



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

CRIMINAL APPEAL NO. 1165 OF 2019

Laxman Prakash Kshirsagar
Age: 29 years, Occu.: Agir.,
R/o Dhaswadi, Tq. Ahmedpur,
Dist. Latur

..APPELLANT

VERSUS

1. State of Maharashtra
Through Police Station Officer,
Kingaon Police Station,
Tq. Ahmedpur, Dist. Latur

2. Ganpatrao Dadarao Shinde
Age: Major, Occu.: Agri.,
R/o Pathrud, Tq. Majalgaon,
Dist. Beed

..RESPONDENTS

....
Mr. V.D. Sapkal, Senior Advocate i/b Mr. S.R. Sapkal, Advocate for appellant
Mrs. S.N. Deshmukh, A.P.P. for respondent no.1 – State
Mr. S.S. Shirsath, Advocate for respondent no.2
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**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**
RESERVED ON : 05th MARCH, 2024
PRONOUNCED ON : 20th MARCH, 2024

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

1. Both, the appellant and his father were tried for committing murder of the wife of appellant and their one and half year old child by setting them ablaze at their own residence and also for offence punishable under Section 498-A of the Indian Penal Code ('I.P.C.'). Rachana, sister of the appellant, is also one of the accused. She is, however said to have been absconding.

2. The Court of Additional Sessions Judge, Ahmedpur ('trial Court') vide its judgment and order dated 26th September, 2019 passed in Sessions Case No. 16 of 2015 convicted the appellant for offence punishable under Section 302 of the I.P.C., and therefore, sentenced to suffer imprisonment for life and to pay fine of Rs.25,000/- with default stipulation. He was acquitted of the charge for offence punishable under Section 498-A of the I.P.C. The appellant is, therefore, in this appeal before us. The appellant's father was acquitted of the offence punishable under Sections 302 and 498-A of the I.P.C. Neither the State nor any of the family member of the deceased has preferred appeal against acquittal.

3. **Facts, as are disclosed from the police papers (charge-sheet), are as follows :-**

Manisha (deceased), was the sister of P.W.2 – Sharad. She had married the appellant on 13th June, 2012. The couple was blessed with a baby boy, Aditya. Manisha was treated well for about one year of her marriage. Ku. Rachana, sister of the appellant, would also reside alongwith them. Father-in-law of Manisha started taunting her to be a woman of evil luck, as since her marriage with the appellant, nothing good had happened in the family. The fact is, however that a baby boy, Aditya was born within one and half year of marriage of the appellant and Manisha. It is also the case of prosecution that Rachana, on completion of her D.Ed., returned to her father's house. She started harassing and ill-treating Manisha. Father of Manisha, P.W.- 3 - Ganpatrao had given her a cell phone so that she could

talk to him. The appellant, however took away the said phone. It is also the case of prosecution that the appellant and his father started asking Manisha to fetch Rs.5 lakh from her parents for Rachana's marriage. On 28th March, 2015, Manisha called her father, P.W.3 - Ganpatrao on cell phone and requested him to get her back, lest the appellant and in-laws were determined not to live her alive.

4. It is also the case of prosecution that in the early morning of 29th March, 2015, both, Manisha and her son – Aditya suffered extensive burns. Both of them were rushed to the Government Hospital, Latur. Police Officer, P.W.5 - Narayan, on duty at the hospital recorded her dying declaration-cum-F.I.R. (Exh.41). Based on the same, crime vide C.R. No.16 of 2015 was registered for the offences punishable under Sections 302, 307, 498-A, 323 and 504 read with Section 34 of the I.P.C. Another dying declaration of Manisha was also recorded by P.W.7 – Tandale, Executive Magistrate. Her parents were informed. Manisha's brother P.W.2 – Sharad, their father, P.W.3 - Ganpatrao alongwith her cousin, P.W.4 – Shubhangi rushed to the hospital. Manisha related them that Prakash (acquitted), her father-in-law picked up quarrel with her early in the morning. He even assaulted her. Her husband, Laxman (appellant) and sister-in-law – Rachana poured kerosene on her person and set her ablaze. Within eleven hours of the incident, Manisha succumbed to the burns. Aditya had also passed away. Section 302 of the I.P.C., therefore, came to be invoked.

