



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

CRIMINAL APPEAL NO.469 OF 2018

- 1) Navnath s/o Shivaji Kate
Age 34 years, Occu. Driver
- 2) Shivaji s/o Vithoba Kate,
Age 68 years, Occu. Agri.
- 3) Parvatibai w/o Shivaji Kate,
Age 62 years, Occu. Agri.

All above R/o Kate Mala,
Hiware Zare, Tal. Nagar,
District Ahmednagar

... APPELLANTS

VERSUS

1. The State of Maharashtra
Through the Police Station Officer,
Nagar Taluka Police Station,
District Ahmednagar
(Copy to be served on
Public Prosecutor, High Court of
Judicature of Bombay,
Bench at Aurangabad)
2. Manoj s/o Dnyaneshwar Kharat,
Age 34 years, Occu. Labour,
R/o Shantinagar, Abhay College Road,
Behind 50 Rooms Chawl,
Opp. Jain Mandir, Dhule

... RESPONDENTS

.....
Mr. N.V. Gaware, Advocate for appellants
Mrs. Uma Bhosle, A.P.P. for respondent No.1 – State
Ms. Yogita S. Thorat, Advocate holding for
Mr. N.L. Choudhari, Advocate for respondent No.2.
.....

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

Date of reserving judgment : 27th February, 2024.

Date of pronouncing judgment : 3rd May, 2024.

JUDGMENT (PER R.G. AVACHAT, J.)

The challenge in this appeal is to a judgment of conviction and order of sentence, dated 17/5/2018, passed by the Court of learned Additional Sessions Judge, Ahmednagar (Trial Court) in Sessions Case, No.214/2016. Vide impugned judgment and order, the appellant Nos.1 and 2 have been convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and therefore, sentenced to suffer imprisonment for life and fine of Rs.50,000/- (Rupees fifty thousand) each with default stipulation. While the appellant No.3 has been convicted for the offence punishable under Section 302 read with Section 106 of the Indian Penal code and therefore, sentenced to suffer rigorous imprisonment (R.I.) for seven years and to pay fine of Rs.30,000/- (Rupees thirty thousand) with default stipulation.

2. Facts in brief, giving rise to the present appeal are as follows :-

Navnath (appellant No.1) is a son of appellant Nos.2 and 3 (father and mother respectively). The appellants are hereinafter referred to as A/1, A/2 and A/3, for the sake of convenience. The appellants were residing together at Kate Mala, Hiware Zare, Taluka and District Ahmednagar. Adinath, brother of appellant No.1 along with his wife and children would also reside with the appellants. Sarika (deceased) had married A/1 way back in April 2007. The couple was blessed with two children – Pawan and Yash.

3. It is the case of prosecution that, parents of Sarika (deceased) were financially unsound. She was, therefore, being subjected to ill-treatment by the appellants. The appellants picked up quarrel with Sarika (deceased) in the morning of 9/3/2016 for no reason. A/2 (father-in-law) poured kerosene on her person. A/1 (husband) set her ablaze by igniting a match stick. A/3 (mother-in-law) helped both A/1 and A/2 in setting Sarika ablaze. She continued to abuse Sarika. Adinath (brother-in-law of Sarika) and A/3 rushed Sarika to Civil Hospital. P.W.4 Dr. Pushpa was on duty in Casualty Ward. She got Sarika admitted to hospital. Both Adinath and A/3 gave P.W.4 Pushpa history of kerosene stove to have accidentally burst and thereby Sarika suffered burns. P.W.4 Dr. Pushpa

took Sarika into confidence in absence of both Adinath and A/3 to learn from her that A/1 poured kerosene on her person and A/2 allowed her to be burnt. A/3 remained a mute spectator to the incident. She (P.W.4) recorded the same in the medical papers as a history given by the victim.

4. P.W.4 Dr. Pushpa informed the concerned Police Station. P.W.5 Sampat was a Police Head Constable. He rushed with a requisition letter (Exh.60) to Executive Magistrate-cum-Naib Tahsildar, P.W.1 Sanjay. P.W.1 Sanjay, in turn, visited the hospital and after having found Sarika to be conscious oriented on her medical check-up, recorded her statement (dying declaration). Based on the same, a crime vide C.R. No.I-62/2016 was initially registered for the offences punishable under Sections 307 and 498-A read with Section 34 of the Indian Penal Code. P.W.9 Ravindra was entrusted with the investigation. He paid visit to the scene of offence. Scene of offence panchanama (Exh.64) was drawn in presence of two panchas. The appellants were arrested. Clothes on the person of A/1 and A/2 were seized under panchanama (Exh.67).

5. Sarika succumbed to the burns on 12th i.e. 3 days after the incident. Section 302 of the Indian Penal Code,

therefore, came to be invoked.

6. P.W.6 Manoj Kharat, brother of Sarika gave a statement, informing that, Sarika was continuously ill-treated by the appellants. She used to relate her woes to him and his parents. According to him, on the preceding day i.e. on 8th March 2016, Sarika had informed him on phone that A/1 had abused and threatened her. After demise of Sarika, a statement of Pawan, 8 year old son of Sarika, was recorded. According to the prosecution, he was an eye witness to the incident.

7. The mortal remains of Sarika were first subjected to inquest panchanama (Exh.88) and then autopsy (Exh.77). P.W.7 Dr. Manoj conducted autopsy. In his opinion, the cause of death of Sarika was hypovolemic shock due to 98% superficial to deep burn injuries. The seized articles were sent to Forensic Science Laboratory for analysis and report. Upon completion of the investigation, the appellants were proceeded against by filing a charge sheet before a Court of learned Judicial Magistrate, First Class, Court No.4, Ahmednagar (J.M.F.C.). The learned Magistrate committed the case to the Court of Sessions. The case was in turn assigned to the Trial Court.

8. The Trial Court framed the Charge (Exh.38). The appellants pleaded not guilty. Their defence is of Sarika to have suffered burns accidentally or she might have committed suicide.

9. The prosecution examined 9 witnesses and produced in evidence certain documents, to bring home the charge. On appreciation of the evidence adduced by the prosecution, the Trial Court convicted and consequently sentenced the appellants as stated above.

10. Heard. Learned counsel for the appellants would submit that, the deceased had suffered 98% of burns. She was not conscious-oriented and even mentally fit to make a statement-cum-dying declarations. The dying declarations relied on by the prosecution have all been fabricated. The learned counsel drew our attention to the medical papers of the victim to indicate that the Surgeon had recorded that her condition was critical. He would further submit that, the F.I.R. was lodged on the basis of second dying declaration. The dying declarations did not contain endorsement whether those were read over to the deceased. Thumb impressions

appearing thereon have not been attested. The deceased had suffered 9% burns to her upper limbs i.e. from finger tip to the shoulder. As such, the thumb impression could not have been obtained. The first dying declaration is in a printed format. Name of Medical Officer is missing therein. She was given injectables. Her physical as well as mental condition, therefore, could not be said to be well oriented. None of the appellants suffered any burn injury since the case of the prosecution was that all the accused were inside the room. Appellant No.3 has not been attributed with any overt act in first dying declaration except her presence. No chemical analysis in relation to kerosene can was done.

11. The learned counsel also adverted our attention to the written statements submitted by the appellants before the Trial Court, suggesting their defence therein. According to him, the deceased was quarrelsome. She wanted to stay away from the in-laws. She further wanted to have her children admitted to English Medium school at Ahmednagar.

12. Turning to the evidence of a child witness, the learned counsel, relying on the authoritative pronouncements, would submit that, the child witness is prone to tutoring.

Evidence of child witness should not be relied on as it is. As a caution, a corroboration to the evidence of the child witness has to be there. Statement of child witness was recorded after the demise of his mother. It is not known as to why the investigating officer did not record statement of the children of the deceased soon after registration of the F.I.R. When the child witness gave evidence before the Court, he was under influence of his maternal uncle, since he was staying with his maternal grandparents for over a year next before he gave evidence before the Court.

