

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

CRIMINAL APPEAL NO.343 OF 2020

Amit Radheshyam Sharma,
Age 36 years, Occ. Private,
R/o. Buldi Main Road,
Near Loha Pul,
District Nagpur

...APPELLANT

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station Sitabuldi,
District Nagpur

...RESPONDENT

Shri A.C. Jaltare, Advocate for the appellant.
Shri N.S. Rao, A.P.P. for the respondent/State.

CORAM : ROHIT B. DEO & URMILA JOSHI-PHALKE, JJ.
RESERVED ON : DECEMBER 09, 2022.
PRONOUNCED ON : MARCH 03, 2023

ORAL JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard finally with the consent of learned Counsel appearing
for the parties.

2. The appellant is assailing the judgment and order dated
13/03/2020 passed by the Additional Sessions Judge, Nagpur in Sessions

Case No.115/2016 by and under which the accused is convicted for the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as 'the IPC' for short) for committing murder of his wife and sentenced to suffer imprisonment for life and to pay fine of Rs.2000/- in default to suffer rigorous imprisonment for 15 days.

3. The accused was prosecuted for causing the death of his wife by name Pooja @ Alka Sharma who had suffered burn injuries on 12/11/2015 and succumbed to the burn injuries on 16/11/2015.

4. The prosecution case as has unfolded during the course of time is thus :

A] Deceased Alka Amit Sharma is the wife of the accused suffered burn injuries on 12/11/2015 at about 10.00 am in her residential house situated at Telipura, Sitabuldi, Nagpur within the jurisdiction of Sitabuldi police station. PW-9 – Arun Badriprasad Nagare had received information about the said patient who was admitted in the hospital as she received the burn injuries. Therefore, he approached to the patient and made enquiry with her. It revealed to him that there was quarrel between the injured Pooja @ Alka Sharma and her husband and her husband poured kerosene on her and set her ablaze, therefore, he called Women Police Officer Smt. Waghade for recording her statement.

B] PSI Waghade on 12/11/2015 accordingly visited Mayo hospital and met the Medical Officer. She made enquiry whether the victim is in position to give the statement. The Medical Officer gave endorsement to her that patient is fit to give a statement on the requisition letter. Accordingly, she recorded a statement of a victim as per her say. The victim has narrated before her that on the day of incident there was quarrel between her and her husband at about 8.30 am, and therefore, he poured kerosene on her and set her ablaze. She shouted for help. After hearing her shouts neighbours came there and extinguished the fire and shifted her to the hospital. On the basis of said declaration, police have registered the offence vide Crime No.430/2015 initially under Section 307 of the IPC.

C] After registration of crime PW-8 – PSI Waghade and PW-9 – Arun Nagare visited the alleged spot of incident and drawn the spot panchnama. During the spot panchnama they have seized the burnt pieces of cloths, kerosene can, match box and other articles from the spot. They have also obtained the handwash of the accused for chemical analysis. The accused was arrested. During the investigation, victim injured Pooja @ Alka Sharma succumbed to the burn injuries on 16/11/2015. Therefore, offence was converted under Section 302 of the IPC. All the incriminating articles are forwarded to chemical analysis

and after completion of investigation they have submitted the charge-sheet against the accused. As offence punishable under Section 302 of the IPC was exclusively triable by the Court of Sessions. The learned Magistrate committed the case to the Court of Sessions. The Sessions Judge has framed the charge against the accused vide Exhibit 5. The accused pleaded not guilty and claimed to be tried.

5. To substantiate the contention of the prosecution, the prosecution has examined in all 10 witnesses as follows:

- (i) PW-1 – Anshuman Pritamsingh Parihar (Exhibit 10) – oral dying declaration – neighbour hostile.
- (ii) PW-2 – Mohd. Salim @ Illu Mohd. Sultan (Exhibit 11) – neighbour hostile.
- (iii) PW-3 – Sanjay Chirkut Shembhekar (Exhibit 14) – panch on spot.
- (iv) PW-4 – Nandu Ramchandrarao Kubade (Exhibit 16) – Rickshaw driver – oral dying declaration.
- (v) PW-5 – Subhachand Uttamlal Kesarwani (Exhibit 17) – Father of the deceased.
- (vi) PW-6 – Umabai Subhachand Kesarwani (Exhibit 18) – Mother of the deceased.
- (vii) PW-7 – Dr. Kishor Bhivram Deoghale (Exhibit 22) – Medical Officer who gave endorsement.
- (viii) PW-8 – Madhuri Hanumantrao Waghade (Exhibit 34) – Police officer who recorded dying declaration – Investigating Officer.

- (ix) PW-9 – Shri Arun Badriprasad Nagare (Exhibit 52) – Investigating Officer.
- (x) PW-10 – Gajanan Surbaji Kokate (Exhibit 59) – Executive Magistrate.

