



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

CRIMINAL APPEAL NO.30 OF 2022

Sudam s/o Yamaji Bhalekar
Age : 43 years, Occu : Agril,
R/o. Nipani, Tal. & Dist. Aurangabad

... Appellant
(Orig. Accused)

Versus

The State of Maharashtra,

... Respondent

.....

Mr. Sudarshan J. Salunke, Advocate for Appellant
Mrs. Kalpalata - Patil Bharaswadkar, Addl. PP. for the Respondent /
State.

.....

CORAM : R. G. AVACHAT AND
NEERAJ P. DHOTE, JJ.

RESERVED ON : 04.09.2024
PRONOUNCED ON : 14.10.2024

JUDGMENT (*Per* NEERAJ P. DHOTE, J.) :

. This Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') is directed against the Judgment and Order dated 21.10.2021, passed by the learned Additional Sessions Judge, Aurangabad in Sessions Case No.193 of 2018, convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as the 'I.P.C.') and sentencing him to suffer Rigorous Imprisonment for Life and to pay fine of Rs.20,000/- (Rs. Twenty Thousand Only), in default, to suffer Rigorous Imprisonment for 06 (six) months.

2. Prosecution's case, as revealed from the Police Report, is as under :

2.1. Radhabai Sudam Bhalekar (Deceased) was the wife of Appellant. Out of wedlock, they had one daughter and one son. They were residing together at Nipani, Taluka and Dist. Aurangabad. Their agricultural field was acquired for extension of Solapur Highway. They received the compensation to the extent of Rs.6,00,000/- (Rs. Six Lakh), out of which Rs.4,00,000/- (Rs. Four Lakh) were deposited in the bank for their daughter's marriage and Rs.2,00,000/- (Rs. Two Lakh) were spent wastefully by the Appellant in liquor and gambling. The Appellant used to demand the amount which was deposited in the bank, to which the Deceased did not agree. Due to refusal of Deceased to part with the money, the Appellant used to beat and give threat to kill her.

2.2. On 06.02.2018 around 10:00 a.m. when Deceased, the Appellant and their daughter were in their house, the Appellant asked Deceased to accompany him in the bank and withdraw Rs.1,00,000/- (Rs. One Lakh) for him. Deceased declined and told him that the said amount was kept for their daughter's marriage, upon which the Appellant beat her. Again around 13:30 hrs the Appellant demanded money from Deceased, to which she refused. The Appellant picked the Can filled with kerosene and poured on Deceased and set her on fire by igniting the matchstick. While burning, Deceased caught hold the Appellant. The Appellant

pushed Deceased and went outside the house. Deceased too came outside the house. Their daughter doused the fire by water. The neighbours gathered and took Deceased and the Appellant to the hospital for treatment. Deceased suffered 98% burn injuries. The concerned Police Station was informed and the Police Sub-Inspector from the Police Station Chikhalthana recorded the statement of Deceased, after obtaining the doctor's endorsement about her fitness, in which she narrated the incident. The crime came to be registered against the Appellant for the offence punishable under Sections 307, 323, 504 of the Indian Penal Code with the Chikhalthana Police Station.

3. During the investigation, the Spot Panchanama was carried, the statements of witnesses were recorded, on the requisition by the Investigating Officer the Special Judicial Magistrate recorded the statement of Deceased on 07.02.2018 after ascertaining her fitness to give the statement. Deceased succumbed to the injuries on 11.02.2018. The Inquest was done and the body was referred for Post-mortem. On conducting the Post-mortem, the cause of death was revealed as "*Septicemia due to Burns*". Section 302 was added to the crime. The Appellant was also admitted to the hospital as he suffered the burn injuries. The Appellant came to be arrested. The Articles seized during the investigation were referred for chemical analysis. The medical

papers were collected and on completion of the investigation, the Appellant came to be Charge-sheeted.

4. The learned Trial Court framed the Charge against the Appellant for the offence punishable under Sections 302, 323, 504 of the I.P.C. at Exh.08, to which the Appellant pleaded not guilty and claimed to be tried. To prove the Charge, Prosecution examined in all 09 (nine) witnesses and brought on record the relevant documents including the Dying Declarations. The Reports from the Forensic Science Laboratory were submitted by Prosecution before the learned Trial Court. After Prosecution closed its evidence, the learned Trial Court recorded the statement of the Appellant under Section 313 (1)(b) of the Cr.P.C. The Appellant examined himself as the Defence Witness No.1. The Appellant denied the case and evidence of Prosecution and raised the defence that Deceased immolated herself due to quarrel between them, which was on account of money given by Deceased to one Vilas Pawar. After hearing both the sides and appreciating the evidence on record, the learned Trial Court passed the impugned Judgment and Order.

