

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

CRIMINAL APPEAL NO.463 OF 2016

Parmeshwar s/o Sadashiv Sanap,
Age-30 years, Occu:Labourer,
R/o-Village Isarwadi, Taluka-Paithan,
District-Aurangabad,
(At present Appellant is in Aurangabad
Central Prison, Harsool, Aurangabad,
Taluka and District-Aurangabad)

**...APPELLANT
(Orig. Accused No.1)**

VERSUS

The State of Maharashtra,
Through the Police Station,
M.I.D.C., Paithan,
District-Aurangabad.

...RESPONDENT

...
Mr. Satej S. Jadhav Advocate for Appellant.
Mr. R.D. Sanap, A.P.P. for Respondent – State.
...

A N D

CRIMINAL APPEAL NO.595 OF 2016

Sampat S/o Bhagwan Garje,
Age-47 years, Occu:Private Service,
R/o-Baramati, Taluka-Baramti,
District-Pune.

**...APPELLANT
(Father of Victim)**

VERSUS

- 1) The State of Maharashtra,
Through Police Station Paithan,
M.I.D.C., Taluka-Paithan,
District-Aurangabad,
- 2) Kamalbai w/o Sadashiv Sanap,
Age-57 years, Occu:Household,
R/o-Raimoha, Tq-Shirur (K.),
District-Beed.

...RESPONDENTS

...
Mr. Ramesh R. Imale Advocate for Appellant.
Mr. R.D. Sanap, A.P.P. for Respondent No.1 – State.
...

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

DATE OF RESERVING JUDGMENT : 31st MARCH 2023

DATE OF PRONOUNCING JUDGMENT : 3rd MAY 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Both the Appeals arise out of the Judgment and order passed by the learned Additional Sessions Judge, Aurangabad in Sessions Case No.191 of 2008 dated 8th July 2016 and therefore the same are proposed to be disposed of by this common Judgment.

2. Criminal Appeal No. 463 of 2016 is filed by original accused No.1 challenging his conviction after holding him guilty of committing offence under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs.1000/- and in default of payment of fine, to suffer simple imprisonment for one month. It is alleged that accused No.1 has committed murder of his wife.

3. Appellant in Criminal Appeal No. 595 of 2016 is the father of deceased Dipali, who challenges acquittal of original accused No.2 i.e. mother-in-law of Dipali from the offence punishable under Sections 302, 342 read with Section 34 of the Indian Penal Code, by invoking the provisions of Section 372 of the Code of Criminal Procedure.

4. The prosecution story, in short, is that Dipali and accused No.1 Parmeshwar (hereinafter referred to as "accused") got married in November 2004 and they had a son – Shubham, aged about 1½ years on 28th August 2007. Parents of Dipali used to reside at Baramati whereas her matrimonial home was at

Raimoha, Tq-Shirur, District-Beed, but accused was running a grocery shop at Isarwadi, Taluka-Paithan, District-Aurangabad. The in-laws used to reside at Raimoha whereas accused, Dipali and son Shubham used to reside at Isarwadi.

5. It is the further prosecution story that Dipali had caught fire and was admitted to Bembde Hospital, Aurangabad on 28th August 2007 and her dying declaration Exhibit-76 came to be recorded by the Executive Magistrate Krushna Shinde around 2.10 p.m. and then it was treated as First Information Report (for short "FIR"). Offence vide Crime No.61 of 2007 was registered with M.I.D.C. Police Station, Paithan, for the offence punishable under Sections 307, 342 read with Section 34 of the Indian Penal Code against husband as well as mother-in-law. It is further prosecution story that on the same day even PW-8, the then API Jivan Mundhe also recorded dying declaration Exhibit-102 when Dipali was admitted in Bembde Hospital and thereafter the investigation was taken up. Panchnama of the spot was executed and certain articles were seized from the spot. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. Dipali succumbed to the

injuries on 3rd September 2007. The inquest panchnama was prepared and dead body was sent for postmortem. Provisional postmortem report was initially collected and later on final postmortem report has also been collected. Supplementary statements were recorded. Later on accused persons came to be arrested. The clothes on the person of the accused were also seized. Seized articles were sent for chemical analysis and after completion of the investigation, charge-sheet was filed before the learned Judicial Magistrate First Class, Paithan.