6. Besides the oral evidence Prosecution also relied upon various documents such as :

Spot panchnama (Exhibit 15), Post-mortem notes (Exhibit 21), Requisition by police to Medical Officer for recording dying declaration (Exhibit 23), Inquest panchnama (Exhibit 29), Requisition to Chemical analysis (Exhibit 35), Invoice challan (Exhibit 36), Merg (Exhibit 37), Invoice challan (Exhibit 45), Information received from Mayo hospital (Exhibit 53), Letter to Executive Magistrate (Exhibit 54), FIR (Exhibit 55), Arrest Panchnama (Exhibit 56), Requisition to Medical Officer by Executive Magistrate and dying declaration (Exhibit 4), Chemical Analyzer Report (Exhibits 62, 63 and 64).

7. After hearing both the sides and after recording the evidence, learned trial Court came to the conclusion that the accused is the perpetrator of the crime, and therefore, convicted of the offence punishable under Section 302 of the IPC and sentenced to suffer imprisonment for life and to pay a fine of Rs.2000/- in default to suffer rigorous imprisonment for 15 days.

8. Being aggrieved and dissatisfied with the judgment of the trial Court, present appeal is preferred by the appellant on the ground that the entire case is based on the dying declaration which is recorded by PW-8 – Madhuri Hanumantrao Waghade and PW-10 – Gajanan Surbaji Kokate. Both the dying declarations are of the same time. Therefore, veracity and legality of the said dying declaration is in question. There is no independent witness to prove that it was the accused who has poured the kerosene on the deceased and set her ablaze. Though the neighbour witnesses supported the prosecution case regarding the alleged incident but they have not supported that it was the accused who poured kerosene on her person and set her ablaze. The fact that the deceased has made oral dying declaration to these witnesses is not supported by them. Besides the dying declaration there is absolutely no evidence to show that the relation between the deceased and the accused were not cordial. In fact, deceased has sustained injuries accidentality. She has not made any dying declaration. The accused was convicted on the concocted evidence. As the dying declaration is not truthful, benefit of doubt goes to the accused and hence the accused to be acquitted.

9. Heard Shri A.C. Jaltare, learned Counsel for the appellant. He reiterated the same contentions and submitted that the law regarding the dying declaration is well settled. The dying declaration is the last

statement made by 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 speak the truth and only the truth. But such statement should be voluntarily reliable and is not an attempt of tutoring. Then the Court can safely rely on such dying declaration and it can form the basis of conviction. He submitted that in the present case, the evidence of PW-8, PW-9 and PW-10 regarding the dying declaration is not satisfactory, not cogent and not reliable one and deserves to be discarded. Thus, the prosecution failed to prove the charges against the accused, therefore, the accused to be acquitted from the charges by interfering the findings of the trial Court.

10. On the other hand, learned Additional Public Prosecutor Shri N.S. Rao submitted that the prosecution has placed its reliance on the dying declaration made to PW-8 – Madhuri Hanumantrao Waghade and PW-10 – Gajanan Surbaji Kokate who is the Executive Magistrate. The recitals of the dying declaration consistently shows that it was the accused who poured the kerosene on the deceased and set her ablaze as there was quarrel between them. Deceased has sustained the burn injuries and succumbed to the death. The deceased was ill-treated by the accused and on the day of incident also there was quarrel between them and accused has poured kerosene on the deceased and set her ablaze.

The evidence of dying declaration is consistent, reliable, and therefore, trial Court has acted upon it. Hence, no interference is called for.

11. After hearing both the sides and after giving thoughtful consideration to the submissions made by both the parties. Following points arise for our consideration :

- (i) Whether the prosecution proves that the death of the deceased is homicidal one? and
- (ii) Whether the accused has poured the kerosene on her person and set her ablaze?

12. To substantiate the contention that the deceased has sustained the burn injuries and she succumbed to the death due to the said burn injury, the prosecution mainly placed reliance on the medical evidence i.e. the post-mortem examination which is at Exhibit 21. Said post-mortem report is admitted by the defence. As per the recitals of the post-mortem report, deceased had sustained burn injuries to the extent of 72%. She had sustained 9% of burns on head, neck and face, 9% on right upper limbs, 7% on left upper limbs, 12% on anterior trunk, 7% on posterior trunk, 14% on right lower limb, 14% on left lower limb. Thus, she had sustained total 72% of the burn injuries. Admittedly, Medical Officer is not examined as the defence has admitted the said post-

mortem report. The inquest panchnama is also on record at Exhibit 29. The recitals of the inquest panchnama is also admitted by the defence. The recitals of the inquest panchnama also shows that deceased has sustained burn injuries and she died due to said burn injuries. Said inquest panchnama is at Exhibit 29. Thus, the cause of death as per the post-mortem report is septicaemia due to the burns. Admittedly, burn injuries can be accidental, suicidal or homicidal therefore, whether the deceased has sustained the homicidal burn injuries the other evidence which is produced on record is to be appreciated.