5. Heard the learned Advocate for the Appellant and the learned Addl. P.P. for Prosecution.

6. It is submitted by learned Advocate for the Appellant that the case is based on Dying Declarations made by Deceased before the Policeman and the Special Judicial Magistrate. When Deceased had suffered 98% burns, it is unlikely that she gave such a lengthy statement to the Policeman. The minute details in the first Dying Declaration indicate that it was not in the words of Deceased. The incident was of 06.02.20218 and the Dying Declarations were recorded on 07.02.2018 and therefore, the possibility of tutoring Deceased by her maternal relatives cannot be ruled out. Injured died after 05 (five) days of the incident of '*Septicemia Due to Burns*'. Prosecution did not examine the persons, who helped the Victim for admission to the hospital for treatment. No medical papers of the Appellant were brought on record and the statement of the Appellant, who was also injured, was not brought on record and therefore, adverse inference should be drawn against Prosecution. The learned Trial Court did not appreciate the evidence in its right perspective and therefore, the Appeal be allowed and the Appellant be acquitted. In support of his submissions, he relied on the Judgments which will be considered in later part of the Judgment.

7. It is submitted by the learned Addl. P. P. that Prosecution's case is based on two (02) consistent Dying Declarations. Deceased in her Dying Declarations had stated that the Appellant poured kerosene

on her and set her on fire. The doctor had certified the fitness of Injured to give the Statement. In view of the consistent Dying Declarations, no other evidence is required and therefore, the Appeal may be dismissed as the learned Trial Court has rightly passed the impugned Judgment and Order. She cited the judgment in support of her submissions, which will be considered in later part of the Judgment.

8. Scrutinized the evidence on record. The evidence on record shows that, the following aspects are not in dispute :

- (a) Deceased was the wife of the Appellant.
- (b) The Appellant, Deceased and their daughter PW5 – Jayashree Bharat Borde were residing together at Nipani, Dist. Aurangabad.
- (c) Deceased died of burn injuries.
- (d) The incident of Deceased suffering the burn injuries is dated 06.02.2018 at their residential house.
- (e) Deceased suffered 98% burn injuries.
- (f) Deceased died after 5 (five) days from the day she suffered burn injuries.
- (g) The Appellant was present in the house at the relevant time.
- (h) The Appellant suffered burn injuries in the incident for which he was hospitalized.

8.1. The Appellant admitted the following documents :-

- (a) Exh. 24 – Post-mortem Report.
- (b) Exh. 25 – Arrest Form

- (c) Exh. 33 – Inquest
- (d) Exh. 37 – Medical Certificate of cause of death issued by GHATI Hospital, Aurangabad
- (e) Exh.57 – Letter to Police by Dahiphale Hospital informing death of injured on 11.02.2018 at 09:50 p.m.
- (f) Exh.58 – Indoor record of Deceased at Dahiphale Hospital

9. It is Prosecution's case that the Appellant was demanding money from Deceased, received towards compensation of their acquired land, and which were kept in the bank, to which Deceased refused and the Appellant poured kerosene on her and set her on fire at their residential house in the afternoon of 06.02.2018. On the other hand, it is the defence version that, out of the compensation amount which were received towards compensation for their acquired land, Deceased gave Rs.2,00,000/- (Rs.Two Lakh) to one Vilas Pawar for medical treatment and the said person avoided to refund the said amount and quarrel took place between the Appellant and Deceased on that count and so, Deceased poured kerosene and set herself ablaze. Prosecution's case is entirely based on the Dying Declarations. The first one was recorded by PW1 – Sakhu Bhagwan Rathod, who was working as PSI at the Chikhalthana Police Station and the second one was recorded by PW7 – Sanjay Kacharuji Chavan, the Special Judicial Magistrate and one oral Dying Declaration to PW8 – Rajendra Pandharinath Thombre, who was the brother of Deceased.

10. The evidence of PW1 – Sakhu Bhagwan Rathod shows that, she was posted as PSI with the Chikhalthana Police Station between 25.08.2015 to 10.03.2019 and on 06.02.2018 she was on duty. On that day i.e. 06.02.2018, the Police Station Officer (PSO) directed the enquiry in MLC No.1348 and 1349 to her, *vide* Exh.21. She gave letter to the Medical Officer for examination of Deceased and the Appellant. On certifying their condition to give statement, she proceeded to Ward No.22-23 of the GHATI Hospital along with one police constable namely Deepak Surase (Buckle No.1448). The said letter at Exh.22 was handed over to the Medical Officer. The Medical Officer directed the relatives of Deceased to go out of the Ward and thereafter, Medical Officer examined Deceased and made endorsement on the letter that Deceased was fit to give statement.

11. The evidence of PW2 – Dr. Mrunal Chidanand Aawlekar shows that since June-2017 she was attached to the GHATI Hospital, Aurangabad as the resident doctor and on 06.02.2018 she was on emergency duty. She admitted Deceased and the Appellant in different wards and started their treatment. Deceased suffered more burns and she was serious. Around 07:30 p.m. when she (PW2) was present in the burn ward, PW1 – Sakhu Bhagwan Rathod came to her and gave requisition to examine both the said patients i.e. Deceased and the

Appellant and to endorse about their fitness to give statement. She drove the relatives of Deceased out of the room and examined Deceased. She examined her pulse, respiration, pupils, consciousness and orientation to time, place and person. On examination, she found Deceased fully conscious, oriented and fit to give valid statement and accordingly gave the endorsement at Exh.28 on the letter at Exh.22 issued by PW1 – Sakhu Bhagwan Rathod.

