



Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.242 OF 2011

1. Shri Narendra s/o Balkrushna Badshe,
aged about 32 years, occupation labour.

2. Shri Surendra s/o Balkrushna Badshe,
aged about 25 years, occupation labour.
(dead)
appeal is abated against
appellant No.2 as per court's
order dated 12.6.23.

3. Sau. Jyotsana w/o Surendra Badshe,
aged about 22 years, occupation household.

4. Smt.Kokilabai wd/o Balkrushna Badshe,
aged about major, occupation household,
All 1 to 4 r/o Shirajgaon, taluka Morshi,
district Amravati. **Appellants.**

:: V E R S U S ::

State of Maharashtra,
through PSO Shirkhed, taluka Morshi,
district Amravati. **Respondent.**

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Shri C.F.Bhagwani, Counsel for the Appellants.
Shri M.J.Khan Additional Public Prosecutor for the Respondent/
State.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 19/07/2023

PRONOUNCED ON : 12/09/2023

JUDGMENT

1. The appellants (accused persons) have assailed
judgment and order of conviction and sentence dated
7.5.2011 passed by learned Ad hoc Additional Sessions Judge,

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Amravati (learned Judge of the trial court) in Sessions Trial No.95/2010 whereby they are convicted for offences punishable under Sections 498-A and 306 read with Section 34 of the Indian Penal Code.

For offence punishable under Section 498-A read with Section 34 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for one year each and to pay fine Rs.500/-, in default, to suffer simple imprisonment for one month.

For offence punishable under Section 306 read with Section 34 of the Indian Penal Code, accused Nos.1 and 2 are sentenced to suffer rigorous imprisonment for five years each and to pay fine Rs.1000/-, in default, to suffer simple imprisonment for two months; and accused Nos.3 and 4 are sentenced to suffer rigorous imprisonment for three years each and to pay fine Rs.1000/-, in default, to suffer simple imprisonment for two months.

2. During the pendency of the appeal, appellant No.2 Surendra s/o Balkrushna Badshe died and the appeal is abated against him.

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3. The case of the prosecution, as unfolded in evidence of prosecution witnesses and also detailed in First Information Report, is as under:

4. Jaya (deceased) married to accused No.1 - Narendra in the year 2001. Accused No.2 Surendra, is her brother-in-law (husband's brother); accused No.3 Sau. Jyotsana, is her sister-in-law (wife of accused No.2), and accused No.4 Smt.Kokilabai is her mother-in-law. After the marriage, she resumed cohabitation at the house of the accused persons. From the said wedlock, she gave birth to two daughters. In the meantime, accused No.2 married to accused No.3 and they started residing separately in the same house. The crime was registered on the basis of dying declaration recorded by Executive Magistrate Prakash Shankarrao Ghormade wherein it is alleged that after the marriage, the deceased was subjected for cruelty by all the accused persons on flimsy grounds. On the day of incident i.e. 8.12.2009, she was abused by all the accused persons and accused No.1 assaulted her due to which she poured kerosene on herself and set her ablaze. As per allegations,

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the accused persons abetted her to commit suicide by ill-treating her.

5. On the basis of the said dying declaration, the offence was registered vide Crime No.206/2009 at Shirkhed Police Station under Sections 306 and 498-A of the Indian penal Code. During investigation, the investigating officer recorded relevant statements of witnesses. It revealed from the investigation that immediately after the incident, accused No.1 admitted the deceased in hospital. The hospital authorities informed the incident to the police. Executive Magistrate Prakash Ghormade recorded dying declaration on 9.12.2009 by which the deceased narrated that she had sustained burn injuries accidentally. On the basis of the said dying declaration, an accidental death was registered. The investigating officer visited the alleged spot of the incident and drawn spot panchanama. In the alleged incident, accused No.1 also sustained burn injuries and he was also admitted in the same hospital i.e. General Hospital, Amravati. From the statements of witnesses, involvement of the accused persons was revealed and subsequently two dying declarations were recorded. During treatment, the deceases succumbed to the

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burn injuries on 16.12.2009. Accordingly, inquest panchanama was drawn and the dead body was referred for postmortem examination. After completion of the investigation, the investigating officer submitted chargesheet against the accused persons.