13. It is not in dispute that on 12/11/2015 when deceased was present in her matrimonial house at about 10.00 am, she sustained burn injuries. As per the prosecution, it was the accused who poured kerosene on her and set her ablaze whereas as per the defence deceased has sustained the burn injuries accidentality and accused is falsely implicated. To prove that the death of the deceased is homicidal one, the prosecution placed reliance on the evidence of PW-1 – Anshuman Parihar who is the neighbour of the deceased and the accused. As per his evidence, on 12/11/2015 at about 10 am he heard the shouting, therefore, he proceeded towards the house of the accused and saw that the wife of the accused was burning in the room. She was demanding water. He extinguished the fire and shifted her to Mayo hospital. PW-2

Mohd. Salim @ Ullu Mohd. Sultan examined vide Exhibit 11 is also a neighbour. His evidence is also to the extent that on 12/11/2015 at about 10.00 am when he was present in the house he heard the shouts in the locality as “Bachao Bachao”, therefore, he ran towards the house of the accused. The wife of the accused was sitting in the house in burning condition he put upon her a blanket and removed her into the hospital in one autorickshaw. He admitted her in the hospital. Thus, both these witnesses have stated that after hearing the shouts they immediately rushed to the spot of incident and saw that the deceased has sustained the burn injuries and they shifted her to the hospital. As both the witnesses have left loyalty towards the prosecution as regard to the oral dying declaration made by the deceased to them, they were cross-examined by the learned Additional Public Prosecutor. They specially denied that the deceased had stated anything to them about the incident. They denied that the deceased had made any disclosure to them regarding the alleged incident. Thus, the evidence of PW-1 and PW-2 is only to the extent that deceased had sustained injuries and they shifted her in the hospital.

14. The prosecution has also placed reliance on the evidence of PW-4 – Nandu Ramchandrarao Kubade who was auto rickshaw driver and in whose autorickshaw deceased was shifted to the hospital. He

testified vide Exhibit 16 that since 1983 he was plying the autorickshaw. On 12/11/2015 at about 8.45 to 9.00 am people of locality called him at the house of accused Amit Sharma. They have put wife of accused in the autorickshaw who was in a burn condition and people told him to take Mayo hospital. Two ladies accompany her in the autorickshaw. While taking to the Mayo hospital wife of the accused discloses that the accused poured kerosene on her and set her ablaze. She was admitted in the Mayo hospital. During his cross-examination he admitted that he is not aware about the names of the said ladies. He had not informed about the said utterance to nobody till 18/11/2015 i.e. till recording his statement. Thus, the defence has attempted to bring on record that PW-4 is not the reliable witness as he has not made any disclosure about the said dying declaration by the victim when she was taken to the hospital in his autorickshaw.

15. Besides the evidence of PW-4, prosecution further relied upon the evidence of PW-8 - Madhuri Waghade who has recorded dying declaration of the deceased. As per her evidence, on 12/11/2015 she was working as a Police Sub-Inspector in police station, Sitabuldi. Police Sub-Inspector Nagare has received the information regarding the incident. He informed her through telephonic call that being a lady officer she has to record the statement of the victim. Accordingly, she

visited the Mayo hospital and met the medical officer. She made enquiry with the medical officer whether the victim is in a position to depose. The medical officer enquired with the victim and gave an endorsement to her that patient is fit to give statement. Thereafter she recorded the statement as per the narration of the victim. The victim has narrated before her about the alleged incident. Said statement is at Exhibit 24. On the basis of said statement, police have registered the offence. During investigation she had also drawn the spot panchnama, recorded the statements of the witnesses, collected the post-mortem reports and accordingly completed the investigation.

16. As the entire case is based on the dying declaration, prosecution has also examined PW-10 – Gajanan Kokate who acted as an Executive Magistrate. PW-9 – Arun Nagare – Investigating Officer has issued a letter to the Executive Magistrate for recording the statement of the deceased Alka Sharma. On 12/11/2015, as per the said requisition by the police, he visited the Mayo hospital, met the medical officer and obtained the endorsement that the patient is fit to give statement and thereafter he recorded the statement. The deceased has narrated before him that on 12/11/2015 there was quarrel between her and her husband and he poured kerosene on her and set her ablaze. PW-10 has recorded the statement, accordingly by obtaining her signature on the

said statement. Said statement is at Exhibit 60. During cross-examination PW-10 has admitted that it is necessary to ascertain the mental state of a person deposing. He also admitted that it is to be ascertained by putting general questions to the injured. He testified that he put the general questions and thereafter recorded the statement. He further admitted that he has not mentioned that which thumb's impression was obtained by him on the said statement. Thus, his cross-examination is only to the extent that he has not recorded the questions on the basis of which he ascertain the medical fitness of the patient.