12. The above evidence of PW1 – Sakhu Bhagwan Rathod and PW2 – Dr. Mrunal Chidanand Aawlekar corroborate each other. Though they were cross-examined, the said evidence of these witnesses remained unshaken. The cross-examination of PW1 – Sakhu Bhagwan Rathod shows that she also verified the condition of Deceased before recording her statement. The evidence of above two witnesses established that Deceased was under medical treatment of GHATI Hospital and was fit to give statement.

13. The further evidence of PW1 – Sakhu Bhagwan Rathod shows that in presence of Medical Officer she enquired with Deceased and recorded her statement at Exh.23. For the purpose of convenience, the relevant part from her evidence is reproduced below:

“Thereafter in presence of Medical Officer I interrogated the lady. She was talking. She stated her name as Radhabai Sudam Bhalekar, age 35 years, occupation household and agriculture and resident of Nipani, Tq. and Dist. Aurangabad. She stated that she was residing with her husband Sudam, son Rushikesh age 16 years and daughter

Jayashree aged about 18 years. She used to do agricultural work to maintain her. She stated that their agricultural land was acquired for Solapur High Way. Her husband received compensation of Rs.6,00,000/-. He had fixed Rs. Four Lacs in her name for marriage in Maharashtra Bank branch at Chikalthana. She further stated that Sudam had wasted Rs.2,00,000/- in liquor and gambling. He used to demand Rs.4,00,000/- fixed in her name. She did not pay that amount to him. Accused used to pick up quarrels with her and used to assault her as she refused to pay the money. She further state that accused had threatened her to kill if she failed to pay the amount.

3. *On 6.2.2018 at about 10:00 a.m. accused Sudam told her to accompany him to the Bank when she was at home alongwith her daughter. He further told her to pay Rs.One Lakh to him out of that amount from her account. She further stated that she told him that the amount was fixed for marriage of her daughter and she would not pay the amount to him. At that time Sudam assaulted her by means of slaps and fists. Thereafter 1.30 p.m. she was in the house alongwith Sudam and Jayashree. At that time her husband Sudam told her to go to the Bank and withdraw Rs. One Lakh and give it to him else he would kill her. When she refused to pay Sudam poured kerosene on her person from the kerosene can and lifted the match-box from the place of worship and ignited her. She was shouting as her saree burnt. She hugged her husband Sudam. He pushed her and ran out of the house. She also ran out of the house. Her daughter Jayashree was extinguishing fire by pouring water on her person. Her sister in law (Jawoo) Champa Lahu Bhalekar, Chanda Ankush Bhalekar, brother in law, Ankush Bhalekar and Mhaske rushed there. They also extinguished fire by putting clothes on her person. Her brother in law Ankush and one Subhash Pathade took her and her husband in white car of Gopinath Bhalekar and admitted them in Ghati Hospital. She stated that her back, chest, both hands and both legs sustained burns. Sudam Yamaji Bhalekar was also under treatment in Ghati Hospital. She stated that she did not pay the amount fixed in her name to her husband and being annoyed accused poured kerosene on her person and burnt her and tried to kill her. She also stated that she was under treatment and action may be taken against accused. She admitted the contents. I obtained her signature and left thumb impression on the statement. I also put my signature on the statement. I also obtained the endorsement of medical officer who was present at the time of recording statement. The statement now shown to me is the same. It bears thumb impression and signature of Radhabai. It also bears my signature and endorsement of medical officer. The contents are correct. It is marked at Exh.23."*

14. The further evidence of PW2 – Dr. Mrunal Chidanand Aawlekar shows that Sakhu Bhagwan Rathod (PW1) and one constable recorded statement of Deceased in her presence. Sakhu Bhagwan Rathod (PW1) read over the contents to Deceased which she admitted and put her signature on it and, thereafter she (PW2 – Dr. Mrunal Chidanand Aawlekar) endorsed the statement to the effect that it was recorded in her presence. She identified the said endorsement at Exh.29 which is on Exh.23 which is the statement of injured. Though it has come in cross-examination of PW1 – Sakhu Bhagwan Rathod that in the statement it is not mentioned that it was recorded in the presence of Medical Officer, the evidence of Medical Officer i.e. PW2 – Dr. Mrunal Chidanand Aawlekar corroborate the evidence of PW1 – Sakhu Bhagwan Rathod that the statement was recorded in her presence.

15. In support of the contention that on suffering 98% burn injuries it was not possible for Deceased to give statement, learned Advocate for the Appellant relied on the Judgment in **Janabai Ranu Patole and Anr vs. The State of Maharashtra, 1997 ALL MR (Cri.) 1157** wherein it is observed as under -

‘It would be an impossible feat of performance in our judgment, on the part of a person having sustained 95% burn injuries, to make such a coherent, spontaneous and well reasoned F.I.R. which runs into two full-scape (foolscap) typed pages. Its length belies the claim of Prosecution that Deceased lodged it.’