5. Mortal remains of both, Manisha and Aditya were subjected to autopsy. Scene of offence panchanama (Exh.15) was drawn in the presence of panchas. Inquest panchanama (Exh.42) too was drawn. Certain articles seized from the scene of offence during investigation were sent to Forensic Science Laboratory, Aurangabad for analysis. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of investigation, the appellant and his father were proceeded against by filing charge-sheet before the Court of Additional Sessions Judge, Ahmedpur. It is reiterated that Rachana is said to have been absconding.

6. The trial Court framed charge (Exh.10). The appellant and his father pleaded not guilty.

7. The prosecution examined ten witnesses and produced in evidence certain documents. The appellant too examined one witness in his defence and put on record written statement, under Section 313 of Code of Criminal Procedure. On appreciation of evidence in the case, the trial Court convicted the appellant for offence of murder and consequently sentenced as stated above. His father has been acquitted.

8. Learned senior counsel for the appellant first took us through the evidence of P.W.1 - Chandrakant and the scene of offence panchanama (Exh.15). It was brought to our notice that the room, wherein the incident

took place, was found to have been bolted from inside. The room had only one entrance door. Although it had two windows, both had iron grills with wooden doors. It was also brought to our notice that inside bolt of the entrance door of the room was not in order. We were taken through the evidence of P.W.1 – Chandrakant and D.W.1 – Ankush to submit that it was D.W.1 - Ankush, who made efforts to broke open the entrance door of the room. Our attention has also been drawn to the description of the room given in the scene of offence panchanama (Exh.15). Same indicates two-three roof tin sheets were partly removed from their fixed place so as to ensure smoke to have way out of the room. Learned senior counsel then adverted our attention to the medical papers wherein the history was given that a *chimni* (small kerosene lamp) accidentally fell on the person of Manisha. She caught fire thereby. It was pointed out to us that a kerosene lamp was seized during scene of offence panchanama (Exh.15). The panchanama further indicates that a kerosene can too was found at the scene of offence.

9. Learned senior counsel would further submit that relations of the deceased i.e. her brother, father and cousin (P.W.2 to 4 respectively) were informed. They came to the hospital. They were with the deceased. On the demise of both, Manisha and Aditya, their funeral was taken place at the village whereat Manisha's matrimonial home was. He would further submit that statements of P.W.2 to 4 were recorded on 05th April i.e. six days after the incident. Had the deceased really made them oral dying declaration,

both P.W.2 and 3 (brother and father of the deceased respectively), who were present while inquest was drawn and funeral was performed, had an earliest opportunity to register the crime against the appellant and his family members. Learned senior counsel would further submit that one of the relations of the deceased was a practicing advocate. He immediately rushed to the hospital and played a role with a view to implicate the appellant, his father and sister in the offence in question.

10. Turning to written dying declarations (Exh.41 & 49), learned senior counsel first took us through the medical papers of the deceased Manisha. She had suffered 96% of burns. She was administered fortwin injection. P.W.5 - Narayan, who recorded her dying declaration-cum-F.I.R. (Exh. 41) admitted that health of Manisha had deteriorated. She was not even responding to the commands. Initially, the medical officer on duty, P.W.10 – Dr. Agrawal had informed him that her condition was critical, and therefore, did not record her statement. After a while, both, P.W.5 – Narayan, police official and P.W.7 - Tandale, Executive Magistrate recorded her statement-cum-dying declaration. With a view to avoid repetition, we would prefer to refer to their evidence while appreciating entire evidence in the case.

11. In short, according to learned senior counsel, the prosecution evidence inspires no confidence to sustain conviction for the serious offence of murder. The appellant and his father had already been acquitted of charge for the offence punishable under Section 498-A of the I.P.C.