6. After committal of the case, charge was framed against both the accused under Section 302, 342 read with Section 34 of the Indian Penal Code, at Exhibit-28. Both the accused pleaded not guilty. Trial was conducted. Prosecution has examined in all eight witnesses to bring home guilt of the accused. After the incriminating evidence had come, statements of the accused persons under Section 313 of the Code of Criminal Procedure have been recorded. The defence of the original accused No.2 was of total denial. The defence of accused No.1 was that Dipali was short tempered. There was house warming ceremony at Raimoha and they had gone to that place. Parents-in-law stayed

there. Accused came to Isarwadi on 27th August 2007 and on the next day i.e. on 28th August 2007 Dipali had come without informing her parents-in-law. Paternal uncle of Dipali was residing at Paithan and Dipali had gone to her said uncle's place and then phone call was given to accused to fetch her. As accused wanted to purchase goods for his shop, he had gone to Paithan and when he returned home around 3.45 p.m., at that time Dipali was present in the house. He got annoyed because he had asked her to stay for two days at Raimoha still she had come back. But, thereafter when Dipali told him that she would cook food, accused took their son and went out of the house. Around 15 to 20 minutes thereafter rain started and therefore, he was returning to his house when he met his neighbours Suresh Ughade and Kusum Ughade. He had talked with them and then came near his house and found that all the doors of the house were closed and smoke was coming outside. Therefore, he went to the house of said Ughade family, kept the child there and returned and entered the house by climbing the wall. He opened the door from inside. He saw that Dipali was lying with burn injuries. With the help of said neighbouring couple, he shifted Dipali to Government Hospital, Paithan. He had asked the

maternal uncle and aunt of Dipali to join him in the hospital. From Government Hospital, Paithan Dipali was asked to shift at Ghati Hospital, Aurangabad. Relatives of Dipali came to Ghati Hospital and then in the midnight they shifted Dipali to Bembde Hospital, Aurangabad. Thus, the defence of the accused is that Dipali had set herself to fire in annoyance as she was short tempered. Accused No.1 examined himself as well as DW-1 Kusum Ughade, to support his defence.

7. After hearing both the sides and considering the evidence on record, the learned trial Judge has come to the conclusion that offence under Section 302 of the Indian Penal Code has been proved beyond reasonable doubt against accused No.1 - husband and he has been convicted as aforesaid. Accused No.2 - mother-in-law has been acquitted of all the charges. Hence both these Appeals.

8. Heard learned Advocate Mr. Satej Jadhav for the appellant in Criminal Appeal No.463 of 2016 and learned APP Mr. R.D. Sanap for the State. Heard learned Advocate Mr. R.R. Imale for the appellant in Criminal Appeal No.595 of 2016. Criminal Appeal

No.595 of 2016 is heard for the purpose of admission only as respondent No.2 i.e. original accused No.2 was not summoned. Whether the said Appeal was worth admitting has been considered and would be dealt with accordingly in the foregoing paragraphs.

9. Learned Advocate Mr. Satej Jadhav for original accused No.1 has vehemently submitted that the learned trial Judge has not appreciated the evidence properly. Spot panchnama Exhibit-37 has been admitted by the accused as he is not disputing that Dipali caught fire in the said house but still it can be seen that the said spot is stated to be shown by one Deelip Raosaheb Dhakne and it is mentioned in the spot panchnama Exhibit-37 that when accused was taking his wife to hospital after she sustained burn injuries, he had given the key of the house to said Deelip Dhakne. He opened the house with the said key and shown the place. Therefore, whatever was seen by the panchas was the situation, but it is not corroborated by the person who had immediately gone to the said place. Police could have got the fact confirmed from Kusum Ughade, whose name was taken in the dying declaration also. PW-1 Sampat Garje is

the father of deceased Dipali. He has tried to say that accused was addicted to liquor and used to ill-treat Dipali under the influence of liquor. Accused used to beat Dipali and therefore father had taken Dipali to his house at Baramati. But surprising point to be noted is that both the dying declarations are silent on these points. Deceased has not made any allegation in respect of ill-treatment. No doubt PW-1 Sampat states about oral dying declaration given to him by Dipali when he met her in Bembde Hospital, but in his cross-examination PW-1 has stated that he had never gone to Ghati Hospital when initially from Government Hospital Dipali was shifted there. This is again contrary to PW-2 Ashok Sanap who is the maternal uncle of deceased who resides at Paithan. PW-2 Ashok has stated that after he received information from unknown person that Dipali has caught fire and admitted to Government Hospital, Paithan, he went to that hospital. Accused was accompanying Dipali when she was shifted to Ghati Hospital. Ashok has also stated that he was there when Dipali was shifted to Bembde Hospital, but he says that in the entire journey he never talked to deceased and not attempted to get information as to how she caught fire. But then he says in the cross-examination that parents of Dipali had come when she

was in Ghati Hospital. Rather in positive way this witness has stated that Dipali had not stated before him in Ghati Hospital that accused had set her to fire. Conduct, even of deceased, in not disclosing anything to her own maternal uncle, is surprising.

