

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.334 OF 2017

Chandrakant Vishwanath Solas,
Age 25 yrs., Occ. Labour,
R/o Rahulnagar, Galli No.2,
Mama Chowk, Aurangabad.

... Appellant

... Versus ...

The State of Maharashtra

... Respondent

...

Mr. D.S. Ingole, Advocate h/f Mr. N.S. Ghanekar, Advocate for appellant
Mrs. V.S. Choudhari, APP for respondent

...

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

RESERVED ON : 04th SEPTEMBER, 2023

PRONOUNCED ON : 12th SEPTEMBER, 2023

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

1 Present appeal has been filed by the appellant challenging his conviction by learned Additional Sessions Judge, Aurangabad on 10.07.2017 in Sessions Case No.32/2015 after holding him guilty of committing offence

punishable under Sections 302, 498-A of the Indian Penal Code, 1860.

2 It is not in dispute that deceased Madhuri got married to the appellant about 04 years prior to 08.11.2014. They were residing at Rahulnagar, Aurangabad. At that time their daughters Nikita was 2½ years old and Janhvi was 5 months old. They were residing with the parents of the appellant and his two brothers.

3 The prosecution has come with a case that Madhuri was admitted to GHATI, Aurangabad on 08.11.2014 and on the same day her statement was recorded by PW 1 ASI Mr. Narayan Butte around 7.15 p.m. She disclosed that the accused was addicted to liquor and used to pick up quarrels and used to assault her under the influence of liquor. Around 1.30 p.m. on 08.11.2014 she was with her husband i.e. appellant. Appellant was under the influence of liquor. He was abusing and assaulting her. He was also abusing her relatives. She told that she is fed up with his daily harassment and it is better that she would die. The accused then asked her, as to whether she has courage. Thereupon, she poured kerosene from stove on herself and then he said that how she would die, let he would set ablaze to her. He ignited the matchstick and threw it on her. As a result of which, her clothes caught fire and then accused fled from the house. Madhuri

started shouting. As a result of which, the neighbouring Abedabi came and extinguished her fire. The father-in-law then took her to GHATI, Aurangabad.

4 On the basis of above said statement offence vide Crime No.189/2014 came to be registered for the offence punishable under Sections 307, 323, 504 of the Indian Penal Code. On the same day Executive Magistrate has recorded her statement around 9.25 p.m. The spot panchnama was executed, when Medico Legal Certificate was received by ASI Mr. Narayan Butte. In fact, he has carried out the spot panchnama first and then had gone to hospital to record the statement/dying declaration, which came to be then registered as First Information Report. Madhuri succumbed to the injuries on 19.11.2014 and after executing inquest panchnama, the dead body was referred for postmortem. She was sustained 63% burns and the cause of death was "Septicemia due to dermo-epidermal thermal burns". Thereafter, Section 302 of the Indian Penal Code came to be added, statements of the witnesses were recorded, accused came to be arrested and after completion of investigation charge sheet was filed.

5 After the committal of the case, charge was framed and when accused pleaded not guilty, trial has been conducted. Prosecution has

examined in all 10 witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides the learned trial Judge has held that the prosecution has proved offence under Section 302 of the Indian Penal Code and has sentenced the accused to suffer imprisonment for life and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer simple imprisonment for 10 days. The accused has been further held guilty of committing offence punishable under Section 498-A of the Indian Penal Code and has been sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer simple imprisonment for 10 days. The substantive sentences were directed to run concurrently and set off under Section 428 of the Code of Criminal Procedure has been granted. The accused has been acquitted of the offence punishable under Section 504 of the Indian Penal Code.

6 Heard learned Advocate Mr. D.S. Ingole holding for learned Advocate Mr. N.S. Ghanekar for the appellant and learned APP Mrs. V.S. Choudhari for the respondent.

