

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.523 OF 2016

Prabhakar s/o Ramdas Shinde
Age: 35 yers, Occu.: Agri.,
R/o. Village Kolegaon Wadi,
Taluka Jafrabad, Dist. Jalna.

.. Appellant

VERSUS

1. The State of Maharashtra
Through Police Station, Jafrabad,
Tq. Jafrabad, Dist. Beed.

2. Sudam s/o Rama Makode,
Age: 55 years, Occu.: Agri.,
R/o. Shindi, Tq. Jafrabad,
Dist. Jalna.

.. Respondents

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Mr. M. D. Gitte, Advocate for the appellant.

Mr. A. M. Phule, APP for respondent No.1 – State.

Mr. Govind Kulkarni, Advocate for respondent No.2.

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

DATE : 23rd August, 2023

JUDGMENT (Per Smt. Vibha Kankanwadi, J.) :-

. Present appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Jalna on 02.09.2016 in Sessions Case No.88 of 2014 after holding him guilty of committing offence punishable under Section 302, 498-A of

Indian Penal Code.

2. The facts which are not in dispute are that deceased Lata was married to present appellant in the year 2006. On the day of incident they had son by name Ganesh aged 7 years and daughter by name Komal aged 5 years. They all were residing together at Kolegaon, Tq. Jafrabad, Dist. Jalna.

3. The prosecution story in short is that when Latabai was admitted to Government Hospital, Buldhana, her dying declaration Exhibit-22 came to be recorded by P.W.6 PHC Durgadas Dahale on 01.02.2014. In her statement, she had stated that she is residing with her husband and children separately from her parents-in-law since two months after her marriage. Her husband i.e. present accused is addicted to liquor. She used to give him advise, but he was not listening. He used to beat her and had tried to ablaze her by pouring kerosene on her person twice in past, but she had rescued herself. When accused came home around 7.00 to 7.30 p.m. on 27.01.2014, Latabai told husband that since he is spending money on the liquor, there are no eatables in the house. He brings money on credit from people and then people start coming to the house while demanding the amount and, therefore, he should repay the amount. Husband did

not like that advise and after abusing her, he assaulted her with stick. She got up on the next day i.e. 28.01.2014 around 7.00 a.m. and she was near the hearth, but then again there was dispute between her and the husband on account of the amount of hand loan. Again the husband i.e. accused assaulted her with bamboo stick and abused her and also told that he would finish her. He brought the kerosene can kept under a cot, poured it on her and threw a burning kerosene lamp on her. She caught fire and ran out of the house by shouting for saving her. Neighbour Dnyaneshwar Nivrutti Pawar extinguished the fire by pouring water on her. Thereafter husband and cousin mother-in-law Chandrakala took her to Buldhana in Ape rickshaw of one Ganesh Shelke.

4. On the basis of said statement recorded by P.W.6 Durgadas, offence vide Crime No.10 of 2014 came to be registered under Sections 307, 498-A, 323, 504, 506 of Indian Penal Code with Jafrabad Police Station and investigation was started.

5. It appears that prior to FIR i.e. Dying Declaration Exhibit-22, P.W.14 Narayan Misal, the then Naib Tahsildar/Executive Magistrate recorded the statement of Latabai around 2.00 p.m. on 30.01.2014, wherein also she had blamed the accused.

6. After the registration of the FIR, panchanama of the spot was carried out and certain articles were seized from the spot. Statements of witnesses were recorded. Unfortunately, Latabai succumbed to the injuries on 04.02.2014. Inquest panchanama was prepared and the dead body was sent for postmortem. After the postmortem was carried out, supplementary statements of the witnesses were recorded. The accused came to be arrested. Accused gave memorandum and discovered bamboo stick with which he had allegedly assaulted deceased. The seized muddemal was sent for chemical analysis. Offence under Section 302 of Indian Penal Code came to be added and after completion of investigation, charge-sheet was filed.