13. The learned counsel further adverted our attention to the writings given by the brother of the deceased and A/1 acknowledging the condition of Sarika was critical and if anything untoward happened, they would not hold the hospital responsible. The same suggests deceased Sarika was not conscious oriented to make a statement. The history was given as accidental burns (bursting of stove) at 8.00 a.m. There is nothing to indicate as to in what way the Medical Officer took the victim into confidence to have her statement as a history to be recorded in medical papers. The same too is very vague. Some endorsement has been made in the margin of the medical papers. According to the learned counsel, the

deceased died due to hypovolemic shock due to 98% superficial to deep burn injuries, as a result of which internal organs got congested. Sedatives were administered as pain killer. Learned counsel took us through the evidence of each and every witness to ultimately submit that the dying declarations and the evidence of the child witness and that of the brother of the victim Sarika did not inspire confidence. Contradictions amounting to omissions in the police statement and evidence of the brother of the deceased Sarika were also brought to our notice. He would further submit that, the appellants have been acquitted of the offence punishable under Section 498-A read with Section 34 of the Indian Penal Code. The same suggests that, there was no motive for the appellants to eliminate Sarika. According to learned counsel, based on such quality of evidence, the Trial Court ought not to have convicted the appellants. He, therefore, urged for allowing the appeal. Learned counsel has relied on a host of authorities. A list thereof is given below :-

- (1) Jayamma & anr. Vs. State of Karnataka etc.
(2021) 6 SCC 213
- (2) Sampat Babso Kale & anr. Vs. State of Maharashtra
(2019) 4 SCC 739
- (3) Surinder Kumar Vs. State of Haryana

(2011) 10 SCC 173

- (4) Chacko Vs. State of Kerala
(2003) 1 SCC 112
- (5) Sandip Prakash Rathod Vs. State of Maharashtra
2022 SCC OnLine Bom 7224
- (6) State of Punjab Vs. Gian Kaur & anr.
1998 SCC (Cri.) 942
- (7) Keshav Dada Sangale & anr. Vs. State of Maharashtra
(2011) 4 AIR Bom R 628
- (8) Gopal Vs. State of Madhya Pradesh
(2009) 12 SCC 600
- (9) Kajal Sen & ors. Vs. State of Assam
(2002) 2 SCC 551
- (10) Hari Om Alias Hero Vs. State of Uttar Pradesh
(2021) 4 SCC 345
- (11) Suryanarayana Vs. State of Karnataka
(2001) 9 SCC 129
- (12) Raja Ram Yadav & ors. Vs. State of Bihar
(1996) 9 SCC 287
- (13) V. Venkateshwarlu Vs. State of Andhra Pradesh
(2012) 8 SCC 73
- (14) Radhey Shyam Vs. State of Rajasthan
(2014) 5 SCC 389
- (15) Panchhi & ors. Vs. State of U.P. etc.
(1998) 7 SCC 177
- (16) Shaikh Bakshu & ors. Vs. State of Maharashtra
(2007) 11 SCC 269

14. The learned A.P.P. would, on the other hand, submit

that, the scene of offence panchanama indicates kerosene stove was not there. The appellants have thus raised a false defence of bursting of a kerosene stove. On many of the articles, kerosene residues were noticed during chemical analysis. Sarika was blessed with two minor children. She had no reason to commit suicide nor was there any question of it being an accidental death. Master Pawan (child witness) is an eye witness to the incident. He gave graphic details as to how the incident took place. The same suggests involvement of all the appellants in the crime in question. The learned A.P.P. reiterated the reasons given by the Trial Court in support of the impugned judgment and order. She relied on the Apex Court judgments in case of **Khushal Rao Vs. State of Bombay (AIR 1958 SC 22)** and **Laxman Vs. State of Maharashtra (AIR 2002 SC 2973)**. She would further submit that, even absence of certification of doctor as to fitness of mind of declarant would not render declaration non-acceptable. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in free state of mind. 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. (Case of Laxman Vs. State, supra). The learned A.P.P. ultimately urged for dismissal of the

appeal.

15. Considered the submissions advanced. Perused the judgment impugned herein. Let us reappreciate the evidence in the case.

16. Admittedly, Sarika (deceased) had married A/1 in April 2007. She was blessed with two minor sons. One of them (Master Pawan) was examined as a witness to the incident. The incident took place in the house of the appellants in the morning of 9/3/2016. Sarika suffered 98% of burns. Details thereof are as under :

Superficial to deep burns

1)	Over face and neck	:	9%
2)	Chest and abdomen	:	9 & 8 % respectively
3)	Back (Thoracic and lumber region)	:	9% each
4)	Both lower legs and buttock : (anterior and posterior)		18% each
5)	Upper limb (anterior and posterior)	:	9% each
	Total burn injuries	:	98%

17. P.W.7 Dr. Manoj had conducted post mortem examination. According to him, Sarika died of hypovolemic shock due to 98% superficial to deep burn injuries. She succumbed to the burns 3 days after the incident.

18. Admittedly, the parental house of deceased Sarika was at Dhule. Her brother (P.W.6 Manoj) would also reside at Dhule. It took long for him to reach Civil Hospital. Before arrival of her relations from her parental side, dying declarations had already been recorded. There was, therefore, no question of the deceased to have been tutored to make dying declarations.

19. P.W.6 Manoj, brother of Sarika testified that the appellants would harass and ill-treat her since her parents were financially unsound. His evidence would further indicate that, many a time he had been to her matrimonial house to reason with the appellants and request them to be kind enough. His evidence further indicates that, on 8th March i.e. a day preceding the day on which Sarika suffered burns, she had made a phone call to him and informed A/1 to have abused her. In his cross-examination (para 15), the talk between the two on phone has been admitted. A suggestion was given to him in the

following way.

“It is correct that on 8/3/2016 when Sarika called me up, I told her that such instances used to occur in matrimonial house and not to take same very seriously.”

20. Evidence of P.W.6 Manoj further indicates that, Minakshi, relative of deceased Sarika from her parental side had reached the hospital before he reached. Adinath, brother of A/1 was also in the hospital. It has further been brought on record through his cross-examination that, A/1 had purchased gold ornaments for Sarika two years before the incident. He, however, denied that Sarika had pledged those ornaments at Dhule to raise funds for him (P.W.6). He admitted that he disliked the attitude of accused Navnath as he abused him and drove him away when he visited his house before 2 ½ years of the incident. He further admitted that he got annoyed due to his behaviour. He admitted that, deceased Sarika used to do agricultural work as well as household work. He admitted that, it was Sarika's wish to admit her sons in English Medium school and that there was no English Medium school at Hiwre Zare, the accused did not agree to admit the children in English Medium school. He admitted in his cross-examination that, he

did not know as to whether Sarika was willing to get shifted to Ahmednagar for that purpose. He denied the suggestions that, after some days of marriage of Sarika, accused Nos.2 and 3 got separated. He admitted in his cross-examination that accused No.2 was Ex-Sarpanch of the village. He stated that he did not know as to whether accused Navnath also started participating in village politics. He admitted that deceased Sarika was suspecting character of accused Navnath. She had disclosed the said fact to her mother. He, however, stated that, he did not know as to whether for that reason she was annoyed with the accused Navnath. He denied the suggestion that Sarika wanted to get separated from Adinath, and Adinath and Navnath were not ready for that. He denied the suggestion that Sarika was of quarrelsome nature. He volunteered that, according to deceased, her statement was recorded by the police only once and that he had not stated the police that all the accused set Sarika on fire. He denied the suggestion that the deceased had also not stated him that all the accused set her on fire. Portion marked "B" from his police station was read over to him. He admitted that it was also not fully correct. He volunteered that the accused had conspired together and set the deceased on fire. He admitted that, he did not remember as to whether he had stated the police that all the accused had

set the deceased on fire. He admitted that, he had given statement to police as disclosed by the deceased. He denied the suggestion that the deceased told him that all the accused set her on fire and therefore he had stated so to the police. He further admitted that he did not remember as to whether his statement was recorded by the police after the death of Sarika. He denied the suggestion that there was no ill-treatment to deceased Sarika by any of the accused at any point of time. He also denied the suggestion that he did not receive any phone call of deceased Sarika on 8/3/2016. He also denied the suggestion that on 9/3/2016 Sarika disclosed nothing to him. He further denied the suggestion that there was no physical or mental ill-treatment by accused to deceased Sarika.