According to him, it would be anybody's guess as to whether the deceased committed suicide or suffered burns accidentally. He would further submit that admittedly, the appellant had immediately rushed his wife (Manisha) to the hospital. The same indicates him to have no intention to commit her murder. Learned senior counsel ultimately urged for allowing the appeal.

12. Learned A.P.P. and learned counsel for Respondent No.2, father of the deceased would, on the other hand, submit that the scene of offence panchanama (Exh.15) would indicate there was another door to the south of the room, wherein the incident took place. P.W.1 - Chandrakant, a witness to the scene of offence panchanama appears to have been won over. The room did have two-three big windows, with no grills. No woman would commit suicide taking along her one and half year old child. According to them, the evidence on record indicates the neighbours had rushed the deceased to the hospital. There is no evidence to indicate what the appellant, husband of the deceased, was doing all the time. According to learned counsel, the oral as well as written dying declarations are very much consistent with each other. Had the appellant been falsely implicated, the deceased would not have spared her mother-in-law as well. Medical papers of the deceased have also been referred to alongwith evidence of the medical officer, P.W.10 - Dr. Agrawal to submit that at the time of recording her dying declaration, the deceased was conscious oriented. Medical papers would indicate pulse rate of Manisha was normal. She was in a fit state to make both the statements. Doctor, on examining her, certified accordingly

on both the dying declarations. Both the learned counsel would submit that a lady on the death bed would not falsely implicate her husband or in-laws. The sister-in-law would harass deceased Manisha. The deceased on the previous day of the incident, had related her woes to her father – P.W.3 - Ganpatrao. It was brought to our notice that dead bodies of the deceased were taken into custody by her brother and not by her in-laws. They would further submit that being a woman, she observed patience and tolerated ill-treatment only with a view to save her marriage. It was also submitted that the incident took place in the early morning of month of March. Thus, there was no question of a *chimni* (small kerosene lamp) to be kept either burning or readily available for lighting. The scene of offence panchanaa (Exh.15) indicates no such kerosene lamp was in the room. The witnesses to the scene of offence panchanama are the residents of the village wherein the appellant resides. They are close to him. They, therefore, appear to have given evidence supporting the defence.

13. According to learned counsel, the evidence on record made out the offence beyond reasonable doubt. The trial Court has rightly convicted the appellant. His sister is still absconding. Same indicates her conduct is inconsistent with innocence. They ultimately urged for dismissal of appeal.

14. Considered the submissions advanced. Perused the evidence on record. Also perused the judgment impugned herein. Let us advert thereto and appreciate the same.

15. The appellant married Manisha (deceased) in June 2012. The couple was blessed with a baby boy, Aditya (deceased). The premises they were residing in is a two storey house. One room on the ground floor and similar room on the upper floor. The incident took place in the upper floor room by 07:00 in the morning on 29th March, 2015. Both, Manisha and her son, Aditya suffered extensive burns. They were, therefore, immediately rushed to the Government Hospital, Latur for treatment. Manisha passed away about eleven hours after the incident. The child, Aditya died even there before.

16. Postmortem reports of both, Manisha and Aditya (Exh.45 & 54 respectively) indicate both of them died due to shock due to burns. Admittedly, Manisha suffered 96% of burns. Split-up thereof is as under :-

- 1) Head, neck, face - 9%
- 2) Right upper limb - 9%
- 3) Left upper limb - 9%
- 4) Anterior trunk - 18%
- 5) Posterior trunk - 18%
- 6) Right lower limb - 17%
- 7) Left lower limb - 16%

17. The question is whether the appellant committed murder of his wife and son. His sister is also an accused. She is, however absconding. Her father stands acquitted of the charge of having assaulted deceased Manisha immediately before she was set ablaze. It was the case of prosecution that the deceased was ill-treated since the appellant, his father and sister thought her to have brought bad luck to the family. She was even

ill-treated with a view to coerce her to fetch Rs.5 lakh from her parents for marriage of Rachana (absconding accused). The trial Court, on appreciation of evidence in the case, acquitted the appellant and his father from the charge for offence punishable under Section 498-A of the I.P.C. Neither the State nor any of the family member of the deceased preferred appeal against acquittal. The trial Court, on appreciation of evidence in the case, disbelieved the prosecution case that the deceased has made oral dying declaration to her brother, father and cousin (P.W.2 to 4 respectively).