7. After the committal of the case, the prosecution has examined in all fourteen witnesses to bring home the guilt of the accused. The accused has examined two witnesses in defence. D.W.2 Jayraj Suryawanshi was then Residential Naib Tahsildar of Buldhana, who had recorded the dying declaration Exhibit-66 around 11.55 a.m. of 28.01.2014. D.W.1 Dr. Rajendra Ramlal Chavan is the medical officer, who had given endorsement regarding the fitness of Latabai to give dying declaration. In the said dying declaration, deceased Latabai

had not blamed anybody and has stated that her husband had gone out for work and she was preparing tea on stove around 7.30 a.m. When she was filling air in the stove, it bursted. That is how she caught fire and, thereafter, her husband and sister of father-in-law took her to hospital. Thus, the defence was that she caught fire as a result of bursting of stove and after her relatives arrived, she has changed the version and the two dying declarations recorded subsequently are outcome of tutoring.

8. Taking into consideration the evidence on record and hearing both sides, learned Trial Judge has held the accused guilty. For the offence punishable under Section 302 of Indian Penal Code, the accused has been sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for three months. Further, he was also convicted for the offence punishable under Section 498-A of Indian Penal Code and has been sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.3,000/-, in default to undergo rigorous imprisonment for three months. Set off has been granted under Section 428 of the Code of Criminal Procedure as the accused was never released on bail. Fine amount that would be recovered was directed to be paid to

P.W.1 Sudam Rambhau Makode, father of deceased Latabai, as compensation under Section 357(1) of the Code of Criminal Procedure. This judgment and order is under challenge in this appeal under Section 374 of the Code of Criminal Procedure.

9. Heard learned Advocate Mr. M. D. Gitte for the appellant, learned APP Mr. A. M. Phule for respondent No.1 – State and learned Advocate Mr. Govind Kulkarni for respondent No.2.

10. It has been vehemently submitted on behalf of the appellant that the learned Trial Judge has not appreciated the evidence properly. The learned Trial Judge has not considered the first dying declaration in its proper perspective and on some technical issues it is said that the said dying declaration would have been given under pressure from the accused and his relatives. It was wrong on the part of the learned Trial Judge to come to the conclusion that after the arrival of the father, deceased got courage and she has given the second dying declaration Exhibit-58 before Naib Tahsildar. Thereafter in the quick succession, FIR Exhibit-22 was got written. In case of multiple dying declarations, the prosecution was supposed to put cogent evidence. When there are multiple dying declarations, the variance between the two or more dying declarations ought to have

been explained. He relied on the decision in **Rajendra Madhukar Kadam Vs. State of Maharashtra, 2014 (2) Mh.L.J. (Cri.) 502 : 2014 (3) Bom.C.R. (Cri.) 50]**, wherein there were three dying declarations. Then the variance between those dying declarations were brought on record, which showed no consistency. Then in that case such dying declarations cannot be relied. Similar view was taken in **Narendra Vitthalrao Hingane Vs. State of Maharashtra, [2016 DGLS (Bom.) 1687 : 2018 (2) Bom. C.R. (Cri.) 100]**.

11. Learned Advocate appearing for the appellant further submit that if we consider the testimony of P.W.1 Sudam – father of the deceased, then it can be seen that he has stated about the consumption of liquor and the habit of playing cards of the accused, but the acts of harassment as stated is beating. The demand of money was not to him and he does not say that at two times earlier Latabai was tried to be ablaze by the accused. On the day of incident also after he reached Buldhana Civil Hospital, it is said that oral dying declaration was given by deceased Latabai, who alleged to have been kept in general ward of Civil Hospital, Buldhana. In spite of that he has not lodged any report with the police, but then he says that he suspected the dying declaration alleged to have been given to the

Naib Tahsildar and, therefore, he insisted upon and met other police officers also, for recording the second dying declaration of Latabai. The entire story put forward by him is doubtful and same is the case with testimony of P.W.2 Punjabrao – son of P.W.1 and brother of deceased Latabai. He has also not tried to lodge any report against the appellant. All the panchas to the various panchanamas including the discovery panchanama have turned hostile. Even the son of the accused P.W.7 Ganesh, who was then seven years old when his deposition was recorded and was inside the house, has not supported the prosecution. The prosecution has then tried to prove dying declaration Exhibit-58 through P.W.11 Dr. Afshah Khan, the medical officer attached to the ward where the deceased was admitted and P.W.14 – the then Naib Tahsildar. The core has been taken by the learned Trial Judge, but surprisingly the first dying declaration has not been considered and the second dying declaration by Executive Magistrate suffers from variance with the first. Further, the third dying declaration Exhibit-22 i.e. the FIR would give all the details which P.W.14 had not heard or seen. When the deceased has tried to give explanation regarding the circumstances in which deceased caught fire, the said dying declaration has been discarded stating that the deceased was put under pressure to give that statement. The other

details which are on record have not been considered by the learned Trial Judge and, therefore, the conviction that has been awarded is wrong and perverse.