21. The evidence of P.W.6 Manoj was taken up first for appreciation since the appellants were charged for offence punishable under Section 498-A in addition to Section 302 of the I.P.C.

22. The Trial Court, on appreciation of the evidence in the case, acquitted all the appellants of the charge of offence punishable under Section 498-A r/w 34 of the Indian Penal Code. Neither the State nor the victim (parents or brother of

deceased Sarika) have preferred appeal against acquittal.

23. Admittedly, Sarika was rushed to the hospital by her brother-in-law, Adinath and A/3 (mother-in-law). They gave history of accidental burns (bursting of stove). In our considered view, had they stated true facts, they would have been at the receiving end. The same suggests a false history was given to the Medical Officer. The scene of offence panchanama (Exh.64), that was drawn in the presence of P.W.2 Mahadeo indicates that no kerosene stove was noticed at the crime scene. It was suggested to the investigating officer that, in spite of the same being there, its existence has not been noted in the scene of offence panchanama (Exh.64). The witness to the scene of offence panchanama (P.W.2 Mahadeo) was a public servant. He had no reason to make a false statement. The crime scene panchanama has also not been seriously taken exception to before us.

24. P.W.1 Sanjay was Naib Tahsildar-cum-Executive Magistrate. Police Head Constable Sampat Khaire (P.W.5) had given him requisition (Exh.60) for recording a statement of Sarika admitted to Civil Hospital. It is in the evidence of P.W.1 Sanjay that he received the same by 11.45 a.m. from Police

Head Constable Khaire (P.W.5) himself. It is further in his evidence that, since he was busy in election duty, he went to the Civil Hospital by 12.45 p.m. He met Medical Officer Dr. Pushpa (P.W.4) in Casualty Ward. He also issued her a request letter to give her opinion as to whether the patient was fit to make a statement. His evidence further indicates that, doctor accompanied him to Burn Ward. P.W.4 Dr. Pushpa examined Sarika in his presence. He too put her some questions. There were 2-3 relatives. They were asked to leave. They left. After examining Sarika, P.W.4 Dr. Pushpa gave endorsement, certifying her to be able to give statement. P.W.1 Sanjay referred to the said endorsement. It is further in his evidence that, he too put certain questions to Sarika to ascertain that she was conscious oriented and could respond to his questions correctly. It is further in his evidence that, after having been assured thereof, he recorded her statement (dying declaration), which reads as under :

आज सकाळी ९=०० वाजता माझे सासऱ्याने शिव्या दिल्याने भांडण झाले. माझ्या सासऱ्याने माझ्या अंगावर रॉकेल टाकले व माझ्या नवऱ्याने मला पेटवून दिले. त्यावेळी सासू हजर होते. माझे सासरे माझे संग नेहमी भांडण माझ्या घरची गरिबी परिस्थिती असून रोज भांडत असे. नवरा गर्विष्ठ आहे. माझी तक्रार सासरा, नवरा व सासु याबद्दल तक्रार आहे. सदरचा जबाब घेतांना मी पूर्णपणे शुद्धीवर आहे. यापेक्षा जास्त

सांगणे नाही. हा जबाब मला वाचून दाखविला बरोबर आहे. दि. ९/३/२०१६.

पुन्हा सांगते की माझा नवरा माझ्या घरातून निघून जा असे नेहमी सांगत असे. व मला मारहाण करीत असे. हा जबाब मी सांगितल्यावर दिला आहे. सदरचा जबाब दि. ९/३/२०१६ रोजी दुपारी १३=०० वाजता सुरु करून १३=२० वाजता संपविण्यात आला.

25. P.W.1 Sanjay was subjected to a searching cross-examination. The dying declaration (Exh.61) is in a printed format. Name of the Medical Officer who examined the patient before he recorded dying declaration has not been mentioned therein. He offered an explanation for it. According to him, it was his mistake. The dying declaration contained certification given by P.W.4 Dr. Pushpa to the effect :-

“Pt. (Patient) is conscious, co-operative oriented with time, place and person. Statement start on 9/3/16 at 1.00 p.m.”

26. A similar certification has also been given by her on Exh.61 after recording of the statement was over. P.W.4 Dr. Pushpa too referred to those endorsements in her evidence.

27. The evidence of P.W.1 Sanjay indicates that, since left thumb of Sarika had completely been burnt, he obtained

Sarika's right thumb impression. It is true that, the said thumb impression has not been attested. Exh.61 is also silent to record that the statement was read over to Sarika and she affirmed the same. We do not find it to be a statutory mandate. P.W.1 Sanjay was categorical to state that, it was he who obtained Sarika's thumb impression and has signed alongside the thumb impression in his capacity as Executive Magistrate, who recorded the same.

28. During cross-examination, P.W.1 Sanjay admitted that, the words, "पुन्हा सांगते की" have been added by him later on. According to him, when the statement of Sarika was recorded, she again expressed desire to state something more and, therefore, the last paragraph of her statement was recorded as per her say. The words, "पुन्हा सांगते की" have, therefore, been introduced by him. The dying declaration was recorded between 1.00 – 1.20 p.m. It has further been brought on record during cross-examination of P.W.1 Sanjay that P.H.C. Khaire had not accompanied him to the Civil Hospital. He has not been imparted with the training in recording of dying declaration. The format of the D.D. was prepared by he himself. He denied the suggestion that he only asked the patient about her name and the language she knew. This

impliedly suggests the appellants admit this witness to have interacted with the deceased for recording of her statement. He denied that, P.C. Shaikh who was on duty, dictated the contents of the D.D. he recorded. He also denied that, to just bridge a gap between already obtained thumb impression and the matter of para No.1 of the alleged D.D. some additional material has been introduced by him on his own i.e. "पुन्हा सांगते की". He voluntarily stated that, after completion of the recording of D.D., the victim again expressed desire to say something more and, therefore, the further matter has been recorded on her say.

29. It has further been brought on record that, he knew P.W.4 Dr. Pushpa to be Incharge of Burn Ward since he used to visit the hospital for recording DDs. According to him, no policeman was present near the patient. He went on to state that, condition of right thumb of the victim was better than the left and, therefore, he obtained right thumb impression.

30. P.W.1 Sanjay admitted that, the victim had suffered burns to her face. Ointment was applied. The patient's head, chest, both the hands, leg and back portion were also burnt. The Medical Officer did not examine the patient with the machine/ apparatus, except with stethoscope. According to

him, the Medical Officer was present with him all along during recording of the D.D. The Medical Officer took entry thereof in the hospital record. He admitted the suggestion that the Medical Officer put her endorsement about consciousness of the patient by 12.55 p.m. He denied to have had not read over the contents of the D.D. to the patient after recording was over. He, however, admitted that the font of the words, "पुन्हा सांगते की" appearing in the D.D. is smaller than the font of the other matter therein. According to him, he did not attest the thumb impression of the patient since it was obtained by him and he put his signature alongside. His evidence further indicates that, P.H.C. Khaire did not meet him in the Civil Hospital. He delivered a sealed cover to the Police Inspector of the concerned Police Station. There is some repetition of evidence since two independent Advocates were representing the appellant No.1 and appellants No.2 and 3.

