told by PW 1 and 2 has not been corroborated in dying declaration Exhs.41 and 69. PW 2 admits that adjacent to this gymnasium her mother had set three stones for fire for boiling water for bath. The incident had taken place in the winter season. Therefore, it appears to be a case of accidental fire to deceased but with reason to implicate the accused a false case has been made out.

6 The learned Advocate for the appellant further submits that the testimony of defence witnesses i.e. DW 1 Dr. Dinesh Tupe – son of the appellant and DW 2 Deepak Tupe/Patil – nephew of the accused has not been considered at all. DW 2 has specifically stated that Vithabai was doing prostitution and, therefore, accused had opposed the same. This is the reason as to why the accused has been implicated. DW 1 Dr. Dinesh has also stated that Vithabai was collecting money from the customers of one Yashodabai and Guddi, who were doing prostitution and, therefore, the fact was resisted by his father. As regards the day of incident is concerned, he came to know that there was quarrel between a customer and the prostitute and, therefore, Vithabai and Anita had gone to lodge the report to Police Station. Thereafter, they both went to Bapji Rural Hospital where Vithabai was admitted. He says that the father was not responsible for the incident. If

we consider the said testimony and also the fact that there was no kerosene found at the spot, the learned trial Court ought to have acquitted the accused.

7 Per contra, the learned APP strongly opposed the appeal and submitted that the learned trial Court has properly appreciated the evidence. There is no inconsistency between the two dying declarations Exhs.69 and 41. The Naib Tahsildar was available in the city and, therefore, he was requested by the police to record the statement. No fault can be found in the same. Deceased Vithabai was conscious, oriented and in a fit state to give the statement. She has succumbed to the injuries after about two months. She was not discharged during the said two months period and, therefore, her death is homicidal in nature, as it was caused after pouring kerosene and putting her to fire by lighting with the tembha. PW 1 and PW 2, who are the granddaughter and daughter of deceased, are the eye witnesses. There is some discrepancy, but as regards main incident is concerned, they are consistent. The motive that was behind the act of the accused is stated to be the quarrels and when there is direct evidence, the motive does not assume importance. The other evidence adduced by the prosecution is also consistent and, therefore, the conviction is proper and legal. He prayed for the dismissal of the appeal.

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

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.
- (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring,

prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

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

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

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

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

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

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

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

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

10 Similarly, very recently Hon'ble Apex Court in the case of **Ganpat Bakaramji Lad vs. State of Maharashtra [2018 ALL MR (Cri) 2249]**, has also

reiterated certain tests to be put to use before accepting that dying declaration. It has been held thus -

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

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

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

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

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

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

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining

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

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

The observations in the cases of **Shaikh Bakshu 2007 ALL SCR 2407** and **Kantilal (2009) 12 SCC 498**, are based on the facts and would not, therefore, constitute a precedent or a *ratio decidendi* or even an *obiter dicta* to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the

dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials.”

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

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

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

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

13 Further, we may also rely on **Vikas and others vs. State of Maharashtra [2008 (2) B. Cr. C. 235 (SC)]**, wherein it has been observed that, special sanctity accorded to evidence of dying declaration should be

respected. Unless there are clear circumstances brought out showing that person making statement was not in expectation of death, admissibility of dying declaration should not be questioned. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is no evidence. Section 32(1) of the Evidence Act makes a statement of the deceased admissible. Those statements made by a person as to the cause of his death or to any of the circumstances of the transaction which resulted in his death, are admissible when the person's death comes into question. The essential requirement of such statement to be accepted as evidence would be that the person who makes such statement is under the expectation of death. The special sanctity has been given to such statements as it is believed that a person on the death-bed will not speak lie.

14 Keeping the above said legal position in mind the evidence is required to be re-appreciated, so also, here, the case is not only based on the dying declaration but it is also based on the testimony of two eye witnesses. We would like to consider the dying declarations first. Exh.69 is the dying declaration recorded by PW 10 then PSI Mr. Suresh Deshmukh, when deceased was admitted in Bapji Rural Hospital, Chalisgaon. The testimony of PW 10 Suresh Deshmukh is supported by PW 5 Dr. Pradeep Ahirrao, who was attached to Bapji Rural Hospital, Chalisgaon. As per testimony of PW 5 Dr.