17. To prove whether the patient was in a fit condition to give statement or not. The prosecution placed reliance on the evidence of PW-7 – Dr. Kishor Deoghale vide Exhibit 22. As per his evidence he was serving as a Resident Doctor in Mayo hospital. On 12/11/2015, he was posted in burn ward and was duty as a house officer. Patient by name Pooja Sharma was admitted in the burn ward. He has received one requisition. He examined the patient Alka @ Pooja Sharma, she was fully conscious, oriented to time, place and person, therefore, he made an endorsement on a requisition that the patient is fit for statement at 12.25 pm. Then PSI Waghade recorded the statement of Alka @ Pooja for 45 minutes in his presence. Said statement is at Exhibit 24. His endorsement

is at Exhibit 23. Thus, his evidence is only to the extent that PSI Waghade approached to him and thereafter he examined the patient and gave the endorsement to the extent that patient was in a fit condition to give statement. During his cross-examination, it is elicited that burn patients are administered with heavy pain killers and antibiotics. He further admitted that tablet by name pentazocine are administered to serious patients. Due to the said medicine patient became drowsy. From the cross-examination evidence came on record is through the bed head ticket one can know what treatment was administered to the patient. Initially, he denied that tablet namely pentazocine was administered to the patient during the treatment. However, during the further examination he admitted that pain killers were administered to the patient and pain killers brings drowsiness to the patient as a side effect. He further admitted that casualty papers shows history of accidental burns. Regarding the mental fitness, he stated during the cross-examination that some general questions are asked to the patient to assess her mental and physical orientation capacity. On his satisfaction he gave an endorsement. The evidence further shows before giving the fitness certificate he had examined blood pressure and other clinical examinations. He further admitted that he has not mentioned on the requisition or statement of the patient that the patient is conscious, oriented to the time, place and person. Thus, the evidence

of PW-7 is only to the extent that PSI Waghade approached to him for appearing the endorsement thereafter he examined the patient and gave an endorsement. His endorsement on the requisition is 12.25 pm. As per the evidence of PW-7 – Dr. Kishor Deoghale and PW-8 – Madhuri Waghade, the statement of the injured was recorded at about 12.25 pm on 12/11/2015. As per the evidence of PW-10 also he reached at Mayo hospital at about 12.15 pm obtained the endorsement at about 12.20 pm and started the statement at about 12.25 pm on 12/11/2015. The evidence of Medical Officer is silent regarding the fact that the Executive Magistrate approached to him on 12/11/2015 for obtaining any endorsement regarding the fitness of the patient. The requisition given to the Medical Officer bears the name of PW-7 – Dr. Kishor Deoghale thus, the evidence of Medical Officer PW-7, evidence of PW-8 PSI Waghade and evidence of PW-10 Kokate shows that both the statements are recorded at 12.25 pm. It is pertinent to note that neither PSI Waghade nor PW-10 – Gajanan Kokate narrates about the presence of each other. The Medical Officer Dr. Kishor Deoghale also nowhere narrates the presence of Executive Magistrate – Gajanan Kokate.

18. Besides the evidence of these witnesses, prosecution also relied upon the evidence of PW-3 - Sanjay Shembhekar who acted as a panch on spot panchnama. His evidence is to the extent that police

called him to act as a panch. In his presence police visited the alleged spot of incident. The alleged spot of incident was one house at Telipura. From the spot, one bottle in which there was a blue liquid, red burn pieces of saree, bunch of burn hairs, one match box and burn pieces of cloths were seized. During his cross-examination it came on record that said room was 10 x 10 feet and there were household articles lying in the said room. Thus, the evidence of PW-3 states that the alleged spot was situated which is the residential house of the accused and the deceased. PW-5 – Subhachand Uttamlal Kesarwani and PW-6 – Umabai Subhachand Kesarwani are the parents of the deceased. As per their evidence marriage of the deceased was performed with the accused on 17/06/2012 and the deceased was having one daughter from the said wedlock. Accused was addicted to bad vices of consuming liquor and under the influence of liquor he used to ill-treat the deceased by beating her. They have given understanding to the accused but there was no change in his behaviour and he continued the ill treatment to the deceased. Regarding the incident they both have stated that on 09/11/2015 they received the information that their daughter has sustained burn injuries and admitted in the hospital. They immediately approached to the hospital to see their daughter. On enquiry their daughter disclosed to them that her husband beat her and set her ablaze by pouring kerosene and went out of the house by taking his daughter.