15.1. He further relied on the Judgment in **Sampat Babso Kale & Anr vs. The State of Maharashtra** in Criminal Appeal Nos. 694-695 of 2011 decided on 09.04.2019 by the Hon'ble Supreme Court of India, wherein it is observed as under -

“The victim had 98% burns and the doctor had stated from the record that a painkiller was injected at 03:30 a.m. and the dying declaration had been recorded thereafter; there is a serious doubt whether the victim was in a fit state of mind to make the statement. She was suffering from 98% burns. She must have been in great agony and once a sedative had been injected, the possibility of her being in a state of delusion cannot be completely ruled out. The endorsement made by the doctor that the victim was in a fit state of mind to make the statement was made not before the statement, but after the statement was recorded’. It is further observed that, ‘Normally it should be the other way round.’”

15.2. He further relied on the Judgment in **Kailash Pandurang Yedmewar vs. State of Maharashtra, 2017 (1) ABR (CRI.) 19** wherein it is observed as under :

“The doctor admitted that the finger print on Dying Declaration was not attested by him.” It was observed that *“the patient having 95% burns cannot be expected to give details of the ward number or bed number where she was undergoing treatment and in the last two lines of Dying Declaration, there were two blanks left.”* It was further observed that *“considering these circumstances which were not explained by Prosecution, the Court did not find the Dying Declaration inspiring confidence for being relied upon. Further, the doctor had not explained as to how in short span of 15 minutes, he made the three endorsements.”*

16. On the other hand, learned Addl. P. P. relied on the Judgment in **Vijay Pal vs. State (GNCT) of Delhi, AIR 2015 SC 1495** wherein following are the observations:

“20. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that

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. In the instant case, PW-1 had immediately rushed to the house of Deceased and she had told him that her husband had poured kerosene on her. The plea taken by the appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return, does not also really breathe the truth, for there is even no suggestion to that effect.

21. *It is contended by the learned counsel for the appellant when Deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in **Mafabhai Nagarbhai Raval v. State of Gujarat** wherein it has been held a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial Court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.*

22. *In **State of Madhya Pradesh v. Dal Singh and Others**, a two-Judge Bench placed reliance on the dying declaration of Deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible."*

17. The evidence of PW1 – Sakhu Bhagwan Rathod in respect of the statement of Deceased, is corroborated by Exh.23 which was the statement of Deceased. True it is that the said statement runs into 2 (two) pages written by hand. From the evidence of PW1 – Sakhu Bhagwan Rathod, part of which is reproduced above, it is clear that it was in the form of interrogation. As her evidence shows that she interrogated Deceased, therefore, the reference of ward number in her statement cannot be the reason to doubt the statement. It is clear that it was recorded in the form of Report which the policemen do. The evidence of PW2 – Dr. Mrunal Chidanand Aawlekar does not show that Deceased was administered with such drugs that she was unable to

speaking. Her evidence shows that she examined Deceased before recording her statement and after recording the statement and she was present while statement of Deceased was recorded by PW1 – Sakhu Bhagwan Rathod. This evidence shows that Deceased was throughout in fit state to give statement. True it is that PW5 – Jayashree Bharat Borde, who was daughter of Deceased and the Appellant, in her cross-examination done by the defence, admitted that her mother could not talk due to extensive burns. However, her evidence shows that she did not support the case of Prosecution and was cross-examined by Prosecution before she was cross-examined by the defence Advocate. Her said admission will not help the Appellant in view of unshaken evidence of PW1 - Sakhu Bhagwan Rathod and PW2 - Dr. Mrunal Chidanand Aawlekar, as discussed above.

18. The evidence of PW8 – Rajendra Pandharinath Thombre, who was the brother of Deceased, shows that in his cross-examination it has come that for treatment of Deceased money was withdrawn from the fixed deposit, for which they called the Branch Manager of the bank in Dahiphale Hospital, where Deceased was subsequently shifted and he obtained the thumb impression of Deceased on withdrawal slip. This fortifies the case of Prosecution that Deceased was oriented and in a fit state. Had she being not in a conscious state, the Branch Manager of the Bank would never have allowed withdrawal of money

from her bank account. He would have declined to take the thumb impression of Deceased on withdrawal slip, had she being not in a conscious state or fit state. From the evidence available on record, it is more than established that Deceased was in a fit state of mind to give statement which was recorded by PW1 – Sakhu Bhagwan Rathod in presence of PW2 – Dr. Mrunal Chidanand Aawlekar. Their evidence is corroborated by documents.

19. It is but natural that after the death, the said statement of Deceased at Exh.23 took the form of Dying Declaration. The said Dying Declaration which is duly proved in the evidence of PW1 – Sakhu Bhagwan Rathod attributes the role of pouring kerosene from the Can available in the house and setting Deceased on fire by the Appellant. As regards the thumb impression on the said statement, the Post-mortem Report which has been admitted by defence, in column of 'Percentage and distribution of burns', it is mentioned as 'Left upper limb - 0.8% - Palm area spared'. This goes to show that it was possible to have the thumb impression of Deceased on her statement, though she had suffered 98% burn injuries. The incident took place in the evening of 06.02.2018 and her statement was recorded on 06.02.2018 itself in the hospital around 08:00 p.m. This shows that within short time the statement of Deceased was recorded.