Pradeep Ahirrao, Vithabai was admitted to his hospital at 7.45 a.m. on 08.09.2012. Thereafter, he had given MLC to the City Police Station, Chalisgaon (Exh.46). Around 8.30 to 8.45 p.m. on that day PW 10 Suresh Deshmukh had gone to the hospital and upon his request PW 5 had examined Vithabai, found her to be in a fit condition to give statement and thereby gave endorsement Exh.47.

(It appears that there is a typographical mistake while recording the testimony of PW 5 Dr. Pradeep Ahirrao. The record would show that the First Information Report was registered around 9.00 a.m. which was stated to be on the basis of dying declaration, then in that case the dying declaration could not have been taken after 8.30 p.m. Further, it has come on record that Vithabai was shifted from Bapji Rural Hospital to Civil Hospital, Dhule after 11.00 a.m., to be precise 2.00 p.m. at Dhule and then around 7.00 p.m. she was discharged from Civil Hospital, Dhule and admitted to Dr. Bora's Hospital, Dhule and, therefore, it can be certainly said that there is a typographical mistake while recording the testimony of PW 5 Dr. Pradeep Ahirrao.)

In the cross examination, he has admitted that he is educated as B.A.M.S. (Ayurved). He was on duty between 8.00 p.m. to 8.00 a.m. In the cross-examination he has stated that he had recorded her pulse. Though he admits that her condition was serious, he denied the suggestion that she was in a position to speak. He admitted that he has not mentioned the date and

time below his endorsement Exh.47. Therefore, it can be certainly said that the cross-examination of this witness has not yielded any doubt over the condition of deceased and it is certainly proved that the deceased was in a fit state of mind to give the statement. As per PW 10 Suresh Deshmukh, the contents of Exh.69 were taken as per the say of Vithabai. In Exh.69 Vithabai has stated that she got up around 5.00 a.m., had bath and pooja and then she with her daughter was to go to field around 6.00 a.m., therefore, came out of the house. However, the accused on account of the old dispute had come in front of his house holding kerosene utensil in hand, poured it on her person and set her to fire with the help of tembha. As she caught fire, she started crying for help, then the neighbours came as well as her daughter extinguished the fire and brought her to Bapji Rural Hospital, Chalisgaon. Important point to be noted here is that in her cross-examination PW 2 Anita has stated that before taking injured to Bapji Rural Hospital, they had gone to the Police Station, Vithabai narrated the incident to police, the police reduced it into writing and she had impressed thumb impressed on the same. Important point to be noted is that those questions have been put to her in the cross. Exh.69 was not shown to her. That means, the said document was not pointed out/brought to her notice and then certain admissions have been extracted. Exh.69 is the First Information Report which was taken prior in time and in the said First Information Report/dying declaration the deceased

has given the motive behind the act of the accused also. As aforesaid, the cross-examination of PW 5 Dr. Pradeep Ahirrao and PW 10 Suresh Deshmukh does not falsify the dying declaration.

15 PW 3 Somnath Bagul was the then Naib Tahsildar attached to Circle Division Dhule on 08.09.2012. He was given letter by Dhule City Police Station to record dying declaration of Vithabai. Accordingly, he went to Civil Hospital. The said dying declaration Exh.41 has been recorded around 1.30 p.m. at Dhule on 08.09.2012. PW 4 Dr. Geeta Gole attached to Civil Hospital, Dhule gave the endorsement regarding the fitness of Vithabai to give statement. Important point to be noted is that as per testimony of PW 4 Dr. Geeta Gole, Vithabai sustained more than 30% burn injuries. In the cross-examination she has stated that from time to time she had recorded the blood pressure and pulse of the patient. She had noted that the blood pressure was less than normal, however, she has denied the suggestion that Vithabai was not in a position to speak or fit state of mind to give statement. She has admitted that if there are burn injuries to the head and face, those are counted to 9%, right upper limb 9%, left upper limb 9%, anterior trunk 18%, posterior trunk 18%, right lower limb 18%, left lower limb 18% and genital organ 1%, then it is the serious case of burn. Here, in this case, if we consider the Postmortem Report, then, it says that the burn injuries were to