18. As such, the case is based on two written dying declarations (Exh.41 & 49), one made to P.W.5 – Narayan, Police official and another to P.W.7 - Tandale, Executive Magistrate. For appreciation of evidence in the case, we would prefer to refer to the evidence of brother, father and cousin of the deceased.

19. These three witnesses gave evidence in one voice. According to them, Manisha (deceased) was ill-treated by the appellant, his father and sister as they thought her to have brought bad luck to the family. She was even ill-treated with a view to coerce her to fetch Rs.5 lakh for marriage of Rachana. Deceased Manisha to have brought bad luck to the family of her in-laws is said to be a motive to commit her murder. We, however did not come across any evidence in that regard. Evidence on record, on the other hand, runs counter to the prosecution case as regards motive is concerned. The deceased was treated well, so to say, during first year of marriage. She

conceived and delivered a baby boy within one and half year of marriage. The delivery took place at the house of her parents. On birth of the baby boy, the appellant and all his family members had visited the house of the appellant's in-laws. Moreover, admittedly first birthday of Aditya (deceased) was celebrated by the appellant with fanfare. Parents of the deceased had attended the same. A dinner was hosted to all the invitees. Same indicates the appellant and the deceased to have happy married life. As against this we do not come across that would suggest the deceased to have been ill-treated, treating her to be a woman of evil luck.

20. Admittedly, on the day on which the incident took place, it was the birthday of son of P.W.2 - Sharad, brother of the deceased. The appellant and deceased were invited. Deceased Manisha might have had intended to visit the house of her parents for attending the birthday. There is also evidence to indicate that just two days before the incident, the appellant alongwith some of his villagers had gone to a place in Taluka Baramati, Dist. Pune. The purpose of the visit was to have knowledge for doing agriculture and milk business with advanced technology. There is evidence to indicate the appellant had returned late in the night i.e. by 03:00 a.m. on the day on which the incident took place. The appellant has, therefore, every reason to contend that there might have been some bickering between the couple over attending the birthday of the child of P.W.2 - Sharad. It is also in the evidence of P.W.2 and 3 that on the previous day, Manisha had made a phone call to her father (P.W.3 - Ganpatrao) informing the appellant and in-

laws to have been ill-treating her and even given threats to her life. She, therefore, requested him to immediately take her back to his house. Admittedly, P.W.3 - Ganpatrao did not handover his cell phone to the Investigating Officer to make investigation in that regard, nor the Investigating Officer took efforts to collect Call Data Record ('C.D.R.') to reinforce the evidence of P.W.3 that the deceased on the previous day had related her father about her ill-treatment and requested him to get her back.

Oral Dying Declaration :

21. The brother, father and cousin of the deceased (P.W.2 to 4 respectively) were informed of the incident. They rushed to the hospital, long before Manisha gave her first written dying declaration. According to these three witnesses, Manisha had told them to have been set ablaze by the appellant and his sister – Rachana; and appellant's father had assaulted her. Admittedly, these three witnesses were present in the hospital all along. Their presence is there during inquest and postmortem examination as well. Admittedly, there is a police chowki in the premises of Government Hospital, Latur. None of these three witnesses preferred to relate the police official about the incident. The record indicates that their statements (under Section 161 of Cr.P.C.) were recorded by the Investigating Officer on 05th April, 2015 i.e. six days after the incident that too after going over to their place. Although the dead bodies of the deceased Manisha and Aditya were taken into custody by P.W.2 - Sharad, admittedly, the funeral took place at the village whereat Manisha's matrimonial place was.

