
(2010) 07 BOM CK 0060
In the Bombay High Court
Case No : Criminal Appeal No. 169 of 2008

Gautam Ahire

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 06-07-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 103
Penal Code, 1860 (IPC) — Section 302, 304, 307, 323, 86

Citation : (2010) CriLJ 4073

Hon'ble Judges : S.S. Shinde, J; S.B. Deshmukh, J

Bench : Division Bench

Advocate : C.R. Deshpande, for the Appellant; N.R. Shaikh, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—The appellant herein was tried by the learned Ad hoc Additional Sessions Judge-1, Dhule in Sessions Case No. 47 of 2007 for the offence punishable u/s 302 of I.P.C. and vide judgment and order dated 30th April, 2008 the appellant - accused was convicted for the said offence and sentenced to suffer imprisonment for life and to pay a fine of Rs. 2000/-, in default of payment of fine, to suffer simple imprisonment for six months. Being aggrieved by the said judgment and order of conviction, the appellant preferred the present appeal.

2. The facts leading to the prosecution case, in brief, are as under:

The appellant - accused Gautam Bhila Ahire is the husband of the victim Rinabai. Their marriage was performed prior to 8 to 9 years and from their wedlock, they have one son and one daughter. The accused was addicted to liquor; he was suspecting about the character of wife Rinabai. He used to beat Rinabai. When Rinabai visited her parents house she used to disclose to her parents about the ill-treatment subjected by the accused to her. In the month of November, 2006

there was marriage of the younger sister of Rinabai; therefore, she had gone to her parents house for attending the said marriage, along with her husband accused. At that time, Rinabai disclosed to her parents the fact of ill-treatment subjected by the accused to her. At that time, the accused gave assurance that he will not consume liquor and will not beat Rinabai. Thereafter Rinabai accompanied the accused to his house for cohabitation. On 6.2.2007 at about 6.30 p.m., the accused, under the influence of liquor, beat his wife Rinabai and threw an ignited traditional kerosene lamp/chimney on her person, due to which her sari caught fire. Rinabai herself attempted to extinguish the fire and in that attempt, she fell into nala. Thereafter the accused admitted Rinabai in Civil Hospital, Dhule. ASI Prakash Wagh recorded the statement of Rinabai Gautam Ahire. Thereafter the Special Executive Magistrate Sardar Mansuri also recorded the dying declaration of Rinabai. In both the dying declarations, Rinabai disclosed that her husband threw an ignited traditional kerosene lamp on her person due to which her sari caught fire and she sustained burn injuries. Pramilabai Sapkal, the mother of Rinabai came to know about the incident; therefore, she rushed to the Civil Hospital, Dhule on 7.2.2007 at about 8 a.m. At that time, Rinabai disclosed to her mother that on 6.2.2007 at about 6.30 p.m. when she was alone at her house, the accused under the influence of liquor, beat her and threw ignited traditional kerosene lamp on her person, due to which her sari caught fire and she sustained the burn injuries.

3. On 6.2.2007 at 10.10 p.m. PSI Dattatray Patil registered the offence bearing C.R. No. 48/2007 for the offence punishable under Sections 307 and 323 of I.P.C. on the basis of the dying declaration of Rinabai recorded by ASI Wagh. On 9.2.2007 Rinabai succumbed to her burn injury. Thereafter offence punishable u/s 302 of I.P.C. was added. PSI Patil visited the spot of incident, he drew the spot panchanama, he arrested the accused and seized his clothes. ASI Sonar drew the inquest panchanama. The Medical Officer, Civil Hospital, Dhule, performed autopsy on the corpse of Rinabai. PSI Patil forwarded the seized articles to the Chemical Analyzer, Nashik, and after completion of investigation he submitted charge sheet in the Court.

4. After committal of the case to the Court of Sessions, charge (Exh.17) was framed against the accused for offence punishable u/s 302 of I.P.C. to which the accused pleaded not guilty and claimed to be tried.