10. It is further submitted on behalf of the appellant – accused No.1 that prosecution is mainly relying on both the dying declarations. Dying declaration Exhibit-76 has been recorded by Executive Magistrate PW-3 Krushna, whereas Exhibit-102 has been recorded by PW-8 API Mundhe. If we consider the timings of both the dying declarations, it would be immediately one after another, or rather overlapping. PW-1 Sampat in his cross-examination rather stated that API Mundhe was present when PW-3 Krushna was recording the dying declaration, therefore, such dying declarations cannot be relied at all. Even if for the sake of arguments, Exhibit-76, the first dying declaration taken as it is, Dipali has stated that she received burn injuries around 4.45 p.m., she was set to fire by husband. It is stated that they had come from their village and then husband had locked her in the room, he poured kerosene on her person and set her to fire. Specific question was asked, as to what was the reason for

setting her to fire. She has answered that as she talks more. Except this, there is nothing in the dying declaration Exhibit-76. Exhibit-76 cannot be said to be dying declaration at all when first paragraph is rather, how the Executive Magistrate received the letter, what he has done to get the endorsement and then how by introducing himself he asked Dipali to give statement. The said part cannot be said to be in the words of deceased and therefore, in view of the format used or the way it is written, it cannot be considered as dying declaration. Though PW-4 Dr. Bembde, who had treated Dipali, has been examined and he says that Dipali had sustained 95% deep burns and states in his examination-in-chief that Dipali was in conscious state and fit condition to give statement, in the cross-examination he admits that he has not given any endorsement on the dying declarations regarding the health condition of Dipali. Then prosecution has also examined PW-5 Dr. Vivek Kulkarni, who was attached to Bembde Hospital and has given endorsement on letter Exhibit-81 regarding the consciousness and fit state of Dipali to give statement. But the said endorsement is on a separate sheet of paper and not on the dying declaration itself. Therefore, there was no concrete evidence led by the prosecution that Dipali was

in a fit state to give statement either at the time to recording Exhibit-76 or Exhibit-102. PW-7 Dr. Vikrant Kalokhe is the medical officer who conducted the autopsy. PW-8 API Jivan Mundhe states that at the time of drawing spot panchnama he had seized one stove, but if we consider the spot panchnama, it can be seen that in the kitchen there was a stove. The lid to the opening of kerosene tank of the stove was by the side of the stove. There was little kerosene in the stove but there was a steel glass by the side of the stove in which there was 50 ml. (wrongly written as 'gm.') kerosene in the same. The steel glass was also seized. This indicates that Dipali might be filling kerosene in the stove and then possibility of accident cannot be ruled out.

11. It is submitted that evidence of defence witnesses has not been considered at all by the learned trial Judge. Name of DW-1 Kusum Ughade was also taken in both the dying declarations and she has not been examined as prosecution witness. She has supported the defence that was taken by the accused and the accused had taken the risk of entering the witness box and examining himself, to prove his defence. Nothing contrary has

been extracted in the cross-examination of both the defence witnesses. Though accused had come with the case that deceased has set herself to fire, yet it can also be said that prosecution has not ruled out the possibility of accidental burns to Dipali. The learned trial Judge failed to consider that there was absolutely no motive behind the alleged act. Learned Advocate for the appellant relied on the decision in ***State of U.P. vs. Babu Ram, (2002) 4 SCC 515***, wherein it is observed that defence witnesses are entitled to equal treatment with the witnesses of the prosecution. Motive is equally relevant where case is based on direct evidence as well as where it is based on circumstantial evidence. When motive is absent, the conviction was uncalled for. Learned Advocate therefore, prayed for allowing the Appeal.