6. As the offence punishable under Section 306 of the Indian Penal Code was exclusively triable by the court of sessions, learned Magistrate committed the case to the court of sessions. Learned Judge of the trial court framed charge vide Exhibit-12 and the accused persons pleaded not guilty and claimed to be tried.

7. To substantiate the contentions of the prosecution, the prosecution examined in all 11 witnesses, as follows:

1. Sau.Chaya Ram Chakre vide Exhibit-36 (PW1), sister of the deceased;
2. Rama Udaybhaji Chakare vide Exhibit-37 (PW2), brother-in-law of the deceased (sister's husband);
3. Raju Govindrao Ghormade vide Exhibit-39 (PW3), photographer;
4. Sheshrao Dhoke vide Exhibit-45 (PW4), pancha on spot;

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5. Pramod Mangal Shirsat vide Exhibit-48 (PW5), the brother of the deceased;

6. Dr.Prashant Samadhan Bharsakhale vide Exhibit-52 (PW6), who endorsement on the dying declaration;

7. Vitthal Gopalrao Kherde vide Exhibit-55 (PW7), the police head constable who recorded dying declaration;

8. Prakash Shankarrao Ghormade vide Exhibit-60 (PW8), Executive Magistrate who recorded the dying declarations on 9.12.2009 and 10.12.2009;

9. Sudhir Fattuji Dahabade vide Exhibit-66 (PW9), police constable;

10. Baburao Ramchandra Pathode vide Exhibit-69 (PW10), the Investigating Officer, and

11. Madansingh Surajsingh Rajput vide Exhibit-72 (PW11), the Investigating Officer.

8. Besides the oral evidence, the prosecution placed reliance on dying declaration (Exhibit-21); death report (Exhibit-22); inquest panchanama (Exhibit-23); injury certificate of one Gumtabai (Exhibit-30); injury certificate of accused No.1 (Exhibit-31); postmortem report (Exhibit-32); spot panchanama (Exhibit-46); seizure memo (Exhibit-47); dying declaration recorded on 12.12.2009 (Exhibit-57); First Information Report (Exhibit-58); dying declaration recorded on 10.12.2009 (Exhibit-62); endorsement of Medical Officer

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on dying declarations (Exhibits-53 and 54), and station diary entries Exhibits-70, 73, and 74).

9. On the basis of the oral as well as the documentary evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubts. All incriminating circumstances are put to the accused persons in order to obtain their explanations. After hearing both the sides, learned Judge of the trial court came to conclusion that the accused persons abetted the deceased to commit suicide by ill-treating her and sentenced them as the aforestated.

10. Being aggrieved and dissatisfied with the judgment and order passed by learned Judge of the trial court, the present appeal is preferred by the accused persons on the ground that the entire case is based on dying declarations recorded by Executive Magistrate PW8 Prakash Ghormade on 9.12.2009 and 10.12.2009. Both dying declarations are inconsistent with each other. Police Head Constable PW7 Vitthal Kherde also recorded dying declaration which is also inconsistent as to time of the incident. Insofar as the allegation as to ill-treatment is concerned, the same is vague

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in nature and is not sufficient to prove the charge against the accused persons. Learned Judge of the trial court ought to have considered that the alleged incident occurred on 8.12.2009 at 7:00 pm when the deceased was alone in the house, as per her first dying declaration. As per the first dying declaration, she sustained burn injuries due to the accident. The second and third dying declarations are result of tutoring. The accused persons are convicted on the basis of untruthful and inconsistent dying declarations and, therefore, the conviction deserves to be set aside by acquitting the accused persons.

11. Heard learned counsel Shri C.F.Bhagwani for the accused persons and learned Additional Public Prosecutor Shri M.J.Khan for the respondent/State.