7 The learned Advocate for the appellant has vehemently submitted that the learned trial Judge has not appreciated the evidence properly. The prosecution case was relying on the two dying declarations i.e.

one recorded by PW 1 ASI Mr. Narayan Butte and another was by PW 5 Sanjay Chavan, Special Judicial Magistrate. The endorsement on both the dying declarations appeared to have been given by PW 8 Dr. Rutuja Chavan. If we consider both the dying declarations as it is, yet, the variance can be apparently seen. In one dying declaration the details are tried to be given and the cause for the fight. However, in the other i.e. Exh.46 she only says that she had poured kerosene in anger around 1.00 to 1.30 p.m. but the accused had ignited the matchstick and threw it on her. That means, the reason has not been given. Only on the basis of omnibus statement that accused used to drink liquor and used to abuse and assault will not be a ground of conviction under Section 498-A of the Indian Penal Code. The neighbouring witness Abedabi has not been examined at all by the prosecution for the reasons best known to it. PW 9 Bandu Tribhuvan is also the neighbour of the accused and he says that he extinguished the fire but he has been declared as hostile as he did not support the prosecution story in respect of abusing and assaulting by the accused to the deceased. Testimony of PW 6 Nanbabai, who is the mother of deceased Madhuri, would show that oral dying declaration was given to her, but in the oral dying declaration the story is different. She says that on the day of incident accused came home after drinking liquor and demanded meal to Madhuri. Madhuri replied that there was no material for cooking food and, therefore, food is not ready.

Then the accused started beating her and the further dialogues have been stated. She has also stated that Madhrui told her that she herself had poured kerosene on her person. In her cross-examination the mother has admitted that the accused is residing with his two brothers and parents, jointly. There were two rooms of tin sheets. Elder brother of accused is deaf and dumb and is not earning anything. The younger brother of the accused was unmarried at that time. She admits that Madhrui was alone, who was required to do the household work and she was having small kids. The mother has then denied that Madhuri used to feel tired by doing labourous work and was also fed up with poverty. The dying declarations were the outcome of the tutoring by Siddharth Gaikwad, who is the son-in-law of PW 6 Nandabai. Siddharth was employed in GHATI, Aurangabad at the relevant time. There could not have been any intention on the part of the accused to commit murder of his wife as she was the only person who was doing the household work.

8 In the alternate learned Advocate for the appellant made submission that there was quarrel between the husband and the wife and in that quarrel deceased herself had poured kerosene and it is rather invited by her. Therefore, the act was the outcome of the sudden and grave provocation by the deceased. Hence, the case would fall under Section 304(II) of the Indian Penal Code. The appellant came to be arrested on 09.11.2014 and he

is still in jail. Therefore, the punishment be reduced to already undergone.

9 Per contra, the learned APP strongly opposed the appeal and submitted that there is consistency in the two dying declarations. Those dying declarations have been properly proved. The hostility of PW 9 Bandu will not affect the prosecution story. The dying declarations are worthy of credence and, therefore, the conviction can be based on those dying declarations. The dying declarations were given by Madhuri while she was in fit mental state. The testimony of her mother PW 6 Nandabai would corroborate the dying declaration and there was also oral dying declaration to her. Admittedly, the incident had taken place in the house of accused and, therefore, the accused ought to have expressed explanation as to under which circumstances Madhuri caught fire and received burn injuries. The spot panchnama would show the magnitude and, therefore, it cannot be said that the accused had no intention to kill his wife. Though Madhuri herself had poured kerosene upon herself; yet, it might have been to cause fear in the mind of accused and she had no intention to commit suicide. The accused took the opportunity and then ignited the matchstick and threw the same on Madhuri. He had the knowledge of consequences of his own acts and, therefore, it was culpable homicide amounting to murder. No interference is, therefore, required.

10 Before we proceed to scrutinize the evidence, we would like to say that in this case the prosecution is mainly relying on the two dying declarations; one recorded by the Police Officer and another recorded by the Special Judicial Magistrate. Therefore, we want to take note of the legal position as regards evidentiary value of 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.

11 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]**.

12 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.”

13 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.”

14 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.”

15 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.

16 After taking note of the said position, it is very much clear that the dying declaration can be the basis for conviction if it inspires confidence and if it is procedurally taken/recorded. The law was set into motion after PW 1 ASI Mr. Narayan Butte, attached to Police Outpost, recorded the dying declaration Exh.16. He deposed that he was attached to Police Outpost on 08.11.2014 and after he received Medico Legal Certificate No.305/2014, he went to the place of incident. One Bandu Tribhuvan showed him the place.