Written Dying Declarations :

22. P.W.5 – Narayan, Assistant Sub-Inspector of Police testified that he was attached to Gandhi Chowk Police Station at Latur and was on duty at Government Hospital, Latur on the given day. According to him, Manisha was admitted to the hospital by 10:15 a.m. It is further in his evidence that he visited the ward meant for the burnt patients. He first met P.W.10 - Dr. Agrawal. According to him, Dr. Agrawal told him that condition of Manisha was serious and her statement should, therefore, be recorded lateron. It is further in his evidence that he received a letter of Dr.N.R. Dhabe by 04:20 p.m. on 29th March itself. The letter is at Exhibit 39. The doctor had requested to record the statement of Manisha. Evidence of P.W.5 – Narayan further indicates that he, therefore, sought opinion of P.W.10 - Dr. Agrawal. He opined Manisha was conscious and in fit state of mind to make a statement. P.W.10 - Dr. Agrawal examined her in his presence and certified accordingly. His evidence further indicates that Dr. Agrawal issued fitness certificate. P.W.5 – Narayan, thereafter had some interaction with Manisha and then recorded her statement (F.I.R.-cum-dying declaration, Exh.41). He claimed to have recorded the same as stated by Manisha. Contents thereof are as follows :-

The appellant, his father and his sister picked up quarrel with her over domestic reason. They started abusing and ill-treating her. She was even assaulted. The father-in-law assaulted her. Rachana, sister-in-law and the appellant poured kerosene on her person and set her ablaze. Her neighbours viz. Tatyia, Sumanbai and Pandurang Kshirsagar witnessed the

incident. She was first rushed to the Government Hospital, Ahmedpur and then shifted to Government Hospital, Latur. She has thus grievance against the appellant (husband), Rachana (sister-in-law) and Prakash (father-in-law, acquitted).

23. This dying declaration was stated to have been recorded during 04:50 p.m. to 05:10 p.m. The medical officer on duty, P.W.10 – Dr. Agrawal gave endorsement thereon that Manisha was fit to make a statement.

24. Then there is another dying declaration (Exh.49) recorded by P.W.7 – Tandale, Executive Magistrate. It is in his evidence that pursuant to the requisition issued by P.W.5 - Narayan, Assistant Sub-Inspector of Gandhi Chowk Police Station, he rushed to the hospital. P.W.10 – Dr. Agrawal was on duty. He verified from doctor that Manisha was conscious oriented to make a statement. He obtained doctor's endorsement to that effect before and after recording of statement (dying declaration, Exh.49) of Manisha.

25. The dying declaration recorded by Executive Magistrate is in a printed format. At the beginning and at the bottom of the printed format, there is a matter indicating the patient, whose statement was to be recorded, is in fit state of mind and certification is issued post examination of the concerned patient. Be that as it may. The dying declaration recorded by the Executive Magistrate reads thus:-

Rachana, sister-in-law, Prakash, father-in-law and Laxman, husband (appellant) picked up quarrel with her over domestic reason and

even started beating her up. Both, Rachana and the appellant poured kerosene on her person and the appellant set her ablaze by igniting a matchstick. It has further been stated that her mother-in-law was also present at the house while the incident took place. The neighbours, Tatya and Sumanbai and even others brought her to the hospital.

26. Before adverting to the cross-examination of both, P.W.5–Narayan and P.W.7–Tandale, who recorded dying declarations, we prefer to refer the evidence of P.W.10–Dr. Agrawal, who claimed to have had examined Manisha and certified her to be conscious and fit to make the statement. It is in his evidence that he examined Manisha and accordingly certified on both the dying declarations, one recorded by P.W.5 and other by P.W.7.