12. Learned APP supported the reasons given by the learned trial Judge and submitted that ample evidence was available before the learned trial Judge which proved the offence of murder beyond reasonable doubt. Both the dying declarations were consistent and those have been proved by examining the writers as well as bringing it on record that deceased Dipali was

in a fit state to give statement. The motive was that accused got annoyed after he saw that deceased had come back in contravention of his directions to stay with in-laws. The anger of a person to such a level can lead him to commit offence of any kind and that anger was sudden anger when he saw Dipali in the house. He had poured kerosene on her person and then after igniting the match stick, the burning match stick was thrown on her. Definitely knowledge is required to be attributed when such acts are done. Accused had knowledge that pouring kerosene on the person and putting burning match stick would cause death of his wife. Both the dying declarations were sufficient to convict the accused. Even if we keep the evidence of the father aside, yet there is no perversity in the Judgment of the trial Court. The Appeal, therefore, deserves to be dismissed.

13. Learned Advocate Mr. Imale for original informant – appellant in Criminal Appeal No. 595 of 2016, has vehemently submitted that the learned trial Judge has not appreciated the evidence properly in respect of role of accused No.2. In both the dying declarations, it has been stated by the deceased that accused No.2 had wrongly confined and beaten her in the past

for about 4 to 5 times. The evidence of PW-1 Sampat has not been properly considered. In fact the parents of accused No.1 were residing with accused No.1 and Dipali, therefore there was involvement of accused No.2 also in the offence. Accused No.2 ought to have been convicted by the trial Court.

14. We would like to deal with Criminal Appeal No. 595 of 2016 first, which is under Section 372 of the Code of Criminal Procedure, challenging the acquittal of original accused No.2 – mother-in-law. At the outset in respect of said Appeal, we can say that except two dying declarations there is no evidence against accused No.2. Even if we take the dying declarations as it is, it will not give any active role to accused No.2 in respect of the day of incident i.e. 27th August 2007. We are yet to consider, whether those dying declarations can be relied or not and whether those have been proved properly or not, but still if we take those as it is, yet both the dying declarations attribute role to accused No.1 and as regards accused No.2 is concerned, in dying declaration Exhibit-76 it is stated that in the past, during the period after marriage till the day of recording dying declaration, accused No.2 had confined deceased for about

4 to 5 times in a room and assaulted her. We would like to say that the charge that has been framed at Exhibit-28 by the learned Sessions Judge appears to be totally defective as against original accused No.2 is concerned. There was absolutely no whisper in the first dying declaration that accused No.2 in any way taken part in commission of murder of deceased Dipali, therefore, there was no question of invoking Section 34 for Section 302 of the Indian Penal Code. Further, charge has been framed under Section 342 read with Section 34 of the Indian Penal Code regarding wrongly confining Dipali, but there is no charge for assault. At no point of time the learned APP, who conducted the matter before the trial Court, took objection for the same or gave separate application for re-framing of charge. Recently, in ***Soundarajan vs. State, Represented by the Inspector of Police, Vigilance Anti-corruption, Dindigul, 2023 Live Law S.C. 314***, the Hon'ble Supreme Court, in Para No.16 of the order, observed as under:-

“ 16. We find that, in this case, the charge has been framed very casually. The Trial Courts ought to be very meticulous when it comes to the framing of charges. In a given case, any such error or omission may lead to acquittal and/or a long delay in trial due to an order of remand which can be passed under sub-section (2) of Section 464 of CrPC. Apart

from the duty of the Trial Court, even the public prosecutor has a duty to be vigilant, and if a proper charge is not framed, it is his duty to apply to the Court to frame an appropriate charge. "

15. Even in dying declaration Exhibit-102, at the time of incident the presence of accused No.2 is not stated at all and there is total omission as regards alleged past act of accused No.2 in confining the deceased and assaulting her. PW-1 Sampat himself has stated in his examination-in-chief while describing the oral dying declaration, that daughter told him that accused No.2 had also beaten her by confining her inside the house. But then Sampat says that she did not tell him about it. Further, the details as to when the said confinement and assault had taken place, are not described in the oral dying declaration. Under such circumstance, there was absolutely no evidence against accused No.2. There was no reason for the appellant - Sampat to come under Section 372 of the Code of Criminal Procedure. Even if right is given to victim or the legal representative of such victim to file an appeal under Section 372 of the Code of Criminal Procedure, that does not mean it can be filed without any evidence. When the said appellant, who is PW-1 Sampat himself, has stated that no such disclosure was made by Dipali to him, he

ought to have restrained his feelings. We understand that appellant Sampat has lost his daughter but that does not mean that he should file appeal challenging the acquittal of the mother-in-law when the daughter had not made such disclosure to him.