31. P.W.1 Sanjay tendered in evidence a requisition letter (Exh.60) given by P.H.C. Khaire to him for recording of the D.D. it is at Exh.60. True, it does not bear the time by which he received the same on 9/3/2016. It is also true that, D.D. (Exh.61) is silent to record the same to have been read over to the patient. She (patient) confirmed the same and then put her

thumb impression. The thumb impression appearing thereon has also not been attested.

32. P.W.3 Ravindra was a panch witness to the seizure of clothes on the person of A/1 and A/2 under the panchanama (Exh.66 & 67). He was not subjected to cross-examination by defence.

33. P.W.2 Mahadeo is a witness to the scene of offence panchanama. His evidence is referred to later on.

34. P.W.5 Sampat was a Police Head Constable attached to Nagar Taluka Police Station. It is in his evidence that he was deputed at Walki Outpost. P.H.C. Gaikwad called him on phone and told to make enquiry in the burn case of Sarika. He, therefore, went to the Police Station Officer and there gave the M.L.C. report. He then gave the requisition to the Executive Magistrate (P.W.1) for recording statement of the patient. He referred to his requisition (Exh.60).

35. It is further in his evidence that, he went to the Civil Hospital at 2.00 p.m. on 9/3/2016. He met P.W.4 Dr. Pushpa in Casualty Ward. He requested her to accompany him for

recording statement of the patient. Both of them, therefore, went to the Burn Ward. P.W.4 Dr. Pushpa checked pulse and heart rate of the patient. She also made some enquiries with her. P.W.4 Dr. Pushpa then certified the patient was able to make statement. She accordingly made endorsement on the paper which was with him. He referred to the said endorsement. It is further in his evidence that, P.W.4 Dr. Pushpa too made some enquiry with the patient. He too put her some questions and after having satisfied of the patient being conscious oriented, he recorded her statement, which reads as below :-

जबाब

तुझे नाव काय आहे ?

माझे नाव सारिका नवनाथ काटे असे असून वय - ३० वर्षे असे आहे.

तुम्ही कोठे राहाता ? घरात कोण कोण आहे ?

मी हिवरे झरे, ता. नगर येथे राहते. घरामध्ये नवरा नवनाथ शिवाजी काटे, सासरे - शिवाजी, सासू पार्वती व दोन मुले पवन व यश असे आहेत.

हे कसे झाले तू कशामुळे भाजली आहेस ?

मी घरात असतांना मला सासरचे लोक तू गरीब घरची आहे असे म्हणून माझेशी नेहमी भांडतात. आज दिनांक १/३/१६ रोजी सकाळी ०९:०० वा. चे सुमारास घरी असतांना माझे सासरे शिवाजी विठोबा काटे यांनी काही कारण नसतांना शिवीगाळ

करणेस सुरवात केली व भांडण करू लागले. तेव्हा त्यांनी रॉकेलचा ड्रम घेऊन माझे अंगावर रॉकेल टाकले व नवरा नवनाथ शिवाजी काटे याने काडी ओढून मला पेटवून दिले. माझी सासू पार्वतीबाई शिवाजी काटे ही पण तेथे त्यांना मदत करून मला शिव्या देत होती. सासऱ्याने माझे अंगावर रॉकेल टाकून नवऱ्याने मला पेटवून दिले आहे व सासूने त्यांना मदत केली आहे. म्हणून माझी माझा नवरा सासू सासऱ्याविरुद्ध तक्रार आहे. मी सांगितलेली हकीगत खरी आहे.

36. It is further in his evidence that, on completion of the aforesaid recording, P.W.4 Dr. Pushpa again examined the patient to find her fitness. P.W.4 Dr. Pushpa accordingly made an endorsement below the same. His evidence further suggests that, he read over the matter to the patient. She admitted it to be correct. He then obtained her thumb impression and he put his signature thereon. The statement/ D.D. recorded by P.W.5 Sampat is at Exh.68.

37. He too was subjected to a searching cross-examination. He did not produce any document on record to indicate to have been authorised to record the statement/ D.D. of the patient. According to him, P.H.C. Shri Gaikwad was on examination Bandhobast duty and, therefore, he asked him to make enquiry into the M.L.C. No.105/2016. It was about 11.15

a.m. He, therefore, went to the Civil Hospital directly. He carried the requisition to be given to the Executive Magistrate. He handed it over to P.W.1 Sanjay in his office. He denied the suggestion that he got recorded the second statement of the victim since the first one recorded by P.W.1 Sanjay was defective and not proper, and it was prepared using signatures of the doctor and the thumb impression of the patient on blank form. He admitted that, the D.D. (Exh.68) recorded by him does not contain questions put by him to the patient to ascertain her fitness. He also admitted the statement to have been silent to record therein that it was read over to the patient and she affirmed the same. He, however, categorically denied to have fabricated the second D.D. (Exh.68).

38. It is further in his cross-examination that, he directly went to P.W.1 Sanjay in Tahsil Office. He did not make any entry in the station diary about his proceeding to the Civil Hospital for recording the patient's statement. According to him, he had recorded ten such statements before the one in question. It is also in his evidence that he did not issue a letter to the Medical Officer. The Medical Officer did not tell him as to the patient to have already given her statement to P.W.1 Sanjay. According to him, some part of the thumb of the patient

was not burnt. He could, therefore, obtain patient's thumb impression. He had noticed ink to the very thumb before he obtained the thumb impression.

39. P.W.4 Dr. Pushpa testified that, in September 2015, she was a Medical Officer, Civil Hospital, Ahmednagar. On 9/3/2016, she was on duty as Casualty Medical Officer. At about 9.35 a.m., Adinath Kate (brother-in-law of the deceased) and A/3 admitted Sarika to the hospital in burnt condition. She examined Sarika. She also made some enquiry with Adinath and A/3. Both of them gave history of accidental burns i.e. bursting of kerosene stove. She accordingly recorded the history. It is further in her evidence that, she took the patient on the bed for treatment. Asked both Adinath and A/3 to stay outside. She then took Sarika into confidence. Sarika related her that quarrel took place in the house and in the said quarrel, A/2 poured kerosene on her person and A/1 set her ablaze. At that time, A/3 was also present. She noted the same as a history. She then shifted Sarika to Burn Ward.

40. It is further in her evidence that, by 12.45 p.m. P.W.1 Sanjay visited the hospital. He gave her letter (Exh.67). She examined the patient on his request and then certified her (the

patient) to be conscious oriented to make a statement. It is further in her evidence that she asked the relatives of the patient to remain outside. She then examined pulse rate and heart beats. She made some enquiry with the patient. Sarika was talking coherently and clearly. She found her to be fit to make a statement. She accordingly gave endorsement on the paper (Exh.61). She referred thereto and identified her signature on Exh.61. It is further in her evidence that, P.W.1 Sanjay recorded patient's statement in her presence. After recording of the statement was over, she again examined the patient at the request of P.W.1 Sanjay and then certified her to be fit and oriented. She gave an endorsement to that effect. She referred the same.

41. It is further in her evidence that, thereafter a police officer from Nagar Taluka Police Station came to the hospital. She again examined the patient at his request. The relations of the patient were asked to leave the Ward. On being examined the patient, she found her to be well oriented and able to make a statement. She gave endorsement to that effect. P.W.4 Dr. Pushpa referred to the same. It is further in her evidence that, the police officer recorded the patient's statement in her presence. After recording of the statement was over, she again

examined the patient and gave endorsement about her fitness. She referred to the statement (Exh.68). P.W.4 Dr. Pushpa produced in evidence I.P.D. case papers of the patient (Exh.70).