During cross-examination it came on record that the statement of PW-5 and PW-6 was recorded on the same day. Though police were present in the Mayo hospital they have not made any complaint to the police after disclosure by their daughter. PW-5 specifically admitted that he has not stated to the police that his wife informed to him about the ill treatment to their daughter. He also not stated to the police while giving the statement that at the time of Rakhi festival, deceased informed him about the trouble from her husband and also told them that she will not be alive if they are not taking her at home. As per evidence of PW-6, she along with her husband, son and daughter met her daughter together. She asked the deceased “कैसे कर डाला”, at that time herself and her husband were ahead and both children were behind them. They all heard the reply given by the deceased. She also admitted that their statement was not recorded in the hospital but it was recorded after two days. She denied that deceased committed suicide in heat of anger. Thus, as per the evidence of PW-5 and PW-6, oral dying declaration was made to them by their daughter that it was the accused who poured kerosene and set her ablaze.

19. PW-9 - Arun Nagare is the Investigating Officer who narrated about the investigation carried out by him. During his cross-examination he admitted that he received the information that burn lady was

extinguished by the neighbours. He had not recorded the statements of the neighbours on the spot. The documentary evidence collected by him i.e. Exhibit 53 is the information received by him from Mayo hospital which discloses that he received the information about the incident at about 11.25 am. Immediately, he issued a letter to the Executive Magistrate for recording the statement which is at Exhibit 54. The offence was registered against the accused at about 14.42 hours. Thus, from the evidence adduced on record it shows that alleged incident occurred on 12/11/2015 at about 9.00 to 9.30 am. Immediately, neighbours took the deceased in the hospital. She was admitted in the hospital at about 11.00 am. Before 11.00 am she was taken to casualty department. History of accidental burn injury was given in the casualty department. The medical treatment papers which are filed on record shows that on 12/11/2015, only police officer Waghade approached to the Medical officer for obtaining the endorsement. The medical papers nowhere shows that the Executive Magistrate at any point of time approached to the Medical Officer and requested him to ascertain whether patient is in a position to give statement or not. Requisition to the medical officer was given by PSI Waghade for obtaining the endorsement at about 12.00 pm. The medical officer has given the endorsement at about 12.25 pm and thereafter PW-8 recorded the statement. Below the statement endorsement of the Medical officer is at

about 1.15 pm. The documentary evidence adduced by PW-10 also shows that he reached in the hospital at about 12.15 pm. The medical officer gave endorsement to him at about 12.25 pm and he started recording the dying declaration at about 12.25 pm. Thus, as per the evidence, both the dying declarations are recorded at about 12.25 pm.

20. Besides the oral evidence, prosecution also relied upon the scientific evidence – chemical analyzer reports. Exhibit 4 is the Chemical Analyzer report regarding the partly burnt cloths. The report shows that neither blood nor tissue is detected on Exhibits 2, 3 and 5. Chemical Analyzer report Exhibits 62, 63 and 64 are also on record. As per Exhibit 62, no kerosene residues are found on Exhibit 1 – burnt hairs however, kerosene residues are detected on burnt cloth pieces. Exhibit 63 is the chemical analysis report in respect of blue colour liquid in plastic bottle, partly burnt cloth piece, hair in a packet, match sticks in a match box, partly burnt cloth pieces and safety pin and colourless liquid. Exhibit 64 is the handwash of the accused. As per the chemical analyzer reports, no kerosene residues are found in the handwash of the accused. The kerosene residues are found on partly burnt cloths. Thus, as per the chemical analyzer reports kerosene residues are only found on the partly burnt cloths and not on the handwash of the accused.

21. Thus, the entire case of the prosecution is rested upon the dying declaration. Whether said dying declaration is inspiring the confidence or not is to be seen in the light of well settled legal position. The juristic theory regarding acceptability of a dying declaration that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Great caution must be exercised in considering the weight to be given to this type of evidence on account of the existence of many circumstances which may affect their truth. The Hon'ble Apex Court in the case of ***Laxman vs. State of Maharashtra, 2002 ALL MR (Cri) 2259 (S.C.)***, wherein it is held that normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the 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 the indication is positive and definite. It is further held that what evidential value or weight has to be attached to

such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

22. In the case of *Krishan vs. State of Haryana, 2013 ALL MR (Cri) 727 (S.C.)*, the Hon'ble Apex Court has held that, where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look

for corroboration of the same. In another judgment of ***Surinder Kumar vs. State of Haryana, 2012 ALL MR (Cri) 696***, wherein it is held that though there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration, but the Court must be satisfied that the dying declaration is true and voluntary and in that event, there is no impediment in basing conviction on it, without corroboration. It is the duty of the court to scrutinize the dying declaration carefully and must ensure that the dying declaration is not the result of tutoring, prompting or imagination. Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. In the case of ***Ashabai and another vs. State of Maharashtra, AIR 2013 SUPREME COURT 341***, wherein it is held that statement made by the deceased by way of a declaration is admissible in evidence under Section 32(1) of the Evidence Act. It is not in dispute that her statement relates to the cause of her death. In that event, it qualifies the criteria mentioned in Section 32(1) of the Evidence Act. There is no particular form or procedure prescribed for recording a dying declaration nor it is required to be recorded only by a Magistrate. As a general rule, it is advisable to get the evidence of the declarant certified from a doctor. In appropriate cases, the satisfaction of the person recording the statement regarding the state of mind of the deceased would also be sufficient to hold that the deceased was in a position to