12. Learned counsel for the accused persons reiterated the same contentions and submitted that the law regarding dying declarations is well settled. Dying declaration is the last statement made by a person at a stage when he is in a serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will

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Speak truth and only the truth. However, such statements should be reliable and shall not be result of tutoring. Then, the court can safely rely upon such dying declaration and it can form basis of conviction. He submitted that the evidence on record shows that after admission of the deceased in the hospital, her dying declaration was recorded on 9.12.2009 at 1:55 pm wherein she had specifically stated that she had sustained burn injuries accidentally when nobody was in the house. The second and third dying declarations came to be recorded after arrival of her sister and other relatives. The evidence on record shows that the deceased was accompanied by her sister prior to recording of her dying declaration. As far as allegation, regarding the first dying declaration, that the deceased has stated due to the pressure of her husband, is falsified as her husband was also admitted in the hospital as he had sustained burn injuries. As the dying declarations are inconsistent and vague allegations are made against the accused persons, it is sufficient to show that the prosecution failed to prove the charges and, therefore, the judgment and order passed by learned Judge of the trial court requires interference.

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13. In support of his contentions, learned counsel for the accused persons placed reliance on following decisions:

1. Shankar s/o Vishwanath Kolhe anr anr vs. State of Maharashtra¹;

2. Ramesh Tukaram Rudraksha and ors vs. State of Maharashtra², and

3. Prakash s/o Shivil Chavan vs. State of Maharashtra³.

14. On the other hand, learned Additional Public Prosecutor for the State submitted that there is an inconsistency in the dying declarations on material aspects. There is no exaggeration also. Insofar as the first dying declaration is concerned, wherein the deceased stated that she sustained the burn injuries while cooking food, it has no bearing as the spot panchanama has no reference of the deceased sustaining the burn injuries while cooking food. The circumstances noted during the spot panchanama, do not support the defence that the deceased had sustained the burn injuries while cooking food.

1 2006 ALL MR (Cri) 790

2 2010 ALL MR (Cri) 1834

3 2010 ALL MR (Cri) 2889

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15. Learned Additional Public Prosecutor for the State submitted that the law regarding acceptance of dying declarations is well settled. Now, it is settled that endorsement of doctor on dying declarations is not *sine qua non*, what essential is satisfaction of person who records dying declarations, that the declarant was in a fit condition to give statements. In the present case, the dying declarations relied upon by the prosecution are admissible in evidence and the deceased's statements relate to the cause of death. Nothing is on record to doubt the said dying declarations. Learned Judge of the trial court rightly considered the same and, therefore, no interference is called for in the judgment and order of conviction and sentence impugned in the appeal.

16. The points that need determination are, whether the accused persons had subjected deceased Jaya to cruelty as contemplated under Section 498-A of the Indian Penal Code and whether the commission of suicide by the deceased was abetted by the accused persons.

17. To prove the allegations of the cruelty, the entire reliance placed by the prosecution is on the evidence of sister

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of the deceased PW1 Chaya Chakre, examined vide Exhibit-36; brother-in-law of the deceased (sister's husband) PW2 Rama Chakare, examined vide Exhibit-37, and brother of the deceased PW5 Pramod Shirsat, examined vide Exhibit-48.

Besides the oral evidence, the prosecution also placed reliance on the dying declarations wherein the deceased narrated about the ill-treatment at the hands of the accused persons to her.

If the evidence of the above three witnesses is considered, it is categorically stated by them that the marriage of the deceased took place in the year 2001. At the relevant time, all the accused persons were residing jointly. In the year 2008, marriage was performed between accused Nos.2 and 3 and, thereafter, they started residing separately in the same house. As far as the allegation regarding the ill-treatment is concerned, only incident quoted by PW1 Chaya and PW2 Rama, that in the year May 2009 when the deceased had been to the house of her brother at Gaurkhed and PW1 Chaya and PW2 Rama had also been there, at that time, the deceased disclosed to them that she

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was ill-treated by the accused persons on flimsy grounds by abusing and assaulting her. Second incident quoted is of November 2009 regarding disclosure by the deceased that she is treated with the ill-treatment by the accused persons.

18. During cross examination of PW1 Chaya, it came on record that prior to the incident, the deceased's mother committed suicide by setting herself on fire. Thereafter, her brother also died and subsequently her father expired. Because of three deaths in the family, the deceased was very nervous and was living under depression.

19. As far as the oral dying declaration is concerned, PW1 Chaya and PW2 Rama deposed that after receipt of the message of the incident, they immediately went to the Irwin Hospital in the same night. The deceased disclosed to them that the accused persons harassed her and as she could not bear the harassment, she set herself ablaze.