27. Cross-examination of this witness needs to be adverted to in extenso. His evidence indicates that all the medico-legal papers of the deceased were brought by him before the Court. He admitted that in the medical papers it has been recorded that it was the appellant, who brought Manisha to the hospital. Manisha suffered 96% superficial burns. The medical papers reveal Manisha had hypovolaemic shock, means there was loss of fluid from her body, and therefore, her condition was critical. As her burnts were superficial to deep, it was painful. As per the history narrated by her relatives, she sustained said burn injuries due to fall of *chimni*. It is evident from the medical papers that P.W.2 – Sharad, brother of Manisha was present in the burn ward at 11:00 a.m. He (Dr. Agrawal) testified that

fortwin drug has drowsy effect. Medical papers show that 30 mg. fortwin drug was administered to her. General condition of Manisha at around 04:50 was very poor.

28. It is further in his evidence that when Manisha was brought to the hospital, her face was burnt including lips, cheeks and neck. He also admitted that on the dying declaration (Exh.41) it has not been mentioned that he examined Manisha and found her fit and conscious to make statement. He admitted of there being overwriting of timing below his signature on the last endorsement on certificate (Exh.41) dated 29th March, 2015. He was also categorical to submit that dying declaration (Exh.41) is silent to state what kind of examination he did to find Manisha to have been conscious oriented to make the statement. Medical papers indicate that she was unconscious by 06:15 p.m. Her condition was poor/critical. By 06:15 p.m. she was not responding to verbal commands. By the same time her pulse were palpable and blood pressure was not recordable. Her condition was gasping. Admittedly, Manisha passed away by 06:30 p.m. on 29th March, 2015.

29. Let us now advert to the cross-examination of P.W.5 – Narayan, the police official who recorded dying declaration-cum-F.I.R. (Exh.41). He had already testified in examination-in-chief itself that P.W.10 – Dr. Agrawal had informed him that as condition of Manisha was serious, he should record her statement lateron. Father and brother of the deceased were around her.

They were asked to leave the ward. Then he recorded her statement. He went on to state that entire face of Manisha was burnt. He meant to say that her lips, jaw and throat were burnt. Her head was also burnt. She was kept in nylon mosquito prevention net to avoid infection. Vide letter (Exh.38) he was informed by doctor that condition of Manisha was critical. He was similarly informed vide letter at Exh.39. When he visited Manisha by 10:40 a.m., he saw her condition was critical. It is further in his evidence that while he had been to burn ward to record her statement, she was on the verge of death. There was no movement of her lips. She was unable to understand the questions put to her and even unable to understand the answers given by her. Hence, it took thirty minutes to write the dying declaration (Exh.41). Here, learned A.P.P. would say that what has been recorded in the dying declaration (Exh.41) is, therefore, correct. We are not in agreement with her. It is further in his evidence that Manisha was wailing because of excessive pain. She used to make gestures and he used to understand the same. In the said condition he recorded her statement (Exh.41). It is further in his evidence that Manisha was talking irrelevant.

30. Cross-examination of P.W.7 – Tandale indicates that while he went to record Manisha's statement, a saline was being administered to her. She was moaning and wailing. Her talk was irrelevant and blurred as well.

31. Appreciation of the evidence of P.W.10 – Dr. Agrawal and two officials, who recorded her dying declarations, would indicate that the deceased was critical at the relevant time. Her talk was irrelevant. She

would make gestures. Based thereon, P.W.5 – Narayan understood the same and took it down. She was administered fortwin injection, whereby a patient suffered drowsiness. Furthermore, there is inconsistency between the two dying declarations. Admittedly, mother-in-law of Manisha had gone to the house of her married daughter – Archana in Buldhana district. Admittedly, she was not home while the incident took place. Still, the dying declaration recorded by P.W.7 – Tandale, Executive Magistrate mentions therein presence of her mother-in-law. Same has been recorded suggesting it to have been stated by Manisha herself. When as per the prosecution, some of the neighbours had witnessed the incident and even brought Manisha to the hospital, none of them has been examined.

32. True, in case of ***Irfan @ Naka Vs. State of Uttar Pradesh, 2023 SCC OnLine SC 1060***, it has been observed thus :-

“58. This Court in Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh reported in (2007) 15 SCC 465 and Bhajju alias Karan Singh v. State of Madhya Pradesh reported in (2012) 4 SCC 327 had explained the meaning and principles of dying declarations upon which its admissibility is founded, with the following observations: -

“25. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures.”