the extent of 57% superficial to deep burns and the diagram that has been prepared by PW 6 Dr. Sulbha Salunke, who conducted the autopsy, would show that the burn injuries were to the upper extremity. PW 3 Somnath Bagul as well as PW 10 Suresh Deshmukh both have taken the left thumb impression of Vithabai, which has been objected by the learned Advocate for the appellant, who says that if we consider the diagram that has been given in the postmortem report, then, even the finger had received the burn injuries which will make it impossible to take proper thumb mark and if we consider the thumb marks on the dying declarations, those are having clear finger print. To this, the answer would be that specific question was not asked to PW 3 and PW 10, who have stated that before them the said finger print was taken. No corresponding question was also asked to the Doctor, who had certified the Vithabai in a fit state to give statement. They had the occasion to see and treat Vithabai. When the witnesses were available and if no question is asked, then, the said point cannot be canvassed for the first time in appeal. Vithabai has survived for about two months thereafter. Therefore, taking into consideration the testimony of PW 3 Somnath Bagul, PW 4 Dr. Geeta Gole, PW 10 Suresh Deshmukh and PW 5 Dr. Pradeep Ahirrao it can be certainly said that both the dying declarations were proved by the prosecution beyond reasonable doubt.

16 If we consider both the dying declarations, then certainly there is some difference in dying declaration Exh.69. In Exh.69, she says that she and Anita were supposed to go to field and, therefore, came out of the house around 6.00 p.m., whereas in Exh.41, she says that accused knocked the door at 6.00 a.m. and started saying that there is trouble from her to him, as she is always making noise he would eliminate the reason for the noise itself and then poured kerosene on her person. The act though different, the role attributed to the accused is same and, therefore, it cannot be said that only on the count of this chronology the dying declaration itself is unbelievable. Therefore, we record a finding that both the dying declarations have been proved legally by the prosecution.

17 PW 1 Vaishnavi Aadhav is the daughter of PW 2 Anita Aadhav. Their testimony would give some different picture than the dying declarations on the count that what had happened early morning i.e. prior to even 6.00 a.m. PW 1 and PW 2 do not corroborate each other as regards the alleged incident that had taken place at about 5.00 a.m. and it is also not corroborated by the dying declarations. However, as regards the incident at 6.00 a.m. is concerned, PW 1 Vaishnavi and PW 2 Anita stood corroborated. They were saying that Vithabai was proceeding from the house and then the accused came with kerosene and tembha, poured the kerosene from the

utensil on her person and ablazed her. The neighbouring persons and PW 2 Anita extinguished the fire. Thus, on the material particulars these two witnesses also stand corroborated. There is no reason to disbelieve the testimony of PW 1 Vaishnavi, though she says that her school opens daily around 7.00 a.m. The incident has taken place at 6.00 a.m. and, therefore, she could not have started for going to school when the alleged incident took place. No doubt, it appears that there is some improvement in the testimony of PW 1 Vaishnavi. Even if we completely ignore her testimony; yet, testimony of PW 2 Anita and both the dying declarations would prove the case of the prosecution. PW 2 Anita in her cross-examination has admitted that her husband is residing at a different place, but it has been extracted from her that there used to be frequent quarrel between her mother and the accused. A month prior to the incident there was quarrel between them, which was required to be intervened by her husband. Though she says that neither she herself nor her mother had given any complaint about that incident to the police or regarding the harassment of the accused, when the said fact is extracted in the cross, it will have to be taken a note of. It paints picture that there was a dispute between the accused and the deceased. Now, to what extent the dispute was and what was the reason for the quarrel has not been extracted from her. Again, at the costs of repetition, we would say that when the witnesses were available, the explanation should be called

upon from them and it should not be left to the imaginations by anybody. Detailed cross-examination of PW 2 Anita would show, as to what steps she had taken, whether the deceased was taken for further treatment etc. Therefore, it can be certainly said that there is sufficient evidence to prove that the accused has come prepared to ablaze Vithabai, he had brought the kerosene in the utensil and also brought the tembha i.e. burning wood and, therefore, when Vithabai expired on 10.11.2012 and it has been proved by PW 6 Dr. Sulbha Salunke that her death was due to the burn injuries she had sustained; prosecution has proved that it is the homicidal death.