20. During the cross examination of PW1 Chaya, she admitted that when she reached in the hospital, the deceased was serious. She further admitted that she informed to the deceased that her statement will be recorded again. She was

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sitting near the deceased, till morning. She specifically stated that till morning, no doctor came to see the deceased and only officers, who recorded the dying declarations, came in the night. She denied the defence of tutoring.

21. During the cross examination of PW2 Rama, he also admitted that accused No.1 was also admitted in the same hospital in the gents ward at the relevant time. The deceased was under pain.

22. Thus, the cross examinations above show that general allegations are made against the accused persons. Accused No.1 was also admitted in the hospital due to the burn injuries and, therefore, question regarding pressurizing the deceased to give a statement of accidental burn does not arise. As such, the prosecution story is not trustworthy and evidence of PW1 Chaya and PW2 Rama deserves to be discarded.

23. PW5 Pramod Shirsat, is the brother of the deceased. His evidence is only to the extent that after marriage of accused No.2, all the accused persons started harassing the deceased and she was informing him about the

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said incident whenever she used to visit his house. As per his evidence, the deceased was harassed on flimsy grounds and abused and assaulted. He also narrated that the deceased had been to his house on 2.5.2009 and at the relevant time she narrated the incident.

24. Besides the oral evidence, the prosecution placed reliance on three dying declarations to prove the ill-treatment at the hands of the accused persons. The first dying declaration was recorded on 9.12.2009 at about 1:55 pm which is admitted by the defence at Exhibit-21. As per the first dying declaration, she sustained the burn injuries when lighted stove for cooking food and her saree caught fire. At the relevant time, nobody was in the house. As per the first dying declaration, the alleged incident took place on 8.12.2009 at about 7:00 pm.

25. The prosecution further placed reliance on the evidence of Police Head Constable PW7 Vitthal Kherde. As per his evidence, at the relevant time, he was attached to Shirkhed Police Station. His superiors asked him to visit the Irwin Hospital on 12.12.2009 and to record statement of the

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deceased. Accordingly, he visited the Irwin Hospital and met the doctor. He requested Medical Officer to ascertain whether the patient is in a position to give her statement. The Medical Officer opined that she is able to give her statement. He recorded statement of the deceased in presence of the doctor. As per the statement of the deceased, her marriage with accused No.1 was performed in the year 2001 and she was treated well for 5-6 years. After the marriage of accused No.2, she was ill-treated by him by abusing her and accused Nos.1 and 2 assaulted her. Regarding the incident, she stated that on 8.12.2009, accused No.2 abused her in a filthy language and accused No.3 also hurled abuses to her and her mother-in-law was instigating them. They also rushed to assault her. In the meantime, her husband came from outside, but instead of pacifying the quarrel, he too had started assaulting her. She got annoyed and poured kerosene on herself and set her ablaze. Thereafter, her husband brought her in the hospital. Accordingly, her statement was recorded. Though this witness is cross examined, nothing incriminating is brought on record. The only thing brought on record is that the patient was burnt to the extent of 90%.

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This witness admitted that except writing O.K., the Medical Officer has not endorsed anything on his requisition letter.

26. Executive Magistrate PW8 Prakash Ghormade, has recorded first dying declaration on 9.12.2009 and second dying declaration on 10.12.2009. As per his evidence, on 10.12.2009, he received a telephonic call by the Sub Divisional Magistrate to record dying declaration of the deceased. Accordingly, he went in burn ward wherein he contacted with doctor on duty. The Medical Officer endorsed that the patient is in a position to give her statement. Thereafter, he recorded statement. Before recording statement, the deceased accompanied by her relatives were removed out of the room. He deposed that the deceased narrated before him that her husband and all the other accused persons ill-treated her on flimsy grounds. As she could not bear the harassment, she poured kerosene on herself on 8.12.2009 at 9:00 pm and set herself ablaze. Thereafter, her husband brought her in the hospital. The said dying declaration is at Exhibit-62.

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The cross examination of this witness shows that on 9.12.2009 her dying declaration was recorded by him wherein she had narrated that she lighted stove and burnt accidentally. As per his evidence, at the time of recording second dying declaration, he received requisition at midnight. The visits of the doctor are in the morning, afternoon, and evening. He also admitted that at the relevant time before recording statement, some of relatives were sitting near to the deceased. However, he denied that the dying declaration, recorded on second occasion, was result of tutoring. He further denied that dying declaration Exhibit-62 was recorded under pressure. He further admitted that as per Exhibit-21, first dying declaration, time of incident was 7:00 pm.