5. In order to prove the guilt of the accused, the prosecution examined in all ten witnesses namely Dr. Ajit Raghunath Patil P.W.1 at Exh.23 who performed autopsy on the corpse of Rinabai; Sardar Mansuri P.W.2 at Exh.25 the Special Executive Magistrate who recorded the dying declaration of Rinabai; Dattu Gorakh Ahire P.W.3 at Exh.36 the cousin brother of the accused; ASI Prakash Manga Wagh P.W.4 at Exh.38 who recorded the dying declaration of Rinabai; Jagannath Chindha Ahire P.W.5 at Exh.41 the Police Patil of village Biladi; Dr. Sandip Dongar Borse P.W.6 at Exh.42 the Medical Officer who examined Rinabai and was present at the time of recording her dying declaration; Rajaram Aana

Patil P.W.7 at Exh.43 the owner of the grocery shop situated near the house of the accused; Dipak Nimba Ahire P.W.8 at Exh.44 the auto rickshaw driver who carried the injured Rinabai to the Civil Hospital, Dhule; Pramilabai Atmaram Sapkal P.W.9 at Exh.45 the mother of the deceased Rinabai; and PSI Dattatray Shamrao Patil P.W.10 at Exh.46 the Investigating Officer.

6. After completion of prosecution evidence, statement of accused u/s 313 of Cr.P.C. came to be recorded. The defence of the accused is of total denial and that he was not present at the time of incident at his house and the false case is filed against him.

Learned Ad-hoc Additional Sessions Judge-1, Dhule framed points of determination and after hearing the respective parties, final judgment was delivered on 30.4.2008. The appellant herein was convicted for the offence punishable u/s 302 of I.P.C. and sentenced to suffer R.I. for life and to pay fine of Rs. 2000/- i/d to suffer S.I. for six months. Thus, the appellant preferred the instant appeal assailing the said judgment and order of conviction and sentence.

This Court by order dated 19.6.2008, has rejected the application of the appellant for suspension of sentence and for bail. The appeal was already admitted on 5.6.2008. This Court from the said date directed to call for record and proceeding. Today, the matter is taken up for final hearing. The record and proceeding are made available at the time of hearing of the appeal.

7. The prosecution case mainly rests upon two dying declarations from the spot of incident and C.A. report. Learned Counsel appearing for the appellant vehemently argued that the dying declarations are inconsistent not free from doubt, tutored and also there is no proper endorsement by the doctor that at the time of giving dying declaration, the victim was conscious and in state of mind to give dying declaration. It is further submitted that in one of the dying declaration, the time of recoding the dying declaration is not mentioned and also the prosecution witnesses are not able to tell the correct timing of recording of such dying declaration. It is further submitted that at the time of recording dying declaration, the relatives of deceased Rinabai were present and therefore, the dying declaration is not free from tutoring. The prosecution has failed to bring on record the sufficient evidence so as to establish the motive. The prosecution has failed to prove the motive behind the said incident. It is further submitted that if both the dying declarations are perused carefully, those are totally inconsistent. As also in one of the dying declaration, it is stated that the appellant-husband used to suspect about the character of the deceased Rinabai. However, the said version is missing in another dying declaration. It is further submitted that in one dying declaration it is stated that she herself made attempt to extinguish the fire and fell in gutter (nali) and husband tried to extinguish the fire. However, in another dying declaration, it is stated that husband tried to extinguish the fire. It is further submitted that the victim survived for three days and if the cause of death is perused, no any overt act/intention can be attributed to the appellant for the alleged incident. It is further submitted that dying declaration given before

the Special Executive Magistrate is not in question and answer form, however, it is in narrative form. It is further submitted that evidence of P.W.3 was brought on record to prove that the husband Gautam used to consume liquor and use to beat the deceased, has not been proved, since P.W. 3 has not supported the prosecution case before the court. It has not been established by the prosecution that the appellant used to consume liquor and beat his wife deceased Rinabai. It is further submitted that if the evidence of prosecution witnesses is perused carefully, it appears that some of the witnesses have not supported the prosecution story and therefore, in the given case, the benefit of doubt is required to be given to the appellant/accused. It is further submitted that since the appellant husband was not present at the time of alleged incident in question, there is no question of any role played by the appellant in the alleged incident. Therefore, the counsel for the appellant submitted that the dying declarations are concocted and bogus. Learned Counsel invited our attention to the cause of death and submitted that the deceased died due to septicemia and not by burning. It is further submitted that there is no role or overt act attributed to the appellant by independent witnesses. Both the dying declarations are required to be disbelieved and consequently rejected. Learned Counsel appearing for the appellant further submitted that the evidence of P.W.3, P.W.5 and P.W.7 is not supporting the prosecution case and rather supports the defence taken by the appellant herein. It is further submitted that the defence taken by the appellant accused of plea of alibi does not relieve the prosecution from discharging its burden. Learned Counsel invited our attention to the spot panchnama to contend that the lamp which is recovered from the spot, even according to the prosecution, the lid of the said lamp was opened partially and if the half of the lid of the said lamp was open, in that case, the prosecution case is that the deceased Rinabai died due to burn injuries and the kerosene residues were found on the clothes of the appellant-accused is required to be rejected.