16. We would like to say to the lawyers representing such litigants that merely because the litigant is having desire, they should not file such appeals for which there is no base in the evidence. The lawyers are the officers of the Court and therefore, they should definitely see as to whether there would be substance in filing such appeal or not. We could have imposed cost on the appellant – Sampat for unnecessarily filing such Appeal, however, we are condoning his act. The said Appeal deserves to be dismissed at the threshold, even at the stage of admission.

17. Now turning towards appeal against conviction i.e. Criminal Appeal No. 463 of 2016 by original accused No.1, being the first appellate Court wherein the conviction is challenged, this Court is vested with the right to re-visit the evidence that has been

led, re-appreciate it and to arrive at the conclusion. PW-3 Krushna Shinde is the Special Judicial Magistrate who has recorded dying declaration Exhibit-76. Important aspect to be noted is that the endorsement in respect of the fitness of Dipali is taken on a separate sheet of paper. In fact Exhibit-75 appears to be an application by head constable of MIDC Police Station given to the Chief Judicial Magistrate, Aurangabad on 28th August 2007 requesting him to appoint some Special Judicial Magistrate to record the dying declaration of Dipali. Concerned Chief Judicial Magistrate has passed an order of deputing PW-3 Shinde. On the same piece of paper the Special Judicial Magistrate has passed an order / made request in the margin of the said application to the medical officer to give the endorsement regarding the fitness of the patient. Then on the same piece of paper, the concerned doctor appears to have written "patient is conscious and oriented, hence she is able to give dying declaration". There is no separate endorsement at the end of the dying declaration Exhibit-76. It can be seen that the said endorsement is said to have been given by PW-4 Dr. Bembde and he has specifically stated that Dipali was in fit state to give statement though she has received 95% burns. Though both of them i.e. PW-3 Shinde

and PW-4 Dr. Bembde are not explaining as to why right thumb mark has been obtained, yet that point has also not been seriously challenged by the accused persons. As regards dying declaration Exhibit-76 is concerned, it has been objected on the ground that first half of page is in respect of, as to who had given the letter to the Special Judicial Magistrate, how he went to the place and asked the doctor to give endorsement, asking the lady who was near the patient to go out of the room and then asking the patient, after introducing himself that she should tell what she want to say to him, which cannot be considered as part of the dying declaration. We would like to say that there is no set format in respect of dying declaration. It can be in the narrative form or in question and answer form. Definitely it is expected that it should be in the words of the person making such declaration, but the part explaining those circumstances under which the dying declaration had started, being made part of the dying declaration i.e. by giving caption as " मृत्युपूर्व जबाब " will not discard the same being considered under Section 32(1) of the Indian Evidence Act. We are required to see which statements were made by the maker and not the technicalities to

be gone into regarding the format. Under such circumstance, we may consider that dying declaration Exhibit-76 has been proved.

18. Dying declaration Exhibit-102 has been recorded by PW-8 API Jivan Mundhe. The endorsement on the said document is given by PW-5 Dr. Vivek Kulkarni and the said endorsement is on letter Exhibit-81. We would also like to say that giving endorsement on a separate sheet of paper by itself will not cast doubt. That proof will have to be rebutted or discarded by the accused showing that it is given afterthought or has been taken on a separate sheet of paper with *mala fide* intention. No doubt, it is desirable that such endorsement should be on the same piece of paper, but as aforesaid, merely because it is given on a separate sheet of paper, the said endorsement cannot be discarded. Even otherwise evidence can be led by the prosecution to prove that the patient was in a fit state to give statement. Nothing contradictory has been transpired in the testimony of PW-5 Dr. Kulkarni to suggest that Dipali was not in a fit state to give statement. We, therefore, consider that even dying declaration Exhibit-102 can be said to be proved through PW-8 API Mundhe and PW-5 Dr. Kulkarni.

19. Now, the fact will have to be gone into, as to whether those dying declarations can be relied upon and conviction can be awarded. We would like to rely upon following authorities, which govern the principles under which the dying declaration can be said to be admissible and conviction can be based:-

(I) ***Paniben vs. State of Gujarat; (1992) 2 SCC 474,***

(II) ***Surinder Kumar vs. State of Punjab, (2012) 12 SCC 120,***

(III) ***Madan vs. State of Maharashtra; (2019) 13 SCC 464,***

(IV) ***Ganpat Bakaramji Lad vs. State of Maharashtra, 2018 ALL MR (Cri) 2249,***

(V) ***Vikas and others vs. State of Maharashtra [2008 (2) B. Cr. C. 235 (SC)].***

20. 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."