20. The cross-examination of PW1 – Sakhu Bhagwan Rathod shows that in the MLC at Exh.21 and letter at Exh.22 it was mentioned that the patient suffered burn injuries due to ‘explosion of stove in a residential house’. Her further cross-examination shows that the said history / opinion was given by brother-in-law of Deceased while admitting her in the hospital. It is thus clear that the version that, incident was the result of explosion of stove was not given by Deceased. There is one more reason to discard the possibility of suffering burn injuries due to explosion of stove and that is the Spot Panchanama. The evidence of PW4 – Baburao Dashrath Khandagale, who acted as the panch witness, shows that the spot was the house of the Appellant where he noticed one Can and cloths in burnt condition. His evidence nowhere show that there were signs of explosion of stove. The evidence of PW9 – Sudhakar Narayan Chavan, who investigated the crime, shows that the case was marked to him for investigation, he visited the spot and Jayashree i.e. daughter of Deceased, showed the spot which was the house of Deceased. He smelled kerosene in the house which was comprising of three rooms. He found kerosene Can, match box and burnt pieces of pant, blouse, saree and petticoat and he sealed those articles. The evidence of the said Panch Witness and Investigating Officer shows that Spot Panchanama at Exh.43 was prepared. There is no iota of evidence to show that the incident was result of stove blast.

Therefore, the reference of incident due to stove blast in the said communications is not fatal for Prosecution.

21. The evidence in the nature of Dying Declaration at Exh.23 shows that, Deceased after being set on fire she embraced the Appellant, the Appellant pushed her and ran out of the house and she too came out of the house. This gets corroboration from the evidence of PW9 – Sudhakar Narayan Chavan, the Investigating Officer that, he found burnt pieces of pant, blouse, saree and petticoat outside the house in the courtyard. His evidence further shows that he found kerosene Can, match box and burnt pieces of cloths on the spot which was inside the house of Deceased. Finding of the burnt clothes outside the house in the courtyard fortifies the Statement of Deceased at Exh.23 that, the Appellant ran outside the house and she followed him after she was set on fire. Though, the cross-examination of PW4 – Baburao Dashrath Khandagale shows that he gave shaky evidence to some extent, there is concrete evidence of PW9 – Sudhakar Narayan Chavan, the Investigating Officer in respect of Spot Panchanama at Exh.43.

22. From the above evidence, it is clearly established by Prosecution that while Deceased was admitted in the GHATI Hospital, her statement was recorded by PW1 – Sakhu Bhagwan Rathod in the presence of PW2 – Dr. Mrunal Chidanand Aawlekar, Medical Officer.

The evidence of PW2 – Dr. Mrunal Chidanand Aawlekar shows that she was present throughout while recording statement of Deceased. The evidence on record goes to establish that though Deceased suffered 98% burn injuries, she was in a fit state to give statement and on ascertaining about her fitness and condition to give statement, PW1 – Sakhu Bhagwan Rathod recorded her statement as per her say. The evidence shows that before recording the statement, relatives of Deceased were sent out of the room. The said Dying Declaration of Deceased was recorded in 6 (six) hours from her suffering the burn injuries. Dying Declaration at Exh.23 show that the Appellant set her on fire after pouring kerosene as Deceased refused to part money with the Appellant. If we see the evidence of PW5 – Jayashree Bharat Borde, who was the daughter of Deceased and the Appellant, it shows that the Appellant used to demand money from her mother Deceased and quarrel used to take place between them. Her evidence also shows that on the day of incident the Appellant demanded the money to Deceased in the morning. It is settled position under the law that the evidence of witness who had not supported the case of Prosecution, need not be thrown altogether. The said version of PW5 – Jayashree Bharat Borde corroborates the Dying Declaration that the Appellant used to demand the money from Deceased which were kept in the bank. The evidence on record does not show, even slightly that, the said Dying Declaration was the result of tutoring. Hence, there is no hesitation to hold that

Prosecution has duly proved the Dying Declaration at Exh.23 and it can be relied upon.

23. As regards the another / second Dying Declaration is concerned, the same was recorded by PW7 – Sanjay Kacharuji Chavan. His evidence shows that from 2014 till March-2018 he was the Special Judicial Magistrate. On 07.02.2018 he was working in the Court of Senior Division, Aurangabad and on that day around 06:15 p.m. he received requisition from PW9 – Sudhakar Narayan Chavan, the Investigating Officer to record the statement of Deceased who was admitted in Dahiphale Hospital, Aurangabad. There is no dispute on the aspect that initially Deceased was admitted in GHATI Hospital, Aurangabad and thereafter on 07.02.2018 she was shifted to Dahiphale Hospital, Aurangabad. This aspect becomes further clear from the evidence of PW6 – Dr. Prakash Ashokrao Gadge Patil, who was working as the Resident Medical Officer (RMO) with the Dahiphale Hospital at Aurangabad from January-2018 till March -2018. His evidence shows that he appeared before learned Trial Court with the original case papers of Deceased. His evidence shows that on 07.02.2018 Deceased was admitted in the said hospital.