8. Per contra, learned A.P.P. appearing for the prosecution submitted that both the dying declarations are consistent in material particulars. The prosecution has proved those dying declarations by way of examining the prosecution witnesses and also there is corroboration to those dying declarations by oral dying declaration before the mother of deceased Rinabai and also from the recovery of lamp from the spot and C.A. Report.

The dying declaration recorded by A.S.I. is at Exh.40. The said dying declaration is recorded on 6.2.2007 i.e. on the date of the incident itself. The incident took place on 6.2.2007 in between 6.00 to 6.30 p.m. The prosecution in order to prove Exh.40 i.e. one of the dying declaration, has examined Prakash Manga Wagh, A.S.I. as P.W. 4. His evidence is at Exh.38. In his evidence, he stated that at the relevant time, he was attached to Dhule Taluka police station. On 6.2.2007, he was on duty at Civil Hospital, Dhule. As per the direction given by P.S.I. Jakir Shaikh, he visited the Civil Hospital, Dhule for recording evidence of burnt patient Rinabai. The letter which was given to this witness by A.S.I. for recording the statement, is at Exh.39. It is stated by this witness that Medical

Officer took him to injured Rinabai Ahire, the Medical Officer then examined Rinabai, in his presence. The Medical Officer, disclosed that she is conscious and in a fit state of mind to give statement and accordingly he put his endorsement. This witness further states that, "Rinabai disclosed that her husband was suspecting her character, he used to consume liquor, he used to beat her. He ignited match stick, threw it on her, due to which her Saree caught fire and burn injuries caused to her." This witness has further stated that the said statement of Rinabai was recorded as per her say. He obtained her thumb impression on the said statement. The contents of the statement of Rinabai were read over to her. She admitted the contents to be correct. This witness has stated before the court that the statement of Rinabai was shown to him, which is the same. It bears her thumb impression and his signature. This prosecution witness has categorically stated in his examination in chief before the Court, that the Medical Officer was present while recording the statement of Rinabai.

This witness has reiterated in his cross examination that "Medical Officer examined Rinabai in his presence and denied the suggestion that Medical Officer had not examined Rinabai in his presence." He further denied the suggestion that Medical Officer put his endorsement on statement of Rinabai in his cabin.

On careful perusal of statement of this witness and also cross examination, it clearly appears that his statement in "examination-in-chief" has not shattered in any manner in the cross examination. On perusal of Exh 40, it clearly appears that there is endorsement made by Medical Officer that, "patient conscious and statement given in front of me." Therefore, the contention of the counsel for the appellant that while giving statement at Exh.40, i.e. dying declaration, Rinabai was not in fit state of mind to give the said statement, cannot be accepted. On perusal of cross examination of this witness, it clearly appears that the defence has not cross examined to this witness about tutoring by the relatives.

9. Another dying declaration at Exh.27 of Rinabai is recorded by one Mr. Sardar Azam Mansuri, P.W.2. His evidence is at Exh.25. In his statement, he stated that he is entrusted with powers of Special Executive Magistrate for recording dying declarations. He received letter which is at Exh.26, requesting him to record dying declaration of Rinabai. He went to civil Hospital, Dhule and met the in charge Medical Officer. Medical Officer and this witness went to patient Rinabai Gautam Ahire. On his request, Medical Officer, inquired with Rinabai about her name and residence etc. Rinabai narrated the facts of incident to this witness. This witness has recorded the statement as narrated by Rinabai. According to him, Rinabai disclosed that her husband under the influence of liquor used to beat and abused her. She also stated before him that on 6.2.2007, at the evening time, her husband under the influence of alcohol abused and beat her, and threw ignited traditional lamp on her person due to which kerosene fell on her person and she was burnt. She shouted for help and attempted herself to extinguish the fire and fell in the gutter (Nali). Thereafter, her husband shifted her to civil hospital. She further stated that her husband had burnt her and