Thereupon he prepared the panchnama Exh.14. Pieces of sari, one stove, one match box and three partly burnt match sticks were seized from the spot. He says that he had also taken the photographs of the place of incident through Photographer Rajendra Jadhav. Thus, it is to be noted that he had given more importance to the spot and executed the spot panchnama than to go to hospital and record the statement of the injured, which is not the purport and duty of a Police Officer. He then says that after executing panchnama Exh.14 he went to Police Station and then to GHATI, Aurangabad. He gave letter to Medical Officer requesting for the endorsement of the patient and to see whether the patient was in a fit state of giving statement. After the Doctor opined that the patient was in a fit state of mind to give statement of Exh.15, he recorded the statement of the patient. He took thumb impression of the patient and put his signature on the same, which is not at Exh.16. Important point to be noted is that he has given the details as to what was told by the injured/patient Madhuri to him. One may say that when the document is in written format, then contents of the same need not be reproduced by the person who recorded it. In other words, the person, who got the dying declaration recorded may not say about the contents of the same made before him. However, it was expected from PW 1 Narayan Butte that he should say that he had got the mental state of the patient ensured, identity confirmed before recording the statement and after the statement was

recorded/reduced into writing, it was expected that he should have read over to her, get the confirmation of the patient/maker and then again get the certificate from the Doctor stating that the mental condition of the lady was proper/good throughout the statement. But this witness has not stated anything. Only four lines have been stated in respect of Dying Declaration-cum-First Information Report Exh.16 and it has been exhibited. Mere exhibiting a document does not prove the admissibility and such documents cannot be read in evidence. No doubt, in the Exh.16 it is said that the statement was read over to her and she admitted to be correct. But that should have been told by PW 1 Narayan. There is no reason given by him as to why he obtained the endorsement from the Doctor on Exh.15 and not on Exh.16. These two are two separate papers. At this stage itself, it can be seen that PW 8 Dr. Rutuja has also not stated, as to why she has given the said endorsement on Exh.15 and not on Exh.16. It definitely creates a doubt, because such certificate can be conveniently taken at a later point of time. Further, she has also not stated that after the statement was over she had again examined Madhuri and found that she was in a fit state throughout the statement. No such endorsement is there and the endorsement on Exh.15 states that "patient is conscious, oriented and in a state to give valid statement at present". Here, it is to be noted that Madhuri had sustained 63% burns and she succumbed to those injuries on the next day. Therefore,

each and every moment was precious and it ought to have been proved that Madhuri was conscious throughout the statement i.e. till the end also. Therefore, we do not find that the procedure that was adopted by PW 1 Narayan to record Exh.16 was proper and legally acceptable. We are aware that it is not at all necessary to have medical certificate certifying the mental state of the maker in case of dying declaration, but the satisfaction of the writer regarding the said mental status was important. But his examination-in-chief is silent regarding the efforts taken by him to confirm the mental status of Madhuri. In his cross-examination he has stated that he had not talked to the patient prior to obtaining opinion of the Doctor. The Doctor had shown him the patient and then he says that nobody was present while recording the statement except the patient and himself.

17 Even if for the sake of argument we take that the said dying declaration Exh.16 is properly and legally proved, it can be said that what Madhuri has conveyed was that her husband was in habit of drinking liquor and used to assault and abuse her. He used to abuse her relatives also. She has not stated since when the alleged harassment was going on. The second daughter was five months old at the time of incident. If the differences between the husband and wife were of severe nature, then probably the second child would not have been born. The said statement on the part of

the deceased appears to be very vague. As regards the date of incident is concerned, she says that around 1.30 p.m. on 08.11.2014 she was with her husband and her husband was in drunken state. He started assaulting her and abusing her as well as abusing her relatives. Again we find that it is vague, why he would start abusing and assaulting her or abruptly he would do that, is a question. But still she further says that thereafter she told that it would be better to die than to sustain his ill-treatment. Thereupon he told that whether she has courage, thereupon she poured kerosene from the stove and then he said that why she would die, he would kill her. Thereafter, the matchstick was ignited and it was thrown on her person. If we consider the spot panchnama executed by PW 1 Narayan, then it can be seen that the description of spot of incident is as vague as it is. It consists of tin sheets and it appears that it is divided into two rooms. Though at one place it is said that there is kitchen, but there is no mention of other utensils in the same and only stove has been mentioned. At the same time, if we consider the photographs, it shows the utensils. The clear picture is not emerging. Here, again we will take note of the testimony of PW 6 Nandabai, who has admitted that Madhuri and accused used to reside with the parents and two brothers of the accused. There is absolutely no mention about those persons in the dying declaration Exh.16. Where those persons were at the time of incident has not been brought on record by the prosecution. Therefore,

Exh.16 is a doubtful document, even if we take the contents thereof.