12. Per contra, the learned APP strongly supported the reasons given by the learned Trial Judge and submitted that both the dying declarations i.e. Exhibit-58 and Exhibit-22 are consistent. The length of the statement is not required to be considered, but what role is attributed and how the triggering point was raised is required to be explained. The husband has failed to rebut the evidence of the prosecution. When the dying declarations were consistent and firm, it need not be then supported by other persons. The conviction is therefore appropriate and lawful.

13. Learned Advocate Mr. Govind Kulkarni for respondent No.2 - informant while agreeing to the submissions made by learned APP further submitted that there was sufficient evidence and consistency in the dying declarations. Further, the accused has discovered the weapon for assault i.e. bamboo stick. The death of Latabai was due to “septic shock secondary to burn injuries (82% Approx.).” The role has been assigned as well as the motive behind the same has also been told. He relied on the decision in **Jagbir Singh Vs. State (NCT of**

Delhi), [(2019) 8 SCC 779], wherein it has been held :-

“ On a conspectus of the law as laid down by the Supreme Court, when there is more than one dying declaration, and in the earlier dying declaration(s), the accused is not sought to be roped in but in the later dying declaration(s), a somersault is made by the deceased, the case must be decided on the facts of each case. The Court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declarations. If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered. Equally, when there are divergent dying declarations it is not the law that the Court must invariably prefer the statement which is incriminatory and must reject the statement which does not implicate the accused. The real point is to ascertain which contains the truth”

14. Here, the case of the prosecution rests on two written dying declarations and two oral dying declarations. The chronology as is emerging from the record shows that in fact there were three dying

declarations and the police had taken cognizance on the basis of third dying declaration recorded by P.W.6 Police Head Constable Durgadas. The prosecution is in fact expected to be fair. Reliance can be placed on the decision in **Samadhan Dhudaka Koli Vs. State of Maharashtra, [(2008) 16 SCC 705]**, wherein it has been held that :-

“12. A dying declaration made before a Judicial Magistrate has a higher evidentiary value. The Judicial Magistrate is presumed to know how to record a dying declaration. He is a neutral person. Why the prosecution had suppressed the dying declaration recorded by the Judicial Magistrate is not known. The prosecution must also be fair to the accused. Fairness in investigation as also trial is a human right of an accused. The State cannot suppress any vital document from the Court only because the same would support the case of the accused.”

Here, in this case, the only difference is that the first dying declaration has been recorded by Executive Magistrate, but considering the facts, the ratio laid down in the above-said authority is perfectly applicable to the present case.

15. Prosecution therefore ought to have given explanation as to why there was necessity to have further dying declarations and at the time of recording first dying declaration, there was pressure on

deceased. In a way P.W.1 Sudam has tried to give history as to how he was required to approach the different authorities, but except the bare words, there is nothing. If again and again there is an attempt to take dying declarations, then possibility of variance cannot be ruled out. Therefore, a detailed dying declaration taken once would suffice. As the prosecution had not taken care to get the first dying declaration proved, the defence was required to examine D.W.1 and D.W.2 and, therefore, we would like to consider their evidence first as they had come in contact with the deceased first. D.W.2 then Naib Tahsildar Jayraj Suryawanshi has stated that Police Constable Ramesh Kadaleban had met him on 28.01.2014 and give him letter for recording the statement of Latabai Prabhakar Shinde. The said letter is at Exhibit-65. He then says that he went to civil hospital, met the doctor and even asked the doctor to go outside, when he was recording the statement. He took the dying declaration as per the say of Latabai and obtained thumb impression on the same. The dying declaration is at Exhibit-66. If we consider the dying declaration Exhibit-66, it says that she was preparing tea at 7.30 a.m. on stove and when she was filling air in the stove, at that time, it bursted. Nobody was at home. Her husband had gone out for work and then she says that husband had poured water for extinguishing the fire and