24. Coming back to the evidence of PW7 – Sanjay Kacharuji Chavan, it shows that he went to Dahiphale Hospital around 06:30 p.m.

with the letter at Exh.70 which was given by PW9 – Sudhakar Narayan Chavan, the Investigating Officer in respect of recording the statement of Deceased. He met the Medical Officer, to whom he requested to verify the fitness of Deceased. He went to ICU along with the Medical Officer where Deceased was admitted. The Medical Officer examined Deceased in his presence and endorsed on the said letter that the patient was fit to give statement. His further evidence shows that he recorded the statement of Deceased as per her say. The relevant evidence in respect of recording the Dying Declaration is reproduced below for better understanding.

“3] I introduced myself to Radhabai and also disclosed the purpose of my visit. I directed the ladies to go out who were present. Thereafter, I asked her name and age. She told her name as Radhabai Sudam Bhalekar and age 40 years, R/o. Nipani, Tq. and Dist. Aurangabad. She stated that she was agriculturist. I asked her as to when her marriage was performed and how many children she had. She stated that her marriage was performed in the year 1998. She had one son and daughter. I asked her as to when and how she sustained burns. She stated that yesterday i.e. on 6.2.2018 her husband poured kerosene on her person and set her on fire. I asked her as to why her husband burnt her. She stated that “on yesterday morning her husband picked up quarrel with her. He had demanded Rs. One Lakh kept for the marriage of her daughter. She stated that amount was kept for the marriage of her daughter. She told him that she would not pay the amount to him. He threatened her that he would not allow her to live if she won’t pay the amount. Thereafter he left. He returned at 2.00 p.m. She was sitting in the room at backside of the house. All of a sudden he came and poured kerosene from kerosene Can on her person and threw match stick on her person. I asked her whether she had complaint against any other person. She stated that she had complaint against her husband only.” Thereafter I read over the contents of statement to her. She admitted the contents of her statement, thereafter I obtained her left thumb impression on the statement. I also put my signature on the statement and affixed my seal. The statement now shown to me is the same.

It bears thumb impression of Radhabai and my signature. The contents are correct. It is marked at Exh.72. I recorded Exh.72 in presence of medical officer.”

25. This statement of Deceased recorded by PW7 – Sanjay Kacharuji Chavan, the Special Judicial Magistrate was in question – answer form. The relevant questions are reproduced below :

“प्रश्न – तुम्ही कशा जळालात ? व कधी जळालात ?

उत्तर – मी काल दि.06.02.2018 रोजी दुपारी 2:00 वा. राहत्या घरी माझ्या पतीने माझ्या अंगावर रॉकेल टाकुन पेटवुन दिल्यामुळे जळाले.

प्रश्न – तुम्हाला तुमच्या पतीने का जाळले?

उत्तर – काल सकाळी त्यांनी माझ्या खात्यावर मुलीच्या लग्नासाठी जमीनीचे आलेले पैशातुन एक लाख रुपये मागीतले होते. त्यास मी नकार दिला होता. त्यामुळे त्यांनी मला धमकी दिली होती की, मी तुला जिवंत राहु देणार नाही असे म्हणून निघून गेले व दुपारी 02:00 वाजेच्या सुमारास मी मागील घरात बसलेली असतांना अचानक येवून रॉकेलने भरलेली कॅन माझ्या अंगावर ओतली व आगपेटीची जळती काडी माझ्या अंगावर टाकली.”

26. If we see the evidence of PW6 – Dr. Prakash Ashokrao Gadge Patil, it corroborates the above evidence of PW7 – Sanjay Kacharuji Chavan. His evidence shows that PW7 – Sanjay Kacharuji Chavan issued letter to him to opine in respect of fitness of Deceased to give statement. He went to the patient in the ICU and examined her. He found Deceased conscious and oriented to time, place and person and at 07:15 p.m. he gave the endorsement to that effect which was marked as Exh.55. His evidence shows that PW7 – Sanjay Kacharuji Chavan recorded statement of Deceased in his presence and the patient was conscious and oriented throughout her statement and she was able to

He admitted in his cross-examination that Exh.55 endorsement do not speak that the patient was conscious and oriented to time, place and person and was fit to give statement. The evidence goes to show that the endorsement at Exh.55 was “सदर रुग्ण सदय स्थितीत जबाब देवू शकतो”, which means that, *presently the patient was in a position to give statement*. Though, the said endorsement is not in so many words as deposed by the witness, the same is regarding fitness of the patient to give statement.

27. There is one more aspect which would lend support to Prosecution's evidence that Deceased was in a fit state to give statement was that, in this very hospital PW8 – Rajendra Pandharinath Thombre, who was the brother of Deceased had called the Branch Manager with the withdrawal slip upon which the thumb impression of Deceased was taken. This aspect has been considered above while dealing with the first Dying Declaration. Though it has come in the evidence of this doctor witness i.e. PW6 – Dr. Prakash Ashokrao Gadge Patil that oxygen, pain killers and antibiotics were given to Deceased, he denied that Deceased was given sedatives. It further lends support to his evidence that Deceased was in a fit state to give statement.