42. P.W.4 Dr. Pushpa was subjected to a searching cross-examination, wherein it has been brought on record that in case of burn injuries, generally dehydration was noticed and in such a case patient feels drowsy. It would not be correct to say that in dehydration cases, patient used to be confused. Such symptom was not seen in every case. Medicines given to the patient generally start giving results within 15 minutes to half an hour. She admitted that entry of admission of patient in Burn Ward was taken on I.P.D. paper at 11.20 a.m., but in fact the patient was taken in the ward at 12.30 p.m. as per the note taken by the concerned attending Nurse. She further admitted that in the Burn Ward, treatment was actually started at about 12.30 p.m. In casualty Section, she started giving treatment to the patient by 9.40 a.m. She gave her analgesics. It was injectable. She denied the suggestion that the drug suspends the senses. She volunteered that, it reduced the pain. Central nervous system gives sense of pain. She admitted that due to the drug, pain senses are suspended. She denied the suggestion that the drug suspends the central nervous system.

She admitted that drug Atropine works as an analgesic also. She went on to admit that the drug is classified as delirium and that it has also effect of drowsiness, confusion and dizziness.

43. She further admitted in her cross-examination that she had noted pulse rate of the patient at the time of her admission, which was 60 per minute. She had not noted the heart beat rate specifically. She admitted that, in the case paper, she had not mentioned that the patient told her that a quarrel took place in her house. She further admitted that, in the case papers, it is not mentioned specifically that, "her husband set her on fire". She further admitted that, in the case paper she did not mention as to how she took the patient into confidence. She admitted that, in the case paper she has not mentioned that, she asked the relatives i.e. Adinath and Parvati to stay outside. She further admitted in cross-examination that the patient was serious and therefore they obtained endorsement of her husband giving him intimation of the seriousness.

44. P.W.4 Dr. Pushpa further admitted in her cross-examination that it was a case of hypovolemic shock and that such a patient requires immediate and emergency medical

attention. It occurs when the patient loses nearly 1/5th of fluid including serum part of the blood. To a question asked to her in her cross-examination whether in such a case it is impossible for heart to pump at a sufficient rate and to supply blood to different parts of the body, she replied that, "It depends upon quantity of loss of fluid and serum." She admitted in her cross-examination that, in clinical examination, one cannot diagnose the damage caused to different parts of the body internally. She admitted that hypovolemic shock may lead to multiple organ failure and that in such a case first 48 hours are most critical. She admitted that, 9% burn injury to upper limb means from the tips of fingers up to the shoulders and 18% burn injuries to lower limb means from the tip of toes to the waist portion. She admitted that, in the present case genital organs of the patient were intact.

45. She further admitted in her cross-examination that, at about 10.30 a.m. on 9/3/2016, general condition of the patient was low and at 10.40 a.m., when the patient was examined by Surgeon, her condition was poor and feeble. She further admitted that the Surgeon noted bilateral crackles, that means there was noise in lungs. She denied the suggestion that such a patient feels difficulty in breathing. She stated that

in each and every case gasping is not noticed whereas in the present case on 11/3/2016 gasping was noticed. She admitted that the patient may lead to such a stage gradually. She admitted that on 9/3/2016 at about 1.40 a.m. the Surgeon noted poor general condition of the patient and made an endorsement which looks like "expand face". She further admitted that at 12.00 Hrs. in midnight, intimation was given to relative of patient namely Manoj Kharat (P.W.6) about serious state of the patient and such note is taken under the signature of Manoj Kharat in case paper. She admitted that, the in the case paper, after her note of 01.20 p.m., there is no note of examination of the patient in between till 12.00 midnight. The treatment given to the patient in the meanwhile is mentioned in the treatment sheet which is part of the case paper. She admitted that the treatment sheet bears details of medicines given to the patient.

46. P.W.4 Dr. Pushpa further admitted in her cross-examination that, in the case paper she had not taken note of her examination of patient at the time of recording of statement by police officer. She volunteered that, she forgot to take the note at that time. She denied that, it is false statement on her part. She admitted that, as and when patient is examined, they take note in the case paper. She admitted that, in the entries of

examination of the patient taken on 9/3/2016 at 1.00 p.m. up to 10/3/2016, no details of CNS, CRS and CVS were mentioned. She volunteered that the name is mentioned in the chart prepared by the concerned Sister. She stated that there are notings of P i.e. pulse rate and R means respiratory rate. The notings were made by on duty staff.

47. P.W.4 Dr. Pushpa further admitted that, in case of hypovolemic shock, rapid and shallow breathing may be noticed. She denied the suggestion that in such a state patient usually loses consciousness. She admitted that, oxygen supply to the brain is done through blood which includes fluid. She admitted that, due to loss of blood and fluid, oxygen supply to the blood may be affected. She admitted that in such situation the blood becomes thick and cherry red. She stated that, it may be correct that in such case blood may gradually get stagnant. She admitted that, in such a case brain functions may get affected. She denied that after making endorsement on the paper of dying declaration, she removed the relatives of the patient from the Ward. She stated that, it did not so happen that she gave no endorsements on papers at the beginning of the statement. She denied that, Mr. Pardeshi and police officer did not come to her and she did not accompany them and she

did not make endorsements after examining the patient. She admitted that in Burn Ward, the patients are kept in a cage.

48. P.W.8 Pawan, son of the appellant and the deceased Sarika, was about 8 years of age at the relevant time. The Trial Court put him certain questions and interacted with him to find him to be competent witness. The Trial Court then proceeded to record his evidence. It is in his evidence that, on the day of the incident, he himself, his father, Anna (grandfather), Aabu (grandmother) were standing in front of their house. Aabu told Pappa that Sarika did not wash her saree, on which Pappa started abusing Mummy (Sarika). Then Anna (grandfather) abused Mummy (Sarika) filthily, went towards her, pushed her away and assaulted her with his Chappal. He further stated that, then he rushed towards Mummy. At that time, Aabu said that his Mummy should not be kept alive. Then Anna (grandfather) caught hold of hair of Mummy and took her into the house. Pappa followed him. Anna (grandfather) poured something from drum on the person of Mummy and Pappa set her on fire by igniting a match stick. Mummy sustained burns. She started crying. In some time, uncle Adinath came. He poured water and also covered Mummy with quilt and then he took Mummy to hospital.

Mummy died.

49. P.W.8 Pawan was subjected to a searching cross-examination. Being a child, he could not answer some of the questions. According to him, quarrel took place loudly in front of the house. Neighbours had also gathered. True, none of the neighbours has been examined. He was suggested the defence version that on the given day his mother Sarika and Aunt Geeta were asked to bring firewood. He claimed ignorance about the dispute to have taken place over bringing of the firewood. He did not remember whether his mother thereupon got annoyed and went in the room and violently ignited kerosene stove. He further claimed ignorance about the stove to have been burst and his mother suffered injuries thereby. It is further in his evidence that, his statement was recorded three days after the incident i.e. after his mother passed away. According to him, he and his younger brother were kept with the relatives for two days next after the incident. He, however, could not name the relative with whom both of them were. His evidence further indicates that, since the demise of his mother Sarika, he has been residing with his maternal grandparents and he had accompanied his maternal uncle to the Court to give evidence.

50. P.W.9 Ravindra is the investigating officer. His evidence indicates that, the Police Station Officer entrusted him with the investigation of the crime in question. He, therefore, paid visit to the crime scene and drew scene of offence panchanama (Exh.64) in the presence of P.W.2 Mahadeo. It is further in his evidence that, the scene of offence was a house at village Hivre-Zare in Katemala. He collected pieces of burnt Sari and burnt clothes, match stick, kerosene drum etc. from the scene of offence. We do not propose to refer to his evidence in extenso considering his role as an investigating officer.