make a statement. It is settled law that if the prosecution solely depends on the dying declaration, the normal rule is that the courts must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused had no opportunity to test the veracity of the statement of the deceased by cross-examination. The law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated on its own merit.

23. This Court has also taken a similar view in ***Rajkumar Shivnath Yadav vs. Union Territory of Daman and Diu and another, 2016 ALL MR (Cri) 392***, wherein held that as per settled position of law also, the endorsement of Doctor on the dying declaration is not sine qua non or a must. What is essential is the satisfaction of the person who records dying declaration, that the declarant was in a fit condition to give statement.

24. In the present case, prosecution has led the evidence of PW-8 Madhuri Waghade vide Exhibit 34 and PW-10 – Gajanan Kokate vide Exhibit 59. As per their evidence, they both have approached to the Medical officer at 12.00 pm. They obtained the medical endorsement from the Medical Officer regarding the fitness of the declarant and they have recorded the dying declaration at 12.25 pm. Thus, the evidence of PW-8 and PW-10 both have stated that dying declaration recorded by them which is at Exhibit 24 and Exhibit 60 are recorded at 12.25 pm. Both these witnesses have stated that they went to the hospital and recorded the dying declaration of deceased Pooja @ Alka Amit Sharma. The evidence of both these witnesses nowhere discloses that they have satisfied themselves that the patient was physically and mentally fit to give the statement. The evidence of Medical Officer PW-7 - Dr. Kishor Deoghale is also only to the extent that he examined the patient. She was fully conscious, oriented to time, place and person and accordingly, he made endorsement on the requisition of PW-8 - PSI Waghade. He nowhere states regarding the presence of PW-10 – Gajanan Kokate. PW-7 has not stated that at any point of time PW-10 Gajanan Kokate - Executive Magistrate approached to him with request to ascertain whether patient is in a position to give a statement or not. He nowhere stated that on the request of Executive Magistrate he examined the patient and ascertained her fitness regarding whether she is able to give

statement or not. The endorsement which is given by him in a requisition by PW-8 – PSI Waghade is only to the extent that the patient is fit for the statement. Said endorsement nowhere discloses regarding physical and mental fitness of the patient. At the end of Exhibit 24 he has only signed below the statement by mentioning time 1.15 pm. Thus, his evidence also nowhere shows that during the entire statement deceased was physically and mentally fit to give a statement and statement was recorded in his presence. The ultimate test as to whether the dying declaration can be held to be truthful one and voluntarily given, and therefore, before recording the dying declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question. Thus, subject to satisfaction of a Magistrate who opined that the injured was in the fit state of mind at the time of making a declaration is to be recorded. Admittedly, the certification of the doctor was not must but the person who recording the dying declaration has to satisfy himself that the patient is not only physically but mentally fit to give such statement before recording the dying declaration. In the present case, the medical endorsement is not to the extent that the patient was physically and mentally fit to give a statement.

25. To test the evidentiary value of the said dying declaration, Shri Jaltare, learned Counsel for the appellant placed his reliance on

Uttam Vs. State of Maharashtra (2022) 8 SCC 576 wherein it is held that the “dying declaration” is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. He further relied upon ***P.V. Radhakrishna Vs. State of Karnataka (2003) 6 SCC 443*** wherein it is held that the general rule is that all oral evidence must be direct. The eight clauses of Section 32 of Evidence Act are exceptions to the general rule against hearsay. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. He further relied upon ***Jayamma and anr. Vs. State of Karnataka (2021) 6 SCC 213*** wherein it is held by the Hon’ble Apex Court that when a dying declaration has been recorded in accordance with law, and it gives a cogent and plausible explanation of the occurrence, the court can rely upon it as a solitary piece of evidence to convict the accused. Lastly, he

placed reliance on the decision of this Court in ***Criminal Appeal No.64/2006 (Sunil s/o Deorao Dhawale Vs. The State of Maharashtra)*** decided on 20/01/2018, wherein this Court has discussed the law regarding the dying declaration and held that a dying declaration is admissible under Section 32(1) of the Evidence Act. The juristic justification for the admissibility of a dying declaration as substantive evidence, which is an exception to the rule against the admissibility of hearsay evidence which is not tested by cross-examination, is that a person who is facing eminent death would not ordinarily indulge in false implication or resort to falsehood. It is further held that it is a trite law, that a dying declaration can be the sole basis for conviction. However, before basing the conviction on the dying declaration, the conscience of the Court must be satisfied that the maker of the statement was in a fit condition give the statement, the statement is voluntary and truthful and dying declaration is free from embellishments and any other infirmity.