18 In this case, the accused has been arrested on the same day i.e. on 08.09.2012 and his clothes have been seized. The seizure panchnama has been proved through PW 9 Vijay Patil – the panch witness and PW 10 then PSI Mr. Suresh Deshmukh – Investigating Officer. In the cross-examination PW 9 Vijay Patil has admitted that he had not confirmed as to whether the said clothes were that of accused or not. He admitted that he is a panch witness in many sessions cases, but that is not a sufficient factor to discard his evidence. Merely because he stood panch in other cases, it cannot be said that he is habitual and his testimony is required to be discarded. When the said fact was put to accused under Section 313 of the Code of Criminal Procedure at question No.15 regarding the seizure of his clothes and

panchnama Exh.69, he gives answer as “I do not know”. That means, he is not denying the said fact that his clothes were seized or the clothes Article Nos.6 and 7 are not his clothes. C.A. report Exh.73 puts those Article Nos.6 and 7 as Exh. Nos.8 and 9 and it is stated that the result of tests for the detection of kerosene residues on Exhs.8 and 9 are positive. It was positive as regards the other articles also, but we are more concerned with the shirt and the pant. The explanation to that effect has not been given by the accused, as to how his clothes had kerosene residue. This is another circumstance which goes against the accused.

19 The accused has examined his son DW 1 Dr. Dinesh Tupe and his nephew DW 2 Deepak Tupe. It is to be noted that the testimony of DW 1 Dr. Dinesh Tupe would show that he was not an eye witness and, therefore, whatever he had said about the happenings on that day was on the basis of some other person's information. It appears that he was examined, also to show as to why the accused has been implicated. However, it is to be noted that the said reason is not appearing in his statement under Section 313 of the Code of Criminal Procedure. According to DW 1 Dr. Dinesh Tupe, two ladies were residing in the vicinity of Vithabai's house, who were doing prostitution, but according to DW 1, deceased was collecting money from the customers of those two ladies. He says that the vicinity was defamed because

of such activity and, therefore, the accused and his wife were convincing Vithabai to give up the said activity. He also says that on the day of incident there was quarrel between a rickshaw driver, who had come as customer to those prostitutes, and then Vithabai and Anita had gone to lodge report with the Police Station against the rickshaw driver. He then says that thereafter Vithabai and Anita went to Bapji Rural Hospital, where Vithabai was admitted. The said witness is a medical practitioner. He has done B.A.M.S., but should possess the basic knowledge. When according to him, no incident had happened, then why Vithabai was admitted to hospital and the other Doctors are saying that the percentage of the burn she had suffered was to the extent of 57%. In the cross-examination he has admitted that neither he himself nor his father had ever lodged any report against those two persons and/or Vithabai. Therefore, except the bare statement there was no support to his testimony.

20 The testimony of DW 2 has turned out to be rather against the accused himself. Though he says that two ladies were doing prostitution and accused was opposing, he claimed ignorance as to what happened on the day of incident. He admits that Vithabai was shifted to Bapji Rural Hospital and in the cross taken on behalf of the prosecution he admits that he had visited Bapji Rural Hospital, met Vithabai and Vithabai told him that accused had set

her to fire. That means, it was the oral dying declaration given by Vithabai to DW 2. Therefore, taking into consideration the testimony of the defence witnesses, it cannot be said that the accused has been falsely implicated. Rather it supports the case of the prosecution by way of oral dying declaration that accused is the author of the crime.

21 The reasons above stated would take us to the conclusion that the prosecution had proved the offence beyond reasonable doubt against the accused. We do not find any illegality or error committed by the learned trial Judge in convicting the accused. There is no merit in the present appeal. Hence, following order.

ORDER

1 The appeal stands dismissed.

2 Fees of the appointed Advocate is quantified at Rs.10,000/- (Rupees Ten Thousand only).

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)