51. During cross-examination, he testified that, both the appellant Nos.2 and 3 were residing at Katemala itself though they have another house at Hivre-Zare. He denied that kerosene stove was there in the room, however, he intentionally did not seize it during the scene of offence panchanama.

52. Aforementioned is the evidence adduced in the case along with certain documents to which a reference would be made while appreciating the evidence.

LAW RELATING TO DYING DECLARATION

53. Section 32 of the Indian Evidence Act reads :

“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant :- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :-

Sub-section (1) thereof reads as follows :

“(1) when it relates to cause of death :- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

54. Way back in 1958, the Apex Court, in case of Khushal Rao (supra), observed :-

“(C) Evidence Act (1 of 1872), S.32,S.114, S.133 – Dying declaration and confession.

Sometimes, attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But it is not right in principle to do so. Though under S.133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice, Illustration (b) to S.114 of the Act, lays down as a rule of prudence based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said to a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. Generally, speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver.

(D) Evidence Act (1 of 1872), S.32 – Dying declaration – Value.

It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human

memory and human character, and in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. A.I.R. 1940 Mad. 196, Approved.

(E) Evidence Act (1 of 1872), S.32 -Dying declaration – Corroboration.

In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once; the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities. Observations in A.I.R. 1953 SC 420, held to be in the nature of obiter.”

of Laxman (supra) observed :

3. 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. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed 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 court 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 to always be on guard to see that the statement of the deceased was not as 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 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. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a

doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, 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.

4. The court relied upon the earlier decision. In *Ravi Chander v. State of Punjab*, [1998] 9 SCC 303 wherein it had been observed that for not examining by the doctor the dying declaration recorded by the executive magistrate and the dying declaration orally made need not be doubted. The magistrate being a disinterested witness and is a responsible officer and there being no circumstances or material to suspect that the magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the magistrate does not arise.

5. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his

evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind where-after he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma and Ors. v. State of Andhra Pradesh, [1999] 7 SCC 695 must be held to be not correctly decided and we affirm the law laid down by this court in Koli Chunilal Savji and Anr. v. State of Gujarat, [1999] 9 SCC 562 case.”

56. Moreover, the Apex Court, in Jayamma’s case (supra), held

14. Before we advert to the actual admissibility and credibility of the dying declaration (Ex.P-5), it will be beneficial to brace ourselves of the case-law on the evidentiary value of a dying declaration and the sustenance of conviction solely based thereupon. We may hasten to add that while there is huge wealth of case law, and incredible jurisprudential contribution by this Court on this subject, we are consciously referring to only a few decisions which are closer to the facts of the case in hand. We may briefly notice these judgments.

14.1 In P.V. Radhakrishna. v. State of Karnataka (2003) 6 SCC 443, this Court considered the residuary question whether the percentage of burns suffered is a determinative factor to affect the credibility of a dying declaration and the probability of its recording. It was held that there is no hard and fast rule of universal application in this regard and much would depend upon the nature of the burn, part of the body affected, impact of burn on the faculties to think and other relevant factor.

14.2 In Chacko v. State of Kerala (2003) 1 SCC 112,

this Court declined to accept the prosecution case based on the dying declaration where the deceased was about 70 years old and had suffered 80 per cent burns. It was held that it would be difficult to accept that the injured could make a detailed dying declaration after a lapse of about 8 to 9 hours of the burning, giving minute details as to the motive and the manner in which he had suffered the injuries. That was of course a case where there was no certification by the doctor regarding the mental and physical condition of the deceased to make dying declaration. Nevertheless, this Court opined that the manner in which the incident was recorded in the dying declaration created grave doubts to the genuineness of the document. The Court went on to opine that even though the doctor therein had recorded “patient conscious, talking” in the wound certificate, that fact by itself would not further the case of the prosecution as to the condition of the patient making the dying declaration, nor would the oral evidence of the doctor or the investigating officer, made before the court for the first time, in any manner improve the prosecution case.

14.3 In *Sham Shankar Kankaria v. State of Maharashtra* (2006) 13 SCC 165, it was restated that the dying declaration is only a piece of untested evidence and must like any other evidence satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. Further, relying upon the decision in *Paniben v. State of Gujarat* (1992) 2 SCC 474, wherein this Court summed up several previous judgments governing dying declaration, the Court in *Sham Shankar Kankaria* (Supra) reiterated:-

“(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja v. State of M.P.*[(1976) 3 SCC 104]);

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See

State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552 and Ramawati Devi v. State of Bihar [(1983)1 SCC 211)];

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy v. Public Prosecutor [(1976) 3 SCC 618]);

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P. [(1974) 4 SCC 264]);

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See Kake Singh v. State of M.P. [1981 Supp SCC 25]);

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P. [(1981) 2 SCC 654]);

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu [1980 Supp SCC 455]);

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar [1980 Supp SCC 769]);

(ix) Normally 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 eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram v. State of M.P.* [1988 Supp SCC 152]);

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan* [(1989) 3 SCC 390]);

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v. State of Maharashtra* [(1982) 1 SCC 700])”.

16. We may also take note of the decision of this Court in the case of *Surinder Kumar* (Supra). In the said case, the victim was admitted in hospital with burn injuries and her dying declaration was recorded by an Executive Magistrate. This Court, first doubted whether the victim could put a thumb impression on the purported dying declaration when she had suffered 95-97 per cent burn injuries. Thereafter, it was noted that “at the time of recording the statement of the deceased.....no endorsement of the doctor was made about her position to make such statement”, and only after the recording of the statement did the doctor state that the patient was conscious while answering the questions, and was “fit to give statement”. This Court lastly noticed that before the alleged dying declaration was recorded, the victim in the course of her treatment had been administered Fortwin and Pethidine injections, and therefore she could not have possessed normal alertness. It was hence held that although there is neither a rule of law nor of prudence that the dying

declaration cannot be acted upon without corroboration, the Court must nonetheless be satisfied that the dying declaration is true and voluntary, and only then could it be the sole basis for conviction without corroboration.

17. Consistent with the cited principles, this Court refused to uphold the conviction in the case of Sampat Babso Kale and Another v. State of Maharashtra 2019 (4) SCC 739. The dying declaration in that case was made by a victim who had suffered 98 percent burn injuries, and the statement was recorded after the victim was injected with painkillers. This Court adopted a cautious approach, and opined that there were serious doubts as to whether the victim was in a fit state of mind to make the statement. Given the extent of burn injuries, it was observed that the victim must have been in great agony, and once a sedative had been injected, the possibility of her being in a state of delusion could not be completely ruled out. Further, it was specifically noted that “the endorsement made by the doctor that the victim was in a fit state of mind to make the statement has been made not before the statement but after the statement was recorded. Normally it should be the other way around.”

[emphasis supplied]

57. We have also perused the other judgments relied on by learned counsel for the appellants to ultimately come to a conclusion that each case has to be decided on its peculiar facts and circumstances obtainable therein. Judgments No.1 to 9 referred in the list hereinabove are on the point of dying declaration. Other judgments relied on are in relation to appreciation of evidence of a child witness.

58. Keeping on mind the legal position as regards D.D., let us appreciate the evidence in the case.

Admittedly, deceased Sarika suffered extensive burns at her matrimonial home by 9.00 in the morning of 9/3/2016. Her parental house is situated at Dhule. Her brother (P.W.6 Manoj) was also residing at Dhule. Sarika was rushed to the hospital by A/3 and her brother-in-law. She had suffered 98% deep and superficial burns. Three days after the incident i.e. on 12/3/2016, she succumbed to the injuries. The post mortem report (Exh.77) indicates Sarika died of hypovolemic shock due to 98% superficial to deep burn injuries.

59. The Trial Court has observed the case to have been based on an eye witness account, dying declarations and circumstantial evidence as well.