26. In the present case as already observed that the prosecution is relying upon two dying declarations Exhibit 24 and Exhibit 60 which are recorded by PW-8 PSI-Waghade and PW-10 Gajanan Kokate – Executive Magistrate. Both these witnesses have stated that they went to the hospital and recorded the dying declaration of the deceased. We are not inclined to place any reliance on the two dying declarations. Firstly, for

the reason that both the dying declaration show that same are recorded at about 12.25 pm on 12/11/2015. If they were recorded at the same time neither PW-8 PSI Waghade nor PW-10 Kokate has made a reference regarding the presence of other. It would not be possible that both these persons would visit the injured at one and the same time and would record the dying declaration. In such case, the contents of both the dying declaration should be the same. In the present case, no doubt basic contents of the dying declaration are the same however, it is difficult to accept that at the same time both have recorded the dying declarations. The dying declaration recorded by them also raises serious doubt. In the mind regarding the veracity of the two dying declarations as PW-7 – Medical Officer who has endorsed on the requisition of PW-10 – Kokate nowhere states that Shri Kokate approached to him. He examined the patient and made an endorsement. His evidence is silent to the extent that both PSI Waghade and Kokate approached to him and obtained his endorsement at the same time. Thus, raises serious doubt in the mind regarding the veracity of the two dying declarations. If both the dying declarations are seen in the context that the deceased has sustained injury as an accused has poured kerosene on her and set her ablaze, then the evidence of PW-8 and PW-10 should corroborate each other by stating that they both have recorded the dying declaration at the same time. But both these witnesses have not narrated regarding the

presence of other person. This Court in the case of *Nasrina Eakbal Pathan (Khan) Vs. The State of Maharashtra 2014 ALL MR (Cri) 4739* held that two dying declarations recorded one by police constable and other by Special Executive Officer recording time shown to be same in both declarations. Veracity of both declarations is doubtful particularly because neither police constable made any reference to presence of Special Executive Officer nor did Special Executive Officer make any reference to presence of police constable. The dying declaration not reliable. Similar facts are in the present case. In the present case also neither PW-8 – PSI Waghade nor Special Executive Officer - Kokate made reference about the presence of the other. Both the dying declaration are recorded at 12.25 pm. The view taken by the Co-ordinate Bench in the above said judgment appears to be reasonable one. There is no reason to take a different view thus, the evidence regarding both the dying declaration raises serious doubt regarding the veracity of the said dying declarations, therefore, it is not acceptable.

27. It is well settled that dying declaration can form the sole basis of conviction if such declaration is true, reliable and has been recorded in accordance with established practice and principles. Besides the dying declaration recorded by PW-8 PSI Waghade and PW-10 Kokate, prosecution also relied upon the oral dying declaration to PW-4 Nandu

Kubade who is examined vide Exhibit 16. As per his evidence he is autorickshaw driver. On 12/11/2015, he was called at the house of accused Amit Sharma. The people gathered there, put the wife of accused Amit Sharma in his autorickshaw who has sustained burn injuries and asked him to take her at Mayo hospital. While taking her to the hospital, the injured disclosed to the two ladies that accused poured kerosene on her and set her ablaze. During his cross-examination he admitted that he is unable to tell the names of that two ladies to the police.

28. It is well settled that dying declaration may be oral or written. Any adequate method of communication will suffice provided communication is positive and definite. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth, observed by the Hon'ble Apex Court in the case of ***Laxman Vs. State of Maharashtra (2002) ALL MR (Cri) 2259***. The Constitution Bench of the Hon'ble Apex Court in the above said judgment further observed that the situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-

examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the 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 always to be on guard to see that the statement of the deceased was not a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. Thus, the aforesaid observation of the Hon'ble Apex Court makes it absolutely clear that the dying declaration can be oral or in writing or any adequate method of communication whether by words or by signs or otherwise will suffice provided the communication is positive and definite. While dealing with the oral dying declaration, Hon'ble Apex

Court in the case of *Prakash and anr. Vs. State of Madhya Pradesh (1992) 4 SCC 225*, has stated that in the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants on the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same.