21. 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."

22. Further, we would like to rely on ***Jagbir Singh vs. State (NCT of Delhi)***, (2019) 8 S.C.C. 779, wherein also the law relating to dying declaration has been explained in Paragraph Nos.18 to 29 and in Paragraph No.31 following ratio has been laid down:-

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

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

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

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

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

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

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

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

31.8.(viii) The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

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

23. The ratio in ***Jagbir Singh vs. State (NCT of Delhi)*** (supra), is again reiterated in ***Rajaram vs. State of Madhya Pradesh, AIR 2023 S.C. 94.***

24. Therefore, when it comes to multiple dying declarations, it is required to be seen, whether those are consistent with each other and if those are not consistent, then whether benefit of the said inconsistency can be given to the accused. If we consider the dying declarations Exhibit-76 and Exhibit-102 from this angle, then we can see that there are inconsistencies in between the two dying declarations. Apparently, it may give the impression that same role is attributed to accused No.1 but the fact remains is that the reason for setting Dipali to fire is given differently in both the dying declarations. In Exhibit-76 deceased has stated that she sustained burn injuries around 4.45 p.m. She was set to fire by accused – husband. It so happened that they had come from their village and then her husband confined her in a room, poured kerosene on her person and thrown burning match stick, resulting in burn injuries. To the question, why she was set to fire, Dipali answers that, as she talks more. Here, the literal translation may be some what different but the intention can be gathered that she was set to fire since she talks more in anger. But Dipali has not stated anything as to what had happened prior to that moment between herself and accused. Whereas, in her dying declaration Exhibit-102, Dipali states that

she had gone to matrimonial house at Raimoha 4 to 5 days prior to 28th August 2007 and she returned around 1.30 p.m. At that time her husband had gone out of the house and after coming to house, husband asked her that, when he had told her to stay at Raimoha, why she has come back. He had then picked up quarrel. Accused kicked her in the stomach and made her to fall down and thereafter poured kerosene on her person and set her to fire. There is no statement that she was confined in the room. Thus, the reason behind the act that she was asked to stay at Raimoha but she did not listen to him and therefore she was put to fire, was tried to be given in Exhibit-102.

25. Now, the prosecution says that the accused, in his examination-in-chief, accepts the fact that he had asked the wife to stay at Raimoha but on the next day the wife returned without informing his parents. Accused also admits that he also questioned her about the same when she came to house and when this fact is admitted, the said improvement cannot be considered as inconsistency. We do not agree to the said submission. It is the cardinal principle that the prosecution should stand on its own feet and cannot search for the

supportive evidence led by the defence. The accused had his own theory to put forth for explaining the circumstances under which his wife had sustained burn injuries in the house. It cannot be forgotten that the said step might have been taken by the accused in view of Section 106 of the Indian Evidence Act. However, even for that purpose also the prosecution will have to first discharge its own duty that the accused – husband was inside the house and then the wife received severe burn injuries.

26. Here itself we would like to say that defence has examined DW-1 Kusum Ughade. Her name reflects in both the dying declarations, but prosecution failed to examine her. In her testimony, DW-1 Kusum has supported the defence taken by the accused that he was with his child outside the house when they saw smoke coming out from the house of the accused. The situation in the house of the accused has been asked in her cross-examination by the learned APP and it appears to be the same as is appearing in the spot panchnama. In her examination-in-chief, Kusum has stated that after the incident she has questioned Dipali, as to why she has done so and then Dipali had replied that she was in annoyance and therefore she

has done so. Thus, Kusum wanted to say that in the heat of anger Dipali has set herself to fire. No doubt, thereafter it is tried to be brought on record that the said oral dying declaration is the omission in statement of Kusum under Section 161 of the Code of Criminal Procedure and in fact the learned defence Advocate has raised objections for recording those omissions. It appears that the learned trial Judge has not considered the evidentiary value of the same. When prosecution has not examined Kusum as its witness though her statement under Section 161 of the Code of Criminal Procedure was recorded, then if the said witness is examined by the accused, the said statement under Section 161 of the Code of Criminal Procedure cannot be referred or cannot be put to the use of contradiction or omission. Thus, from the defence evidence it has been brought on record that accused was not inside the house when the act of receiving burn injuries to Dipali took place.