18 At this stage, we turn to the second dying declaration recorded by PW 5 Sanjay Chavan, the Special Judicial Magistrate. He has stated that he received letter from police at about 8.15 p.m. on 08.11.2014 i.e. Exh.17 requesting him to record statement of Madhuri. Thereafter he went to GHATI, Aurangabad, took endorsement by the Medical Officer, he asked the relatives to go out, he introduced himself to the patient and disclosed about his intention. He put certain questions like name and whereabouts and then he recorded the reason as to how the incident had taken place. He told that around 1.00 to 1.30 p.m. there was quarrel between herself and her husband. She poured kerosene on her person under heat of anger and her husband ignited the matchstick. She told that she has complaint against her husband. Her husband used to beat her by consuming liquor. The said dying declaration is at Exh.46. Thus, it can be seen that almost in sequence the second dying declaration has been recorded and the prosecution has not stated as to why there was necessity to get the second dying declaration recorded from the Special Judicial Magistrate. If we are to say that it has more evidentiary value than the dying declaration recorded by the police, then we will have to compare the two dying declarations. Even though it is in quick succession, the necessary details as to what was the point of quarrel

has not been stated by her. In his cross-examination he has categorically admitted that he had not inquired what was the cause of the quarrel. He has also not inquired about the place of incident. It is definitely certain that in Exh.46 also Madhuri is stated to have said that she poured the kerosene on herself, but then she does not say that what was the reason for her to do that act. Heat of anger has been tried to be stated, but it cannot be related to the alleged daily harassment or ill-treatment. Therefore, both the dying declarations appeared to be contradictory to each other or not fully corroborating to each other. Merely because the role assigned to the accused is same, we cannot say that both the dying declarations should be accepted. Again as regards this dying declaration also the endorsement by Dr. Rutuja is not on the same page, but it is on the separate page that too at the beginning and not even at the end.

19 Taking both the dying declarations as it is, there is absolutely no mention that there was any illegal demand of money and there was cruelty to Madhuri on that count. However, if we consider the charge that was framed at Exh.5 for the offence punishable under Section 498-A of the Indian Penal Code, the learned Additional Sessions Judge has said that the accused being the husband of Madhuri subjected her to mental and physical cruelty by beating, abusing with a view to coercing her to meet his unlawful demand.

That means, the charge was also not properly framed by the learned trial Judge. Section 498-A of the Indian Penal Code gets attracted when the husband and/or his relatives subjects a woman to cruelty and the explanation defining cruelty that has been given dividing it in two parts i.e. (a) and (b). As regards proof regarding the cruelty as contemplated under Explanation (a) of Section 498-A of the Indian Penal Code, the prosecution will have to prove the willful conduct on the part of the husband and/or relative of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (mental or physical) of the woman. Here, the contents of both the dying declarations, as aforesaid, are vague and are not clarifying since when she was being subjected to cruelty. Even as regards the testimony of PW 6 Nandabai is concerned, she has stated that the accused was addicted to liquor. He was beating deceased by consuming liquor. She used to visit her daughter's place and sometimes her daughter used to come to her and at that time she used to tell her about the ill-treatment. But then she used to give understanding to the daughter that there will be change in his behaviour after getting children. She is not further elaborating that what happened after birth of first child, whether same act continued, what course she had adopted to give understanding to the accused and what happened after the second child was born. Such vague statements do not prove the ingredients of the offence. Being the mother of

Madhuri it does not appear that she has tried to have settlement or redressal to her plight. PW 6 Nandabai does not say that she had talks with the parents of accused and asked them to intervene. She has admitted that accused is from her relations even prior to the marriage between the accused and Madhuri. They had the knowledge that accused has two brothers; elder was deaf and dumb and not earning and the younger was unmarried. She was aware that the accused was a labourer. Under the said circumstance, she ought to have taken active part in the redressal of the grievances of daughter. Now, after the incident is over, she cannot be allowed to say it in vague. Even from her testimony we are unable to get that the mental condition of Madhuri had become such that it was likely to drive her to commit suicide. In a sudden quarrel if she decides to commit suicide, then that cannot be covered under Explanation (a) of Section 498-A of the Indian Penal Code. As regards Explanation of (b) of Section 498-A of the Indian Penal Code is concerned, the prosecution will have to prove the harassment of the woman was with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. The facts and the evidence do not indicate that there was any kind of demand from the accused. Therefore, the conviction of the accused for the offence punishable under Section 498-A of the Indian Penal Code is absolutely not

sustainable. The learned trial Judge has failed to consider that the basic ingredients of the said offence are not proved.