then he along with her relatives i.e. sister of father-in-law brought her to hospital. She has specifically stated that nobody is responsible for the incident. No doubt, the two statements create confusion at one place. She says that her husband had gone out for work and in the next sentence itself she says that the fire was extinguished by husband by pouring water. Only on the basis of this confusion or contrary statement, we cannot come to the conclusion that the said statement was given under pressure. For that purpose, we are required to consider the cross-examination of D.W.2. The said witness has stated that he is unable to tell exact time when he received the letter Exhibit-65. Prescribed form is available in their office and he had carried it while going to hospital, but then it is got reiterated from him that while recording dying declaration Exhibit-66, Latabai was in a condition to speak and he had obtained the opinion of the doctor. Prosecution cannot seek any advantage of the fact that D.W.2 had asked the doctor to stand outside. It was his decision to keep the doctor away. That does not mean that while giving the said statement, at any point of time, Latabai's health would have gone down. The said witness was not having knowledge as to who has admitted Latabai in the hospital. Even the suggestion is to the effect that Exhibit-66 does not bear the thumb mark of Latabai. As

aforesaid, the prosecution should be fair. It is not in dispute that D.W.2 was the Executive Magistrate, who was empowered to record dying declaration. That empowerment is by the government itself and, therefore, the prosecution cannot raise doubt over the intention of this witness to record the dying declaration.

16. D.W.1 Dr. Rajendra was the medical officer, who gave the endorsement regarding the medical condition of Latabai. He has stated that on 28.01.2014, he was having duty in casualty. Latabai was already admitted in the hospital. A Constable from Medical Police Chowki went near him and intimated that Tahsildar has come to record the statement of Latabai. Therefore, Dr. Rajendra went to the ward asked the relatives of the patient to go outside the ward. He then examined her and gave endorsement that she was conscious, oriented and fit to give dying declaration. After recording the dying declaration, he was again called by Tahsildar. He examined the patient and gave endorsement that the patient was fully conscious throughout the statement. He admits that he was outside the ward when the dying declaration was recorded. He had not brought the record about the medical treatment or history given by the patient on the day of evidence. We would like to say that it was in fact the duty

of the prosecution to get the medical treatment papers of Latabai on record. The prosecution cannot shirk its responsibility in such a way and try to put the said burden on defence witness. Even in the other two dying declarations it has come on record that Latabai was admitted to hospital by accused as well as his paternal aunt. That also by itself is not sufficient to infer that Latabai was under pressure or she was forced to give dying declaration Exhibit-66 in that way. Some other evidence is required to reach to that conclusion that she was under pressure. Further, when the said dying declaration Exhibit-66 was recorded, it has not come on record that who were the relatives, who were near Latabai. Even if for the sake of arguments it is accepted that only the accused and his maternal aunt were present, they were asked to go out by D.W.1 Dr. Rajendra Chavan. She has admitted the contents of Exhibit-66 after it was written and read over to her. If it was under pressure, she could have definitely told it to D.W.2 Jayraj. In fact, no question was asked to D.W.2 regarding pressure or force or such mental state of Latabai. Therefore, we hold that dying declaration Exhibit-66 was duly proved by the defence and it was the first dying declaration in which she had given clean chit to the relatives including the accused.

17. The second event in sequence can be gathered from the testimony of P.W.1 Sudam. He has stated that on the day of incident, his son P.W.2 Punjabrao received call on his mobile around 10.00 to 11.00 a.m. from accused. Accused had informed him that Latabai set on fire and was admitted to Government Hospital, Buldhana (here we want to clarify that the English deposition appears to be not correctly recorded, as in the Marathi deposition what we got is “लता जळाली”, thereby she caught fire). Thereafter, P.W.1 Sudam and his wife went to Government Hospital, Buldhana around 1.30 to 2.00 p.m. They found Latabai had received burn injuries. He asked her as to how the incident has taken place. Latabai was crying, her cousin mother-in-law was present and then he says that the accused as well as said mother-in-law were watching Latabai in anger in order to pressurize her. He then says that he inquired with doctors as to how much are the burns and received reply that she has received burn injuries to the extent of 82%. He then says that after a while when the said mother-in-law and accused were sitting at a distance he made inquiry with Latabai and at that time Latabai told him that when she returned from agricultural work that time accused demanded money under the influence of liquor and started beating her. Thereafter, at about 9.30 p.m. accused beaten her. Then she went to sleep in that condition,