27. Besides the oral evidence and the evidence in the nature of dying declarations, the prosecution examined photographer PW3 Govindrao Ghormade, who is formal witness. He obtained photographs of the spot of the incident.

28. PW4 Sheshrao Dhoke, has acted as pancha on spot panchanama. He narrated about events happened during the spot panchanama. The spot and seizure panchanamas are

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proved at Exhibits-46 and 47. His cross examination shows that one black colour article was found in a burnt condition. It was looking like stove. There was a smell of kerosene in the said room. The house was partitioned and in one side of the house, accused No.1 was staying and another part of the house accused No.2 was staying along with his wife.

29. To prove authenticity of the dying declarations, Doctor PW6 Prashant Bharsakhale was examined who stated that on 10.12.2009 he was on duty at burn ward No.4. The Executive Magistrate approached him and handed over requisition. Thereafter, he examined the patient and opined that the deceased was conscious and well oriented and also able to give her statement. Thereafter, the Executive Magistrate recorded statement. After completion of the statement, he again examined the patient and gave an endorsement that she is in a position to give statement. The first endorsement was given at 12:50 am and second endorsement was given at 1:18 am. His endorsements are at Exhibit-54.

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The cross examination of this witness shows that the deceased sustained intensive burns. He further stated that there was no rush around the patient. There was no relative of the deceased when her dying declaration was recorded.

30. PW9 Sudhir Dahabade, PW10 Baburau Pathode, and PW11 Madansingh Rajput, are police officials who narrated about the investigation carried out by them. As per station diary entry Exhibit-70, that on 9.12.2009 at about 1:35 pm the deceased was admitted to ward No.4 at Irwin Hospital on account of sustaining burn injuries to the extent of 80%. Similarly, her husband has also sustained injuries to the extent of 22% while extinguishing the fire and he was admitted in the hospital.

31. Thus, from the evidence it reveals that the deceased sustained the injuries on 8.12.2009 at her matrimonial house. She was admitted in the hospital along with her husband. Her first dying declaration was recorded immediately thereafter on 8.12.2009 at about 1:55 pm and subsequently dying declarations are recorded on 10.12.2009

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and 12.12.2009. In the first dying declaration, she stated about the accidental burn injuries. Whereas, in the second and third dying declarations, she alleged the harassment at the hands of the accused persons.

32. The expression 'cruelty' has been used in relation to human conduct or human behaviour. 'Cruelty', thus, is course or conduct of one, which adversely affects the other. It may be mental or physical and intentional or unintentional. It is a question of fact and degree. In relation to the matrimonial matters, it is contemplated that a conduct of such type, which endangers living of the others, amounts to cruelty. Cruelty consists of acts which are dangerous to life and limb or health. Cruelty may be physical or mental. The mental cruelty is a conduct of other spouse which causes mental suffering or fear to matrimonial life of the other. Cruelty however has to be distinguished from ordinary wear and tear of family life. The mere annoyance or irritation may not constitute cruelty rather it is spontaneous change in human behaviour which restricts the other side to live with the spouse under the fear of endangering life or bodily injuries.

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33. While appreciating the evidence of sister of the deceased PW1 Chaya Chakre; brother-in-law of the deceased (sister's husband) PW2 Rama Chakare, and brother of the deceased PW5 Pramod Shirsat, it must be kept in mind that such evidence by close relatives of the victim, needs to be examined with great caution. It is well settled that mere close relationship is not sufficient to discard evidence. However, considering it would be easy for them to make such accusation, after death of victim, their evidence needs to be examined with caution. The claim that the deceased used to disclose them about the harassment, ill-treatment, and cruelty meted out to her, after the death of the deceased, when the deceased would not be available for challenging the same or confronting her with such evidence, is quite easy to be made. Moreover, in such tragic cases, the near and dear ones of the victim genuinely starts believing that husband and in-laws are cause of death and, therefore, there would be a tendency to implicate all family members.