20 PW 7 Dr. Manoj Patekar is the Medical Officer, who conducted the autopsy. There is no much dispute regarding the cause of death. Madhuri had sustained 63% burns and the cause of death was “Septicemia due to dermo-epidermal thermal burns”. In his cross-examination he has admitted that the burn injuries may be possible by accident, therefore, only on the basis of postmortem report we cannot come to the conclusion that the death was homicidal in nature.

21 Here, the prosecution has not examined Abadabi, who had reached the spot first in time, even as per the dying declaration Exh.16. However, prosecution has examined PW 9 Bandu Tribhuvan, the neighbour, who had said that in the noon time when he heard shouting, he came outside, he saw that the wife of the accused was burning. He was unable to say what happened, but he extinguished the fire. Abedabi was present. Madhuri carried to hospital by in-laws. He claimed ignorance as to whether accused is addicted to liquor. He has been declared hostile. But in cross-examination by the accused he has also stated that accused used to reside with his wife, two children, two brothers and parents, jointly. Accused and

his wife using the front room and rest of the members were using the back room. He never heard noise of quarrels between accused and his wife. Those statements in the cross-examination by this witness will have to be considered and those are against the interest of the prosecution. It rather shows that there was possibility of other family members in the house at the relevant time. Those family members have not been made as an accused not even for Section 498-A of the Indian Penal Code. The prosecution has not examined any one of them. Therefore, adverse inference will have to be drawn.

22 PW 2 Ramakant Ingale is the panch to the spot panchnama and as aforesaid, the said panchnama is as vague as it is. PW 3 Amirkhan Pathan is the panch to the seizure of clothes of the accused. Though in his examination-in-chief he has stated that pieces of sari were attached to the pant, in the cross-examination he has stated that he has signed on already executed panchnama and has not seen anything actually. His testimony is of no use at all. PW 4 Rajendra Jadhav is the Photographer. No doubt, those photographs are showing the situation from inside, but even the picture of the lane has also been taken, which shows that the house of the accused was surrounded by other houses. It was the day time and, therefore, possibility of persons immediately going to the spot has not been ruled out. Rather there

would have been many persons, but except PW 9 Bandu nobody has been examined.

23 Now, turning back to testimony of PW 6 Nandabai, to whom alleged oral dying declaration has been given and in respect of the same we would say that the oral dying declaration is the weakest piece of evidence and unless the testimony of the witness inspires confidence, it cannot be relied upon. So also, rule of propriety requires that it should be corroborated. The first and the foremost fact to be noted is that she does not give the time when she reached the GHATI, Aurangabad. She says that she had gone along with son Shailesh and daughter Archana. She is giving a different story. She says that earlier day the accused had assaulted Madhuri under the influence of liquor. He had not allowed to take dinner and on the next day he came to house after drinking liquor, demanded meal to her and when Madhuri replied that there is no material for cooking food and therefore the food is not ready, he started beating her. This story is not told by even the deceased in her both the dying declarations. Therefore, the said oral dying declaration does not inspire confidence.

24 PW 10 Pushpa Patil is the Investigating Officer. She has given the account of the investigation she has carried out. But, as aforesaid, two

dying declarations are not inspiring confidence/trustworthy for the reasons stated and the oral dying declaration is also not reliable. The learned trial Judge ought not to have based the conviction on the basis of two written dying declarations and one oral dying declaration. Further, it is also to be noted that the questions, those were formulated for being asked to accused under Section 313 of the Code of Criminal Procedure, are as cryptic as they are. It is not absolutely indicating as to who has said what. Still the question is asked thereafter, as to why the witnesses were speaking against him. The purpose of putting questions to the accused at the end of the trial is to give an opportunity to the accused to put forth his say in respect of the entire incriminating evidence. Here, we can get that all the incriminating evidence was not put to the accused and thereby a prejudice has been caused to him. Though this point was not agitating by the learned Advocate for the appellant, we are considering the same. As the learned trial Judge has failed to appreciate the evidence properly and has come to a wrong conclusion, interference is required. The appeal, therefore, deserves to be allowed by setting aside the impugned judgment and order. Hence, following order.

ORDER

1 The appeal is hereby allowed.

2 The conviction awarded to the appellant by learned Additional Sessions Judge, Aurangabad, Dist. Aurangabad in Sessions Case No.32/2015 after holding him guilty for the offence punishable under Sections 302, 498-A of the Indian Penal Code stands quashed and set aside.

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

4 He be set at liberty, if not required in any other case.

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

6 We clarify that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)