28. The evidence of PW6 – Dr. Prakash Ashokrao Gadge Patil corroborated by PW7 – Sanjay Kacharuji Chavan shows that while

recording this second Dying Declaration, Deceased was in a fit state to give statement. The evidence of PW7 – Sanjay Kacharuji Chavan shows that when he went to record the Dying Declaration, the relatives of Deceased were present with her and he directed them to go out. It is thus clear that while recording the second Dying Declaration, none of the relatives of Deceased were present. Prosecution has established that Deceased was in the hospital and was fit to give statement while recording her second Dying Declaration. Mere presence of police persons from the concerned police station at that point of time cannot be the reason to discard the Dying Declaration. Thus, this second Dying Declaration can be relied upon.

29. The evidence of PW7 – Sanjay Kacharuji Chavan wherein the second Dying Declaration is brought on record at Exh.72 goes to show that, Deceased gave statement in respect of pouring kerosene from the Can on her and igniting fire with the match stick by the Appellant. True it is that in the second Dying Declaration she had not stated regarding demand of money in the afternoon by the Appellant to her, what she stated is that in the afternoon at 02:00 p.m. when she was present in the house, the Appellant suddenly came with the Can of kerosene, poured the same on her person and ignited the fire. Further, she did not state in her second Dying Declaration that she embraced the Appellant after she was set on fire. True, that on these aspects, there is

inconsistency in both the Dying Declarations. However, on the material aspect i.e. pouring kerosene and setting her ablaze with the help of match stick by the Appellant, there is consistency. In both the Dying Declarations, Deceased had stated that, it was the Appellant who poured kerosene from the Can on her and set her on fire.

30. As seen above, the first Dying Declaration was recorded by PW1 – Sakhu Bhagwan Rathod by way of interrogation and the second Dying Declaration was in question answer form. Therefore, there cannot be word to word similarity in the two Dying Declarations recorded by two different persons. What is important, is the material aspect i.e. cause of burn injuries. Both the Dying Declarations are consistent that, it was the Appellant who poured the kerosene on Deceased and set her on fire.

31. In view of convincing evidence on record, there is no reason to discard the above referred written Dying Declarations. As far as the oral Dying Declaration is concerned, it has come in the evidence of PW8 – Rajendra Pandharinath Thombre, who was brother of Deceased, that he received the information on 06.02.2018 at about 03:15 p.m. that Deceased and the Appellant suffered burns and he was called at GHATI Hospital, Aurangabad. He and his brother Digambar Thombre went to GHATI Hospital where he asked Deceased as to what happened and

Deceased told him that the Appellant had demanded Rs.1,00,000/- (Rs.One Lakh) to her by withdrawing from the bank and she refused to pay the said amount and being annoyed, the Appellant poured kerosene on her and set her on fire. Though Deceased informed him the cause of her death, his evidence shows that his statement was recorded on 12.02.2018. He being brother of Deceased, his conduct of not informing anybody or the Police that the Appellant poured the kerosene on his sister and set her on fire, appears unnatural. His evidence does not show that after Deceased made the said oral Dying Declaration to him, he flung into action and reported it to the police station. In his cross-examination it has come that he did not feel to disclose the facts stated by Deceased to police till she died. This leads us to draw the inference that, no oral Dying Declaration was made by Deceased to PW8 - Rajendra Pandharinath Thombre. Thus, Prosecution's evidence in respect of oral Dying Declaration is discarded.

32. The Appellant examined himself as the defence witness. According to the Appellant, he received Rs.6,00,000/- (Rs. Six Lakh) by way of compensation as his land was acquired for Solapur Highway. He transferred Rs.4,60,000/- (Rs. Four Lakh Sixty Thousand) in the name of Deceased and also paid cash of Rs.1,40,000/- (Rs.One Lakh Forty Thousand) to her. The said amount was for marriage of his daughter - Jayashree (PW5). On the day of the incident, Deceased made phone call to her brother Raju that, marriage of Jayashree (PW5) was to be

performed and Vilas Pawar had taken Rs.2,00,000/- (Rs. Two Lakh) from her and he should accompany her to the house of Vilas to get back the money. Her brother told her to solve the problem by herself as the transaction was done by her. Thereafter, Deceased made a phone call to the said Vilas Pawar and demanded the money. The said Vilas Pawar told her that he will pay the amount in 2 (two) years and avoided to pay the money. On that point, the Appellant told Deceased that they were not in need of extra money from Vilas Pawar, however, she should recover the amount and on that ground the quarrel took place between him and Deceased. Thereafter, Deceased went to the room of worship on the pretext of headache and set herself on fire due to pressure. At that time the Appellant was sitting in the front room and daughter Jayashree (PW5) was sitting in the side room. Deceased came in burning condition and hugged him. Shouts were raised and Jayashree (PW5) ran towards them and poured water on both of them. Thereafter neighbours came and in one vehicle they both were taken to the GHATI Hospital for treatment.