60. So far as regards direct evidence in the nature of an eye witness account is concerned, we have evidence of P.W.8 Pawan, 8 year old child of the deceased. His evidence has been referred to in paragraph No.48 above. In short, the child witness attributed each and every appellant with some overt act

in the incident. Admittedly, he was around 8 years of age at the relevant time. He was kept with some of his relations for two days next after the incident. His statement was recorded on the third day i.e. on the day on which his mother (Sarika) passed away. If we compare his eye witness account with the dying declarations given by the deceased, first to the Medical Officer and then to the Executive magistrate and P.W.5 Sampat, it would indicate that, there is great variance between the eye witness account on one hand and the dying declarations on the other. We, therefore, do not propose to rely on the evidence of Master Pawan. Admittedly, he had been residing at his maternal grandparent's house since the day of the incident. He came to the Court to give evidence in the company of his maternal uncle (P.W.6 Manoj).

DYING DECLARATION (1) :

61. P.W.4 Dr. Pushpa is an independent witness. There is nothing to indicate her to have any kind of interest in the matter. Admittedly, P.W.4 Dr. Pushpa was on duty as a Casualty Medical Officer on 9/3/2016. When Sarika was admitted to the hospital, she was accompanied by A/3 and Sarika's brother-in-law Adinath. Both of them were interested to see that exculpatory history was given to the Medical Officer.

Both of them, therefore, informed P.W.4 Dr. Pushpa that Sarika suffered burns due to bursting of kerosene stove. True, according to them, the incident took place at 8.00 in the morning. The medical papers on record indicate the victim to have been admitted/ brought to the hospital by 9.35 a.m. directly from home. Necessarily, soon after the incident. That falsifies that the incident took place at 8.00 in the morning. The evidence of P.W.4 Dr. Pushpa is to the effect that she asked both Adinath and A/3 to stay outside the room. She then took Sarika into confidence to learn from her (Sarika) that her father-in-law (A/2) poured kerosene on her person and then A/1 allowed her to burn in presence of her mother-in-law. Exh.70 is a medical case record of deceased Sarika. The history given by both, A/3 and Adinath on one hand and deceased Sarika on the other have been immediately recorded in those medical papers. True, in the margin of the said paper, it has been recorded that, according to the history given by the patient. We do not propose to give much importance thereto since the same wording has been recorded in bold on the middle of the very paper also. The history given by deceased Sarika to P.W.4 is in the nature of her first D.D. The Trial Court has rightly observed that, P.W.4 Dr. Pushpa being a Medical Officer, must not have been in the know of legal niceties. Therefore, P.W.4 Dr.

Pushpa's evidence before the Court that A/2 poured kerosene on the person of Sarika and A/1 set her ablaze by lighting a match stick in the presence of mother-in-law could not be said to be an improvement made with a view to ensure the prosecution to be successful. We are in complete agreement with the observations made by the Trial Court in this regard.

62. It is true that, Sarika had suffered 98% of burns. Her pulse rate was 60. A writing was obtained from her husband to the effect that he was informed by the Medical Officer that his wife's (Sarika) condition was critical and if anything untoward happened, he would not hold responsible either to the hospital or the Medical Officer. It is also true that, the Surgeon had found the condition of Sarika to have been critical. It was a noting made post 11.00 a.m. P.W.4 Dr. Pushpa's evidence indicates that she was all along present during recording of both the D.Ds., one by the Executive Magistrate and another by the police officer. It is further in her evidence that, she had examined Sarika before and after recording of her both the statements and found her to be conscious oriented to make statements. She had examined Sarika with stethoscope. Her pulse rate was checked. On both the D.Ds. (Exh.61 and 68), she gave endorsement to that effect

under her signature. She referred those in her examination-in-chief itself. She had also given a separate endorsement on Exh.67, a letter given by P.W.1 Sanjay (Executive Magistrate) to her with a request for examining the patient as to whether she was fit to make a statement.

63. It is true that, P.W.4 Dr. Pushpa and P.W.7 Dr. Manoj, who conducted the post mortem examination, testified that in case of hypovolemic shock, there use to be loss of fluid and blood. Substantial loss of fluid and blood affects physical and mental condition of patients, was the response of P.W.7 Dr. Manoj. According to him, internal organs get damaged as a result of hypovolemic shock. It is only in post mortem examination such damage to internal organs could be noted properly. He has, however, categorically denied that mental condition of a patient could not be ascertained by mere physical examination. Admittedly, P.W.7 Dr. Manoj had not treated deceased Sarika. What he did is the post mortem examination only.

64. P.W.4 Dr. Pushpa admitted that, drug Atropine works as an analgesic also. The said drug is classified as delirium and that it has also effect of drowsiness, confusion and

dizziness. She had administered the patient analgesics in injectable form. She was categorical to deny that such drug suspends the senses. According to her it reduces the pain. She denied that, such drug suspends central nervous system. She admitted that the patient was serious and accordingly, it was informed to her relations. Her evidence further indicates that, in case of hypovolemic shock, the patient requires immediate medical attention. She did admit that, in clinical examination, one cannot diagnose the damage caused to different parts of the body internally. She agreed with the suggestion that hypovolemic shock may lead to multiple organ failure. According to her, first 48 hours are most critical. Her evidence and questions put to her indicate that the condition of the patient was worsen gradually. Difficulty in breathing and gasping was noticed on the day on which Sarika succumbed. According to her, it was her mistake to record in the medical papers that police officer recorded the statement of Sarika. Further, considering the entire evidence on record, we do find it to be a mistake. She gave endorsement about fitness of Sarika to make a statement. The questions put to P.W.5 Sampat also indicate that the defence admitted his visit to the hospital. It was even suggested to him that he noticed ink on the right thumb of the deceased while he obtained her thumb impression

on the statement-cum-dying-declaration recorded by him. The same indicates the statement of deceased was recorded before he too recorded her statement.

65. P.W.4 Dr. Pushpa was a treading doctor. She was present all along. During the patient's admission to the hospital until her both of the D.Ds. were recorded by P.W.1 Sanjay and P.W.5 Sampat she had examined the patient and certified in writing the patient to have been fit to make a statement. We do not find any reason to disbelieve the evidence of P.W.5 Sampat.

DYING DECLARATION (2) :

66. P.W.1 Sanjay, Executive Magistrate was given a requisition letter (Exh.60) by P.H.C. Sampat (P.W.5) to record statement of patient Sarika admitted to Civil Hospital. The said requisition has been tendered in evidence by P.W.1 Sanjay himself. True, it does not bear the timing by which he received the same on 9th March. We find him to be disinterested witness. After having performed his some official work, he reached the hospital. He met P.W.4 Dr. Pushpa there. He gave her a letter (Exh.67) with a requisition to examine Sarika and state whether she was conscious oriented to make statement. The said letter is also on record. P.W.4 Dr. Pushpa gave

endorsement about the fitness of the patient on the letter as well. True, a printed format was used by P.W.1 Sanjay for recording D.D. He was candid enough to admit to have been not imparted with any training in recording of D.D. According to him, the D.D. (Exh.61) does not contain in the concerned column the name of the Medical Officer who examined the patient to certify her to be conscious oriented. According to him, it was his mistake. In our view, P.W.1 Sanjay appears to have not recorded the name of the Medical Officer (P.W.4 Dr. Pushpa) inadvertently. The endorsement given by P.W.4 about the fitness of Sarika to make statement is there (on Exh.61) in her own handwriting and signature as well. It was given by 1.00 p.m. on 9th March. The deceased Sarika stated P.W.1 Sanjay that, by 9.00 in the morning A/2 abused her. A quarrel, therefore, ensued. A/2, therefore, poured kerosene on her person and A/1 set her ablaze. A/3 was present in the house and everything happened in her presence. It was further her case that, her father-in-law would frequently pick up quarrel with her since her parent's financial condition was poor. It is true that, recording of her statement was concluded and thereafter some matter has been recorded as stated by her. The same has been cleared by P.W.1 Sanjay himself. According to him, Sarika then again expressed to state something more. She

then related that, A/1 would ask her to leave home. He used to beat her up. It is also true that, P.W.1 Sanjay admitted that therefore, he prefixed the words, "पुन्हा सांगते की" before Sarika gave further statement after recording of D.D. was over (first part). The said recording did take place in the presence of P.W.4 Dr. Pushpa who has certified her to have been conscious and well oriented as to time, place and person throughout the statement.