but on the next day morning she could not get up because of beating, therefore, she went to earthen furnace in sitting position. Accused again beaten her and poured kerosene on her person from the nearby can and set her to fire by lightening lamp. She then came outside the house by shouting, then Dnyaneshwar Pawar poured water on her. This is the oral dying declaration that has been given by P.W.1 Sudam. At this stage, we would only like to say that this is totally different from the written dying declarations Exhibit-58 and Exhibit-22 except that the accused had set her to fire. Important point to be noted is that this witness is not giving the approximate time when the oral dying declaration was given to him, but then he says that after hearing the said dying declaration, he says that he got suspicious about the incident and then he went to his village Shindi and again went to hospital at Buldhana on the next morning. He had gone to police chowki and told that Latabai want to give second statement. According to this witness, even Tahsildar told him that he has no authority to record second statement. He then says that he along with his another son Viju went to Buldhana Court, met an Advocate and prepared an application. Along with the application, they went to Buldhana Police Station, who refused to accept the said application. Then he went to Sub Divisional Officer and as per the direction of Sub

Divisional Officer they prepared affidavit, gave it to Tahsildar and handed it over to Sub Divisional Officer's office. He thereafter returned to hospital and then the Tahsildar had come to hospital and recorded the statement of Latabai. Thus, it is to be noted that from his statement what we could get is that he was the person who wanted to have the second dying declaration of Latabai to be recorded. The second dying declaration is at Exhibit-58. On dying declaration Exhibit-58 it is written in the upper part that as per the order passed by Sub Divisional Officer Buldhana on 30.01.2014, the said dying declaration is recorded. The prosecution has not examined said Sub Divisional Officer, who has passed that order. Which documents he had considered before giving such order is not known. In fact, whether such order is needed itself is a question. But when as per the prosecution story this was the point which prompted recording of second dying declaration; then there ought to have been evidence to that effect. Still, the fact remains is that the incident had taken place on 28.01.2014 in the morning. In spite of the oral dying declaration, it appears that P.W.1 Sudam had not acted swiftly. He had not gone to the medical police chowki (police chowki situated within the Government Hospital) with a request that the second dying declaration should be recorded. He went home and on the next day

i.e. on 29.01.2014, he has given that application/affidavit to Sub Divisional Officer. In the cross-examination, he has stated that around 2.00 to 2.30 p.m. on 28.01.2014 Latabai had told him about the incident, that too within five minutes and according to him accused and the cousin mother-in-law were sitting at a distance of about 2 to 3 feet away from her. Here, all the while, we are reminding ourselves that as per the postmortem report, she had received 82% burns. Whether the accused and the said mother-in-law were able to hear what Latabai was saying to father is not coming on record. It appears that from the testimony of this witness that there was no reaction from him as against the accused or evidence by the accused against Latabai after the alleged oral dying declaration was given. These are the points which would be relevant for assessing whether Latabai was under pressure when she gave first dying declaration Exhibit-66. The treatment papers are not brought on record by the prosecution. Whether any sedative was given after considerable time of admission is not known. Therefore, the testimony of this witness does not appear to be trustworthy.

18. P.W.2 Punjabrao is the son of P.W.1 Sudam who had received phone call from accused. It appears that he had not gone with the father to Buldhana, but made inquiry about her condition after father

returned around 7.00 to 7.30 p.m. He himself had gone to meet his sister around 10.00 to 10.30 a.m. on the next day i.e. 29.01.2014. He says that Latabai told him after the inquiry was made by him about the incident that her husband had poured kerosene on her person and set her to fire. He then asked as to why she had not gone outside the house. Then she told that her husband had closed the door from inside and therefore, she could not run away. Latabai also told that her husband had beaten her on 27.01.2014 and also in the morning of 28.01.2014 by bamboo stick. Therefore, she was not in a position to walk properly. He then asked her as to why the accused had beaten her and then she told that accused was in a habit of playing cards and consuming liquor, he had obtained hand loan from people. She had tried to give him understanding and on that point she was assaulted on the night of 27.01.2014 and also in the morning of 28.01.2014. It can be seen that this oral dying declaration is again different than the oral dying declaration alleged to be given to P.W.1 as regards the sequence is concerned and the reason for beating. P.W.2 Punjabrao has given contrary statement. At one place he says that Latabai informed him that she could not run as accused had closed the door from inside, but then he says that after she started shouting when accused set her to fire, then accused opened the door and then she

came out of the house, then Dnyaneshwar Pawar poured water on her. Thus, it can be seen that conveniently somersaults are taken. He is then further explaining that the mother-in-law had convinced Latabai that she should give statement that she caught fire due to explosion of stove and then when Latabai denied to give said statement, her mother-in-law threatened her that if she would give that statement then only Latabai would be taken to hospital and then Latabai agreed. This version is not even in the written dying declarations Exhibit-58 and Exhibit-22 as well as to the father. P.W.2 has made material improvements, which have been taken on record thereby making his testimony untrustworthy.