33. In cross-examination the Appellant admitted that on 06.02.2018 he demanded Rs.1,00,000/- (Rs. One Lakh) from his wife which she had kept in her name and when she refused, he assaulted her by means of slaps and fists. This admission gives corroboration to the statements of Deceased in respect of the morning incident. This admission gives blow to the version put forth by the Appellant in

his examination-in-chief. True it is that Prosecution has not examined the neighbours who had come after hearing the shouts. Non-examination of the independent witnesses by Prosecution by itself will not be fatal for Prosecution in view of 2 (two) Dying Declarations which are consistent on material aspect. The evidence of PW1 – Sakhu Bhagwan Rathod shows that she also recorded the statement of the Appellant in the hospital after ascertaining his fitness. Her evidence shows that after recording the statement of the Appellant, she filed MLC No.1348 in respect of the Appellant as no offence was revealed from his statement. The evidence of PW2 – Dr. Mrunal Chidanand Aawlekar also shows that she certified that the Appellant was in a fit state to give statement and thereafter PW1 – Sakhu Bhagwan Rathod recorded his statement in her presence. Admittedly, the statement of the Appellant is not brought in her evidence. It is not known as to what the said statement contained. In all probability, it would have been the same version as put forth by the Appellant in his evidence. If we see the cross-examination of PW1 - Sakhu Bhagwan Rathod and PW2 – Dr. Mrunal Chidanand Aawlekar, they were not asked to bring the statement made by the Appellant, on record. In any event, on scrutiny of the evidence on record, the defence put forth by the Appellant do not appear probable. As regards burn injuries suffered by the Appellant, the evidence in the form of Dying Declaration shows that after Deceased

was set on fire, she embraced the Appellant. The burn injuries caused to the Appellant corroborate the Dying Declaration.

34. The other Judgments relied on by learned Advocate for the Appellant are as follows :

- (a) **Waikhom Yaima Singh vs. State of Manipur, 2011 ALL MR (Cri.) 2048 (S.C.)**
- (b) **Milind Ramchandra Gharat vs. The State of Maharashtra & Another, 2015 ALL MR (Cri.) 2377**
- (c) **Ashok s/o. Pitambar Giri & Anr vs. State of Maharashtra, 2018 ALL MR (Cri.) 5144**

34.1. The legal position that oral Dying Declaration is a weak piece of evidence, is well settled. In the case of **Ashok s/o. Pitambar Giri** (*supra*), it is observed that '*non-examination of neighbours who extinguished fire on the body of deceased was held to be fatal for Prosecution*'. In the case of **Sampat Babso Kale** (*supra*), the Hon'ble Supreme Court of India observed that, '*non-examination of important witnesses was held to be fatal as it led to non-corroboration of Dying Declaration.*'

35. The facts in the aforesaid Judgments are distinguishable with the facts of the case in hand. The law in respect of the evidence in the nature of Dying Declarations is well settled that, Dying Declaration can form the basis for conviction, however, such Dying Declaration has to be proved to be wholly reliable, voluntary and the maker thereof

must be in a fit condition to make it. The oral Dying Declaration is primarily a weak piece of evidence. This legal position is reiterated in the Judgments relied upon by the parties. Coming to the case at hand, both the Dying Declarations implicate the Appellant. They are consistent on material aspect. Deceased in both her statements has consistently stated against the Appellant that he poured kerosene on her and by igniting the match stick set her on fire. There is clear and cogent evidence on record to establish that Deceased was in a fit state at the time of recording both the statements. Both the Dying Declarations bear thumb impressions of Deceased. Not only this, the evidence on record goes to show that Deceased had signed on her first statement above her thumb impression. The said aspect is nowhere challenged by the defence. Both the said Dying Declarations are proved to be reliable. The medical evidence in the nature of Post-mortem Report established that Deceased died due to burn injuries and the cause of death was "*Septicemia due to Burns*". The Can and match box were found on the spot of incident. The C.A. Report at Exh.12 regarding the Articles sent by the Investigating Officer, except match sticks in the match box, were found to be having residues of kerosene. The act of the Appellant in pouring kerosene and igniting the fire clearly shows his intention to kill his wife. Burns suffered by the Appellant were the result of hugging by Deceased to him after she was set ablaze. Act of embracing the Appellant by Deceased further fortifies the case of Prosecution as it

indicate that Deceased did not want to spare the Appellant. The evidence of PW3 - Dr. Vikas Madan Rathod, who was the resident doctor at GHATI Hospital and performed Post-mortem on the body shows that, the injuries suffered by Deceased were possible, if the kerosene was poured on the person and set on fire. In his cross-examination, he denied that the injuries (which were noted at the time of Post-mortem and written in Post-mortem Report at Exh.24) were possible, if the person pours kerosene on his / her person. This clearly rules out the possibility of suicidal death of Deceased.

36. On re-appreciation of the evidence on record, as discussed above, we find ourselves in agreement with the conviction and sentence recorded by the learned Trial Court against the Appellant for the offence punishable under Section 302 of the IPC. Resultantly, the Appeal fails and we pass the following Order.

ORDER

- (i) The Criminal Appeal is dismissed.
- (ii) Record & Proceedings be sent back to the Trial Court.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)