27. No doubt, the prosecution has also examined PW-1 Sampat who has stated about the oral dying declaration, but interesting to note is that Sampat had come at a later point of time but DW-1 Kusum was there with accused and deceased immediately

after the incident. Further, PW-2 Ashok was there with accused and deceased since she was brought to Government Hospital, Paithan. Ashok was there till Dipali was taken to Bembde Hospital, but in categorical terms he states that he had not asked Dipali as to how the incident took place. Ashok is the maternal uncle of Dipali and therefore, it is very much surprising that Dipali would not have told anything to him. It has also come on record that DW-1 Kusum was in fact with accused and deceased from Isarwadi to Paithan. That means, immediately after the incident if at all it would have been told by Dipali as to how the incident had taken place, it was to DW-1 Kusum, then to PW-2 Ashok and then PW-1 Sampat, in the chronology they had come in the journey. It appears that it was obvious for PW-1 Sampat to say that oral dying declaration was given by Dipali to him, but as aforesaid, the said dying declaration is on the line of Exhibit-102 and not dying declaration Exhibit-76. In his cross-examination, Sampat has stated that Magistrate Shinde was also present at the time of recording Dipali's statement by API Mundhe. No doubt, he says that they were outside the hospital, but Sampat is rather saying about presence of PW-3 Shinde and

PW-8 Mundhe near Dipali's bed at one and the same time, which is not corroborated by PW-3 Shinde and PW-8 Mundhe.

28. Examination-in-chief of PW-3 Shinde is absolutely silent as to when he reached the hospital and when he started recording of the dying declaration but his endorsement appears to be of 1.30 p.m. Again examination-in-chief of PW-8 Mundhe is also silent on the point when he reached hospital and recorded dying declaration Exhibit-102. Endorsement on Exhibit-81 states that it was given at 8.45 p.m. The testimony of PW-5 Dr. Vivek Kulkarni, who had given that endorsement, is silent on the point of time. Thus, it appears that the prosecution has conveniently not disclosed the timings and with the statement in the cross-examination of PW-1 Sampat, it appears that the writers of both the dying declarations were present at one and the same time. PW-8 API Mundhe has not explained as to why he felt that a detailed statement is required to be taken when dying declaration Exhibit-76 had already reached the Police Station and offence was also registered. All these circumstances make both the dying declarations unsafe to rely and with the inconsistencies as pointed out above, the benefit should go to the accused.

29. The other witnesses have proved the spot panchnama, the postmortem report, C.A. report etc., which is of corroborative nature, but they do not lead us to the conclusion that the death of Dipali was homicidal in nature i.e. caused by setting her to fire by the accused – husband.

30. The learned trial Judge appears to have seen only the alleged apparent corroboration but when it comes to the dying declaration, meticulous scrutinizing of the evidence is necessary. The maker of the dying declaration is not available for cross-examination, under such circumstance, unless those dying declarations are inspiring confidence and those are in view of the ratios laid down in various authorities, referred above, the same ought not to have been accepted. In order to convict an accused, the prosecution has to prove the offence / case beyond reasonable doubt and if any such evidence is brought on record which creates doubt in the mind of the Court then the benefit should go to the accused.

31. For the reasons above stated, we hold that the learned trial Judge committed error in convicting accused No.1. The Judgment and order of the trial Court is perverse and therefore, deserves to be set aside. It is not the case that merely because the second view is possible when there are two views, this Court is taking the second view. As the learned trial Judge failed to appreciate the evidence properly, the interference is required.

32. For the aforesaid reasons, following order is passed:-

ORDER

(I) Criminal Appeal No. 463 of 2016 stands allowed.

(II) The conviction awarded to appellant – Parmeshwar S/o Sadashiv Sanap in Sessions Case No.191 of 2008 by the learned Additional Sessions Judge, Aurangabad on 8th July 2016 by holding him guilty of committing offence under Section 302 of the Indian Penal Code, is hereby set aside.

(III) Appellant - Parmeshwar S/o Sadashiv Sanap stands acquitted of the offence punishable under Section 302 of the Indian Penal Code.

(IV) Appellant - Parmeshwar S/o Sadashiv Sanap be set at liberty, if not required in any other case.

(V) Fine amount, if any, be refunded to him after the statutory period.

(VI) Criminal Appeal No. 595 of 2016 stands dismissed at the threshold.

[Y.G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/APR23