19. In the further sequence, we would like to consider the testimony of P.W.8 Dnyaneshwar Pawar, who was the first person to reach and extinguish the fire. His name is appearing in all the three dying declarations as well as two oral dying declarations. P.W.8 Dnyaneshwar has stated that he know accused and his wife, who reside opposite to his house. He denied that accused is in habit of consuming liquor. He says that on the day of incident Latabai came outside the house after catching fire and then he had poured water on her. He says that about 100 to 150 people gathered there and at that

time Latabai was not in a position to speak. When it was found by the prosecution that this witness is not supporting, questions in the nature of cross have been put with the permission of the Court to him. He has denied that he has given any contrary statement to police. Further, in the cross on behalf of the accused, he has stated that the incident had taken place around 7.30 to 8.00 a.m. He has specifically stated that there was no quarrel between accused and Latabai and when he extinguished the fire of Latabai, accused was not present. Even if we keep the cross-examination of this witness aside, it can be seen that the prime witness who had gone to the spot immediately has not supported the prosecution.

20. P.W.7 Ganesh is the son of accused and deceased. He was 9 years old at the time of his deposition, which has taken place about two years after the incident. In his examination-in-chief, he has categorically stated that when his mother was preparing tea in the kitchen, at that time, there was sudden explosion of stove. Mother went running towards the door. Thereafter, Dnyaneshwar extinguished the fire. He has stated that one Gaju uncle has called his father on phone and at the time of incident his father was not at home. Again finding that this witness is not supporting the

prosecution. Questions in the nature of cross have been put. In the cross-examination, he admitted that he was residing with the parents of his father after the incident and had come to the Court along with them. He denied the suggestion that he was deposing falsely to save his father at the instance of grandfather. Important point to be noted is that the presence of this witness at the time of incident in the house is not denied by the prosecution. He denied the suggestion that there was quarrel between his mother and father in his presence and father had beaten his mother with stick. There was no suggestion to him that his father is in habit of drinking liquor. What was the reason for the quarrel was not put to him. Thus, the important witnesses have turned hostile.

21. Now, with this background, we turn to the two dying declarations i.e. Exhibit-58 and Exhibit-22. Dying declaration Exhibit-58 is written by P.W.14 Narayan Misal and endorsed by P.W.11 Dr. Afshah Khan. No doubt, on Exhibit-58 there is mistake in recording the thumb mark, but the explanation for the same is given in the cross by this witness. He says that Exhibit-58 bears impression of more than one finger, but he was unable to tell of which fingers those impressions are. It appears that when he wanted to take thumb mark

on the carbon copy also while taking out the main dying declaration, the fingers came in contact and the fingers with the ink got rubbed on Exhibit-58, however, he has taken proper thumb impression on Exhibit-58-A, which is the carbon copy. As regards the carbon copy is concerned, the law is clear. Since it is prepared out of uniform mechanical process and it is a primary evidence within the meaning of Explanation 2 to Section 62 of the Indian Evidence Act and it has been so held in **Prithi Chand Vs. State of Himachal Pradesh, [AIR 1989 SC 702]**.

22. Therefore, even if we take the second dying declaration as proved, yet it says that on the earlier day, there was quarrel between herself and accused around 7.00 to 7.30 p.m. on the ground of hand loan taken and she was assaulted by stick and the quarrel again started around 6.00 to 7.00 a.m. on 28.01.2014 and after the quarrel husband poured kerosene and set her to fire. She does not say about why the hand loan was taken and accused being addicted to vices.