34. In the present case, after applying the well settled parameters for judging reliability of the evidence, it apparent that general allegations are made against the accused

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persons. Admittedly, there is no much improvement, but what is important to note is that allegations of cruelty, as reflected from the evidence, are vague and general. The cruelty contemplated under Section 498-A of the Indian Penal Code is different than the cruelty which is to be considered in matrimonial matters. The explanation appended to the said Section is important which makes it clear that "cruelty means any willful conduct which is 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 (whether mental or physical) of the concerned woman. The words 'willful conduct' and 'likely' indicate that the willful conduct must be of such a nature as would be likely to drive a woman to commit suicide or to cause grave injury to her life and limb or health. Whether the conduct was of such a nature, gravity can be inferred from facts and circumstances of the case.

35. As far as the present case is concerned, there is no incident of cruelty reflected from the evidence. It is pertinent to note that only two instances are mentioned which show that on these two instances the deceased had been to her brother's house wherein she had disclosed regarding the ill-

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treatment at the hands of the accused persons. Admittedly, there is no evidence that either PW1 Chaya or PW5 Pramod Shirsat had made any complaints against the accused person. The natural conduct of these witnesses shall be either they would lodge a report or they would take efforts to give an understanding to the accused persons or would request the accused persons not to ill-treat the deceased. There is no iota of evidence that after disclosure by the deceased, they had made any attempt to communicate either the accused persons by themselves or through their relatives to put forward their request not to ill-treat the deceased. On the contrary, the evidence shows that after the marriage, there was no dispute between the deceased and her husband and positive evidence is adduced to show that there was cordial relationship between them. The admission of PW1 Chaya, PW2 Rama, and PW5 Pramod shows that after the marriage of accused No.2, he started residing separately with accused No.3 in the same house and as such question regarding ill-treatment at their hands does not arise.

36. Considering the nature of evidence, in my opinion, the evidence of cruelty adduced by the prosecution is not

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reliable. Perusal of the oral evidence, as well as the dying declarations, reveals that vague and general assertions were made against the accused persons and, therefore, the evidence adduced by the prosecution to prove the charge of cruelty is not sufficient.

37. The prosecution placed reliance on the dying declarations to prove factum of suicide due to the abetment at the hands of the accused persons. To test evidentiary value of the said dying declarations, the law is settled that dying declaration is the last statement made by a person at a stage when he/she is in a serious apprehension of his/her death and expects no chances of his/her survival. At such time, it is expected that a person will speak truth and only the truth. Normally, in such situations, the courts attach intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declarations and it can form basis of conviction. The general rule is that all oral evidence must be direct. The eight clauses of Sections 32 of the Evidence Act are exceptions to the general rule against

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hearsay. Clause (1) of Section 32 of the Evidence Act makes relevant what is generally described as dying declaration, though such an expression has not been used in any statute. It essentially means that statements made by a person as to the cause of his death or as to circumstances resulting in his death.

38. The Honourable Apex Court in the case of **Jayamma & anr vs. The State of Karnataka**⁴ held that when a dying declaration has been recorded in accordance with law and it gives a cogent and plausible explanation of occurrence, the court can rely upon it as a solitary piece of evidence to convict accuse.

39. The law regarding dying declarations is that it is admissible under Section 31(1) of the Evidence Act. It is an exception to the Rule against admissibility of hearsay evidence which is not tested by cross examination wherein a person, who is facing eminent death, would not ordinarily indulge in false implication or resort to falsehood. It is a trite law that dying declarations can be sole basis for conviction. However, before basing conviction on dying declarations, conscience of

4 (2021)6 SCC 213

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the court must be satisfied that maker of statement was in a fit condition to give statement, statement is voluntary and maker of statement was in a fit condition to give statement, dying declarations are free from embellishment and any other infirmity.

40. The Constitution Bench of the Honourable Apex Court in the case of **Laxman vs. State of Maharashtra**⁵ observed that situation in which a man is on deathbed is so solemn and serene, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since accused has no power of cross-examination, the court insist that dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that statement of deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that deceased was in a fit state of mind and had opportunity to observe and identify assailant. Normally, therefore, the court in order to satisfy whether deceased was

⁵ 2002 ALL MR (Cri) 2259

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in a fit mental condition to make dying declaration look up to medical opinion. But where eyewitnesses state that deceased was in a fit and conscious state to make the declaration, medical opinion will not prevail, nor can it be said that since there is no certification of doctor as to fitness of mind of declarant, dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided indication is positive and definite.