29. In the present case, PW-1 and PW-2 who immediately approached to the injured after the incident their evidence nowhere states that the injured was physically and mentally fit to give a statement. Their evidence is to the extent that she has sustained the burn injuries and she was asking for water. For proving the oral dying declaration, prosecution mainly relied upon the evidence of PW-4 – Nandu who is the autorickshaw driver. Though he has narrated that the deceased made a disclosure to two ladies however, the communication is not narrated by him in a positive and definite manner. He deposed in a general way that she disclosed that the accused poured kerosene on her and set her ablaze. Thus, the evidence of PW-4 regarding the communication is not positive and definite. Thereafter the prosecution

relied upon the evidence of PW-5 and PW-6 who are the parents. Though PW-5 and PW-6 have narrated about the previous ill treatment at the hands of the accused to the deceased but their evidence is general in nature and not in the manner of day, time and place. They have not narrated any specific date of the disclosure by the deceased regarding the ill treatment at the hands of the accused. There was no previous complaint by them regarding the said ill treatment. As per the evidence of PW-5, he and his wife enquired about the victim how it happened and deceased told that her husband beat her and set her ablaze by pouring kerosene and went out of the house by taking her daughter whereas as per the evidence of PW-6, she enquired with the deceased and deceased told her that she has not done anything and accused set her ablaze by pouring kerosene. Thus, there is no consistency in both the disclosure narrated by the deceased. The evidence of PW-5 and PW-6 is not consistent regarding the exact version of the deceased while disclosing the act of the accused. Thus, the evidence of PW-5 and PW-6 regarding oral dying declaration is also not positive and definite. If the written dying declaration is taken into consideration it is recorded on 12/11/2015 at 12.25 pm to 1.15 pm. Another dying declaration recorded by PW-10 is also of the same period. As per the evidence of PW-5 and PW-6 they reached in the hospital at about 6.30 pm on 12/11/2015. The evidence of Medical officer nowhere states about

mental fitness. The evidence of PW-5 and PW-6 is also silent regarding the aspect that the injured was conscious and physically and mentally fit and narrated the facts to them in conscious condition. Thus, the evidence of PW-5 and PW-6 is also vague in nature regarding the mental and physical fitness of the injured. In the absence of the evidence adduced by the prosecution to show that the deceased was physically and mentally fit at the time of making the statement. The crucial question is whether she was conscious as to the manner, time and place and whether she was in a position to make a statement. The medical treatment papers which were subsequently produced on record shows that she had sustained 75% of the burn injuries. PW-7 – Medical Officer has admitted during the cross-examination that pain killers were given to her. Pain killers brings drowsiness to the patient as a side effect. These admissions are sufficient to show that she was under the effect of sedatives as she was having pain due to burn injuries. Thus, her mental and physical orientation capacity was not ascertained either by Medical Officer or by PW-8 or by PW-10. Considering the admission of the Medical Officer, it can be hold that due to the pain killers given to the injured she was in a drowsy condition, and therefore, was not mentally and physically fit to give a statement. Moreover, her evidence regarding the oral dying declaration is not positive and definite.

30. The Hon'ble Apex Court in *Vijay Pal Vs. State (GNCT) of Delhi, 2015 ALL MR (Cri) 1611 (S.C.)* held that dying declaration can be oral or in writing and in any adequate method of communication whether by words, signs or otherwise will suffice, provided the communication is positive and definite. After scrutinizing the evidence it nowhere appears that the communication made by the deceased either to PW-4 or PW-5 and PW-6 is not positive and definite. The facts narrated by her are not reproduced by the witnesses in a definite words uttered by the declarant. In our view the dying declaration on which the trial Court has relied upon is to be rejected in toto as dying declaration altogether shrouded by suspicious circumstances and not trustworthy. The oral dying declaration i.e. the communication between the declarant and two ladies as per the evidence of PW-4 is not positive and definite. The communication between the declarant and her parents is also not positive and definite. We are satisfied that the dying declaration is not recorded as per the legal provisions and creates doubt. Therefore, we are not inclined to accept the said dying declaration by placing reliance upon the same. We are, therefore, of the opinion that the prosecution failed to prove that the evidence of dying declaration is cogent, reliable and trustworthy and no further corroboration is required.

31. In view of that in our considered opinion, the trial Court failed to appreciate the evidence and convicted the accused. The plea of

the accused is succeeded as accused has shown that the dying declaration which is recorded by PW-8 and PW-10 is not free from doubt. The veracity of the oral dying declaration is also doubtful.

32. We are, therefore, of the opinion that as a result of cumulative discussion above, the appellant succeeds. We are accordingly allow this appeal, set aside the judgment of the Court below and order his acquittal. Hence, we proceed to pass the following order :

- (i) Criminal appeal is allowed.
- (ii) The judgment and order of sentence dated 13/03/2020 passed by the Additional Sessions Judge in Sessions Case No.115/2016 is quashed and set aside.
- (iii) Accused is acquitted from the charges punishable under Section 302 of the IPC and his bail bonds stand discharged.
- (iv) The appellant shall be released from the custody unless required in some other case.
- (v) R. and P. be sent to the trial Court.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B. DEO, J.)