59. This Court in Bhajju (supra) has observed as under:

“23. The “dying declaration” essentially means the statement made by a person as to the cause of his death or as to

the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that of a conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.²⁶ The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. ...”

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62. *There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -*

- (i) Whether the person making the statement was in expectation of death?*
- (ii) Whether the dying declaration was made at the earliest opportunity? “Rule of First Opportunity”*
- (iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?*
- (iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?*
- (v) Whether the statement was not recorded properly?*
- (vi) Whether, the dying declarant had opportunity to clearly observe the incident?*
- (vii) Whether, the dying declaration has been consistent throughout?*

- (viii) *Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?*
- (ix) *Whether, the dying declaration was itself voluntary?*
- (x) *In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?*
- (xi) *Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?"*

33. It is reiterated that the deceased, while allegedly made two dying declarations, was not in conscious state of mind. The medical papers reinforces the same. There is inconsistency between the two dying declarations as regards presence of mother-in-law at home when she was admittedly away at the place of her married daughter at Buldhana district. Both the officials, who recorded the dying declarations, in no uncertain terms admitted condition of Manisha was critical. She was moaning. Even her talk was irrelevant. P.W.5 – Narayan recorded her statement based on gestures which he understood. In our view, therefore, both the dying declarations are not fit to act upon.

34. There is another aspect of the matter. P.W.1 – Chandrakant is a witness to the scene of offence panchanam (Exh.15). Neither the prosecution declared him hostile nor learned A.P.P. in-charge of the case put him questions as are permissible in cross-examination. His evidence indicates that the incident took place in upstairs room, admeasuring 10 x 22 ft. True, through evidence of P.W.9 – Hake, Investigating Officer, it has come on

record that the said room has two doors. P.W. 1 has stated the said room to have only one door from northern side. There is also evidence to indicate the said room has two windows with no grills, while P.W.1 testified windows to have iron grills. The scene of offence panchanama (Exh.15), however indicates that bolt of the entrance door of the room from inside was not in order. It had received dent. The investigating officer admitted in his evidence that another panch witness, D.W.1 – Ankush gave five-six kicks to have the entrance door pushed open. Ankush's one *chappal* (footwear) was found at the scene of offence. The same indicates the room wherein Manisha suffered burns alongwith her child, was bolted from inside. There is further evidence to indicate that due to fire, there was smoke. With a view to give smoke way out of the room, two roof tin sheets were removed. D.W.1 – Ankush was examined by the appellant as a defence witness. His evidence reinforces the aforesaid fact. Investigating officer too admitted to have had learnt the same from D.W.1 – Ankush. He also noticed the inside bolt of the entrance door to have bent. Two roof tin sheets of the room were removed. True, kerosene can was found. No *chimni* (small kerosene lamp) was noticed. It appears that P.W.1 – Chandrakant might have been won over. The scene of offence panchanam (Exh.15), however has been admitted in the evidence based on the testimony of investigating officer and P.W.1. The same suggests while the incident took place, entrance door of the room was bolted from inside. It was required to be pushed open with five-six kicks. To give smoke way out, two roof tin sheets of the room were required to be removed. This evidence further lead us to observe the prosecution evidence

to have not been inspiring confidence to sustain conviction of the appellant for the offence of murder and consequential sentence of life imprisonment.

35. For all the aforesaid reasons, we are not at one with the findings recorded by the trial Court. In the result, appeal succeeds. Hence, the following order :-

ORDER

- (I) Criminal appeal is allowed.
- (II) Judgment and order dated 26th September, 2019 passed by Additional Sessions Judge, Ahmedpur in Sessions Case No. 16 of 2015 is hereby set aside.
- (III) The appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- (IV) The appellant be set at liberty forthwith, if not required in any other case.
- (V) Fine amount paid, if any, be refunded to the appellant.

SSD (NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)