41. Thus, the aforesaid observations of the Honorable Apex Court makes it absolutely clear that dying declarations can be oral or in writing or in any adequate method of communication whether by words or by signs or otherwise will suffice provided indication is positive and definite.

42. Thus, the law is quite clear that if dying declaration is absolutely credible and nothing is brought on record that deceased was in such a condition he/she would not have made a dying declaration to a witness, there is no justification to discard the same.

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43. In the light of the above well settled legal position, if the facts of the present case are considered, the prosecution placed reliance on two dying declarations which according to the prosecution are consistent, trustworthy, and reliable.

44. There is no dispute that the alleged incident has taken place on 8.12.2009. The death of the deceased due to the burn injuries is also not in dispute. The deceased was admitted in the Irwin Hospital at Amravati on 9.12.2009 and her first dying declaration Exhibit-21 was recorded at 1:55 pm. The said dying declaration bears signature of the Medical Officer which shows that the said dying declaration was recorded in his presence and the patient was conscious while recording the said dying declaration.

As per the said dying declaration, the alleged incident occurred on 8.12.2009 at about 7:00 pm when nobody was in the house. The said position is not disputed by the defence. As per the said dying declaration, the deceased caught fire accidentally.

Whereas, her second dying declaration was recorded by Executive Magistrate PW8 Prakash Ghormade

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wherein she narrated that the alleged incident has taken place on 8.12.2009 at about 9:00 pm when she set herself ablaze.

The third dying declaration recorded by Police Head Constable PW7 Vitthal Kherde also shows that the deceased narrated before him that the alleged incident has taken place on 8.9.2009 at about 9:00 pm when she set herself ablaze.

If the second dying declaration is perused, below her statement, occurrence of the date and time of the alleged incident is mentioned as 8.12.2009 at about 7:00 pm. Regarding the said fact, there is no clarification by the prosecution that if the alleged incident has taken place, how the timing of the occurrence is appearing in the dying declaration as 7:00 pm.. The second inconsistency came on record is that as per sister of the deceased PW1 Chaya Chakre, in the intervening night of 9.12.2009 and 10.12.2009, no doctor visited the burn ward to see the patient. Whereas, the evidence of Executive Magistrate PW8 Prakash Ghormade and Medical Officer Doctor PW6 Dr.Prashant Bharsakhale shows that the Executive Magistrate has given requisition at

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12:50 am and recorded the statement of the deceased and the last endorsement was given by the Medical Officer at 1:18 am. As far as mental and physical condition of the patient is concerned, there is no endorsement by the Medical Officer that the patient was physically and mentally fit to give her statement. Witnesses especially sister of the deceased PW1 Chaya Chakre; brother-in-law of the deceased (sister's husband) PW2 Rama Chakare and brother of the deceased PW5 Pramod Shirsat, who are the nearest relatives of the deceased, deposed that the deceased was under pain.

45. Now, it is well settled legal position that endorsement of Medical Officer, regarding mental fitness of the patient, is not required. Only requirement is that person, who is recording dying declaration, shall satisfy himself that declarant is in a fit state of mind. He shall record such satisfaction.

46. If the evidence of Executive Magistrate PW8 Prakash Ghormade is considered, admittedly, nothing is on record to show that he has satisfied himself that the declarant is physically as well as mentally fit to give her statement. The

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Medical Officer has only stated that the patient is conscious state and well oriented. Though the patient may be in conscious state, it does not mean that she is physically and mentally fit to give her declaration. Even, if the dying declarations are accepted as it is, general allegations are made in it against the accused persons. There is no mention as to instances, time, and date regarding the ill-treatment caused to her. She has made general statement that she was harassed by the accused persons.

47. In view of the definition under Section 498-A of the Indian Penal Code, ill-treatment shall be to such an extent that the deceased was driven to commit suicide. There should be willful conduct and the willful conduct must be of such a nature which would be likely to drive a woman to commit suicide.

48. Mere contention that the deceased was harassed for trifle reasons, the same is not sufficient to attract the cruelty and is not sufficient to attract willful conduct which would drive her to commit suicide.