23. P.W.6 Police Head Constable Durgadas had taken the dying declaration Exhibit-22 and says that on 01.02.2014 PSI Shingare directed him to record the statement of Latabai. In fact, this witness is attached to Jafrabad Police Station. P.W.12 Shingare has also been

examined, but neither P.W.6 nor P.W.12 are explaining as to who had given information to them on 01.02.2014 that Latabai was admitted to hospital at Buldhana. P.W.14 does not say as to how he transmitted dying declaration Exhibit-58 to Jafrabad Police Station within whose jurisdiction the offence is stated to have taken place. Under the said circumstance, why P.W.6 and P.W.12 felt it necessary that Latabai's statement should be recorded, is a question. Further, without making any inquiry as to whether any statement of Latabai was recorded prior to 01.02.2014, it appears that directly that decision was taken. P.W.13 Dr. Pratik Patara was the medical officer on duty on 01.02.2014, who had given endorsement on Exhibit-22. Even if for the sake of arguments without going into the technicalities if we consider the contents of Exhibit-22, yet it is giving some different version. It is much in details and again it will have to be stated that what was the treatment that was going on 01.02.2014 has not been placed on record by calling the treatment papers.

24. This dying declaration Exhibit-22 does not say of which hand or leg the thumb impression is. At first place, in the cross-examination P.W.6 Durgadas says that Latabai had signed by her right hand, but then he corrected himself and then says that he cannot tell exactly as

to of which hand he had taken the thumb impression.

25. Thus, the entire scrutiny of dying declarations would show that there is variance between each of them.

26. The learned Advocate for the appellant has relied on the decision of the Division Bench of this Court, whereas the learned Advocate for respondent No.2 has relied on the recent decision of the Hon'ble Supreme Court. Under these circumstances, we would consider the law laid down by the Hon'ble Supreme Court. After considering the catena of decisions, the Hon'ble Supreme Court in **Jagbir Singh (Supra)** has observed thus :-

“32. We would think that on a conspectus of the law as laid down by this Court, when there are more than one dying declaration, and in the earlier dying declaration, the accused is not sought to be roped in but in the later dying declaration, a somersault is made by the deceased, the case must be decided on the facts of each case. The Court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declarations. If the Court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness

with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered.”

27. Thus, it is to be noted that each and every dying declaration will have to be tested on its own merits. The parameters have been laid down as to what are the criteria or principles those are to be considered while assessing the dying declarations. Taking into consideration those principles itself, we have considered each and every dying declaration. In addition to that we would say that oral dying declarations are the weakest piece of evidence and here, in this case, the two dying declarations are in variance with each other as well as in variance with the written dying declarations. We cannot restrict ourselves to the role played, but also we will have to consider the reasons or the genesis for the incident. If that genesis is coming differently, then none of the dying declarations which are in variance with the first can be accepted. At the cost of repetition we would say that the prosecution has failed to bring on record that the first dying declaration was the outcome of pressure or threat to the deceased. In

fact, there is total suppression of the first dying declaration by the prosecution and, therefore, the benefit should go to the accused.

28. As regards the other witnesses i.e. panch witnesses P.W.1, P.W.2 and P.W.3 are concerned, they have turned hostile. Though the investigating officer has proved those panchanamas, yet for the proof of discovery of weapon i.e. bamboo stick, when the panchas have turned hostile, the said discovery cannot be said to have been proved at all.

29. The learned Trial Judge has failed to appreciate the evidence properly. Mere apparent corroboration cannot be considered and it cannot be said to be a thorough scrutiny of evidence, which has to be undertaken by any Court of law. Therefore, interference is required. Such conviction cannot be allowed to sustain. Hence, the following order :-

ORDER

1. The appeal stands allowed.
2. The conviction awarded to the appellant by learned Additional Sessions Judge, Jalna in Sessions Case No.88 of 2014 on 02.09.2016 after holding him guilty of committing offence punishable under Sections 302 and 498-A of Indian

Penal Code, stands quashed and set aside.

3. The appellant – Prabhakar s/o Ramdas Shinde stands acquitted of the offence punishable under Sections 302 and 498-A of Indian Penal Code.

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

5. We clarify that by setting aside the conviction, we are also setting aside the order in respect of compensation directed to be paid to P.W.1 Sudam s/o Rambhau Makode i.e. respondent No.2, under Section 357(1) of Cr.P.C.

6. Fine amount deposited, if any, be refunded to the appellant after the statutory period is over.

7. We further clarify that there is no change in respect of order of disposal of *Muddemal property*.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

scm