67. Last part of the D.D. (Exh.61) gets reinforced by the evidence of P.W.6 Manoj, who has testified that, on the previous day, Sarika had told him on phone that A/1 had abused her and asked her to leave the home. During cross-examination of P.W.6 Manoj, the defence admitted the telephonic conversation between P.W.6 Manoj and the deceased on the previous day of the incident. It is reiterated in para No.15 of his cross-examination, it was suggested to him that he told Sarika during the said conversation that such instances used to occur in matrimonial home and not to take them seriously.

68. P.W.1 Sanjay being Naib Tahsildar-cum-Executive Magistrate, went to his office after recording of D.D. (Exh.61). He drew a copy thereof and then handed over the original in

sealed cover to the concerned Police Station. It took some time therein. Based on the said D.D., therefore, a crime (F.I.R.) has not been registered.

DYING DECLARATION RECORDED BY P.W.5 SAMPAT

69. P.W.5 Sampat was a P.H.C. attached to Walki Outpost. His evidence indicates that, P.H.C. Gaikwad was deputed on examination Bandhobast duty. P.H.C. Gaikwad, therefore, requested him to make enquiry into M.L.C. report. P.W.5 Sampat therefore, wrote a letter to P.W.1 Sanjay, Executive Magistrate for recording of a statement of Sarika. His evidence further indicates that, he himself went to the Civil Hospital by 2.00 p.m. He met P.W.4 Dr. Pushpa there. He gave her a request letter to examine the patient and report whether she was able to make a statement. The said letter has already been referred to hereinabove. He then recorded Sarika's statement/ D.D. (F.I.R. Exh.68). He asked Sarika certain questions. P.W.4 Dr. Pushpa, after examining her, gave endorsement about her fitness to make a statement. Similar endorsement has also been given on the very document post recording of the statement was over. Sarika related P.W.5 Sampat what has been stated to P.W.1 Sanjay, Executive Magistrate, which has been referred to hereinabove. She

related him that her father-in-law picked up quarrel for no reason. He doused her with kerosene. A/1 ignited her. A/3 was present and was abusing her. Although it has been stated therein that A/3 had assisted A/1 and A/2 in setting her ablaze, the statement is silent to state in what way/ manner A/3 had assisted A/1 and A/2.

70. On the same lines is the oral D.D. made by the deceased to her brother P.W.6 Manoj. True, he was confronted with his police statement. In the last para of his police statement, wherein there is a summary of the statement, it was stated that, all the appellants set her ablaze. The same cannot be considered to be a material contradiction with his evidence before the Court since in his statement under Section 161 Cr.P.C. he stated to the police what role the appellants played. The same is consistent with the D.Ds. recorded by Executive Magistrate P.W.1 Sanjay with P.H.C. P.W.5 Sampat. And even to substantial extent with the history recorded in the medical papers.

71. A/1 gave a separate defence statement, stating therein that Sarika was quarrelsome. She wanted to stay away from the in-laws. His parents would reside away at Hiwre Zare.

Sarika wanted to admit her children in English Medium school at Ahmednagar. A petty quarrel ensued among the family members. Sarika entered the house with anger and started igniting stove violently. She even closed the door from inside and after a while her shouts were heard. We are unable to accede to these contentions without there being any supportive material even to agree to the same based on preponderance of probabilities. The scene of offence panchanama (Exh.64) indicates that no kerosene stove was found at the place and, therefore there was no question of it having been burnt and seizure by the investigating officer. True, an accused can raise multiple and even mutually exclusive defences. The evidence on record, however, indicates that, the appellants' defence that Sarika suffered burns due to bursting of kerosene stove has even not been made out based on preponderance of probabilities.

72. Considering all the statements made by the deceased, namely – first oral D.D. in the nature of history given to P.W.4 Dr. Pushpa, independent witness. Then recording of her D.D. by Executive Magistrate P.W.1 Sanjay, thereafter recording of her second D.D. by P.W.5 Sampat and oral D.D. made to her brother lead us to agree with the conclusion drawn

by the Trial Court that A/1 and A/2 committed murder of Sarika by setting her ablaze. The Trial Court was, therefore, justified in convicting both of them for the offence of murder, punishable under Section 302 r/w 34 of the I.P.C.

73. True, the appellants have been acquitted of the offence punishable under Section 498-A of the I.P.C. Relying on the judgment in case of Sandip Rathod (supra), learned counsel for the appellants submitted that, in view of acquittal from offence punishable under Section 498-A, the prosecution failed to prove the appellants to have any motive to eliminate the deceased. In our view, the evidence of P.W.6 Manoj, brother of the deceased, and the D.Ds. fell short to make out the ingredients of Section 498-A of the Indian Penal Code and, therefore, they have rightly been acquitted of the said offence. That does not mean that the incident as alleged by the prosecution did not take place. Motive, many a time remains hidden.

74. In our considered view, the Trial Court ought not to have convicted A/3, mother-in-law of deceased Sarika. In the medical history given by the deceased to P.W.4 Dr. Pushpa and the D.D. recorded by P.W.1 Sanjay, what has been stated was

that A/3 was simply present while A/1 and A/2 set her ablaze. In the D.D. recorded by Police Officer P.W.5 Sampat, it has been recorded that, A/3 continued to abuse her and assisted A/1 and A/2. Neither the abusive words have been narrated nor the manner has been stated in which A/3 allegedly assisted A/1 and A/2 in setting her ablaze. The Trial Court convicted A/3 for the offence of abetment of committing murder and, therefore, sentenced her to rigorous imprisonment for seven years. Section 107 of the Indian Penal Code speaks of abetment, which reads as under :

“107. Abetment of a thing .—

A person abets the doing of a thing, who—

First.—

Instigates any person to do that thing; or

Secondly .—

Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly .—

Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 .—

A person who, by wilful misrepresentation, or by

wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.”

75. The aforesaid provision would indicate that, though the offence could be abetted by instigation or intentional aid or by entering into conspiracy, the D.Ds. of the deceased are silent to state as to how and in what manner A/3 had instigated A/1 and A/2 or how she has assisted them in setting her ablaze. The mere fact that she was set ablaze in presence of A/3 and she was a mute spectator is not sufficient to convict her for the offence of abetment of committing murder. We are not in agreement with the reasons given by the Trial Court in convicting the Appellant No.3 Parvatibai w/o Shivaji Kate.

76. For all the aforesaid reasons, the appeal partly succeeds in terms of the following order :

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) The Criminal Appeal of appellant No.1 Navnath s/o Shivaji

Kate and appellant No.2 Shivaji s/o Vithoba Kate stands dismissed.

(iii) The Criminal Appeal stands allowed so far as regards appellant No.3 Parvatibai w/o Shivaji Kate. The order of conviction and consequential sentence dated 17/5/2018, passed by learned Additional Sessions Judge, Ahmednagar in Sessions Case No.214/2016, convicting the appellant No.3 Parvatibai w/o Shivaji Kate and consequently sentencing her is hereby set aside. The appellant No.3 Parvatibai w/o Shivaji Kate is acquitted of the offence punishable under Section 302 read with 106 of the Indian Penal Code. Fine amount, if paid, be refunded to her. Her bail bonds are cancelled.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-