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49. The third dying declaration recorded by Police Head Constable PW7 Vitthal Kherde is of similar in nature. Though the said witness stated that he approached to the Medical Officer and enquired whether the patient is in a position to give statement (requisition is at Exhibit-56), there is no endorsement as to the physical and mental fitness of the patient. He has admitted that the Medical Officer only gave an endorsement on the requisition by mentioning as 'OK'. The said Medical Officer is not examined by the prosecution. The said witness has also not satisfied himself by putting any questions to ascertain whether the patient is physically and mentally fit to give statement. In absence of the said satisfaction, the dying declaration was recorded.

50. As already observed earlier, both dying declarations, as well as the oral dying declaration to sister of the deceased PW1 Chaya Chakre; brother-in-law of the deceased (sister's husband) PW2 Rama Chakare, and brother of the deceased PW5 Pramod Shirsat, also show that general allegations are made against the accused persons. In the last dying declaration, it is tried to bring on record abuses uttered by accused No.2. However, the said fact is not appearing in

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the dying declaration recorded prior in point of time on 10.12.2009.

51. Thus, the evidence of the dying declarations is not inspiring confidence on various grounds i.e. the timing mentioned in the dying declarations regarding the incident by the deceased is 9:00 pm on 8.12.2009. Whereas, date of the occurrence mentioned in the dying declaration by Executive Magistrate PW8 Prakash Ghormade as "8.12.2009 at 7:00 pm". On the contrary, this fact supports the case of the defence and the first dying declaration shows that the alleged incident had occurred on 8.12.2009 when nobody was in the house.

52. Thus, considering the evidence, admittedly, the dying declaration, on which the prosecution placed reliance, is not cogent, reliable and inspiring the confidence.

53. The offence of abetment of suicide is specified in Section 306 of the Indian Penal Code. The ingredients of the said Section require to be proved satisfactorily. It requires abetment as defined under Section 107 of the Indian Penal Code. The expression abetment means a person abets doing

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of a thing, who instigates any person to do that thing; or engages with one or more other person or persons in any conspiracy for doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, or intentionally aids by any act or illegal omission, the doing of that thing. The word 'instigate' literally means to goad, to urge forward, provoke, incite or encourage to do an act. A person is said to instigate to another person when he actively suggests or stimulates him/her to an act by any means or language directly or indirectly.

54. Thus, in order to attract abetment, it must show that accused kept on urging or annoying deceased by words which drive her to commit suicide and whether cruelty can be inferred only from the fact of suicide.

55. In the present case, there is absolutely no evidence on record to show that the cruelty is of such a nature due to which it was difficult for the deceased to lead a life and there was no alternate than to commit suicide.

56. Though evidence of cruelty would be relevant in determining whether death could be suicidal and the evidence

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of death being suicidal would be relevant in judging existence or extent of cruelty. There are number of factors which may lead to a person deciding to take his own life.

57. Considering the entire material on record, the prosecution failed to prove beyond reasonable doubt that the deceased was subjected for cruelty and abetment which involve a mental process was such an extent that there was no alternate for the deceased but to commit suicide. The present case represents that the deceased led marital life with accused No.1 from 2001 to 2009 i.e. approximately eight years and there was no single complaint during these years. The deceased and accused No.1 are having two children from their wedlock. Taking an overall view of the matter, except the general allegations, no other evidence is on record to show that the deceased was subjected for cruelty to such an extent which she could not tolerate the same and she committed suicide. As such, I am of opinion that the prosecution failed to prove that the deceased was subjected for cruelty and she committed suicide due to the said abetment. The evidence in the nature of dying declarations is also not cogent, reliable, and trustworthy.

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58. In the light of the above, as I am of considered opinion that learned Judge of the trial court failed to appreciate the evidence on record and as such convicted the accused persons, I proceed to pass following order:

ORDER

(1) The criminal appeal is **allowed**.

(2) The judgment and order of conviction and sentence dated 7.5.2011 passed by learned Ad hoc Additional Sessions Judge, Amravati in Sessions Trial No.95/2010 is hereby quashed and set aside.

(3) The accused persons are acquitted of the offences for which they are charged.

(4) Bail Bonds of the accused persons stand cancelled.

The appeal stands disposed of accordingly.

(URMILA JOSHI-PHALKE, J.)