therefore, she has grievance against him. Then this witness obtained thumb impression of Rinabai below her statement and he has also signed the said statement. Medical Officer has also put his endorsement to the effect that Rinabai was conscious and able to give the statement. This witness, in his cross examination, has emphatically denied that the dying declaration is result of tutoring by the relatives. This witness in his cross examination, has stated that on his arrival in civil hospital, some relatives were with her, he asked them to go outside and thereafter, he has recorded the statement of Rinabai. On careful perusal of cross examination, it clearly emerges that defence has not put any question to this witness in respect of endorsement by the doctor on the said dying declaration i.e. "Patient conscious and statement given is front of me. D.D. END. 9.20 p.m. 6.2.2007."

10. On careful reading of statement of P.W. 2 and P.W.4 who have recorded the dying declarations, it clearly appears that husband of Rinabai under the influence of liquor used to beat and abuse her and on the date of incident her husband under the influence of liquor abused and beat her, and threw ignited traditional lamp on her person due to which kerosene fell on her person and she suffered burn injuries. The role and overt act attributed to the present appellant is one and the same in both the dying declarations. So far as the role and overt act attributed to the appellant is concerned, both the dying declarations are consistent. Rinabai had also disclosed her mother about the said incident in the same tune. Therefore, the version of Rinabai in both the dying declarations gets corroboration from oral dying declaration made before her mother on 7.2.2007. On careful reading of the dying declarations, which are at Exh.27 and 40, it clearly appears that the appellant-husband used to consume liquor and use to beat Rinabai. He was suspecting about her character and he was not allowing her to talk with any other person. If both the dying declarations are perused carefully, it can be convincingly said that the prosecution has succeeded in establishing the motive behind the incident. On careful perusal of the dying declaration made before the Executive Magistrate, it clearly appears that the Special Executive Magistrate did ask certain questions to Rinabai and in reply to that, answers are given by her. Though learned Counsel appearing for the appellant has contended that the said dying declaration was in question and answer form, however, the fact remains that on reading the said dying declaration though technically not in question answer form but in narrative form, however perusal of dying declaration at Exh.27 would clearly show that the specific questions were put to Rinabai and in reply to those questions, she had answered. At this juncture, it would be relevant to refer to the reported judgment of the Hon"ble Supreme court in the case of Maniben W/o Danabhai Tulshibai Maheria v. State of Gujarat reported in : AIR 2007 SC 1932. In the said judgment the Hon"ble Supreme Court observed that if the questions are put differently the answer is bound to be different. In the said judgment, the Supreme Court has also observed that the statement in dying declaration should be construed reasonably. In para 11 held thus:

The burn injuries were caused by kerosene as it also evident from the Report of the Forensic Science Laboratory (Exh. 73). It may be true that the deceased gave her statement about the cause of her suffering injuries at about 12.45 in the morning before Dr. Ashish, but she gave her statement also before the Magistrate. Admittedly, there is no discrepancy in regard to the involvement of the appellant vis-a-vis her son Girishbhai. The only discrepancy which has been pointed out by Mr. Raichura was that in some of her statements, she had not stated the actual overt act played by appellant herein. In these statements, she merely had answered the questions put to her by different persons. When questions are put differently, answers would also appear to be different. On a first glance, it may appear that the detailed description of the offence is missing, but in our opinion the statement of the deceased must be construed reasonably.

The Hon'ble Supreme Court in the case of Laxman Vs. State of Maharashtra, , has taken a view that while considering the evidentiary value of dying declaration hyper technical view should not be taken. The relevant portion in para 3 of the said judgment reads thus:

A dying declaration can be oral or in writing and any adequate method of communication whether by words by sign 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 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 provided 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.

11. On careful reading of dying declarations at Exh.27 and Exh.40 and after careful reading of the deposition of P.W.2 and P.W.4, the evidence of mother of deceased Rinabai and by examining the witnesses i.e. Medical Officer, who endorsed the dying declarations, the prosecution has proved the dying declarations. If both the dying declarations are perused carefully, it appears that in both the dying declarations, Rinabai stated that her husband took her to hospital. This itself indicates that what is stated in the dying declarations is her

true version. On careful examination of the evidence brought on record, it clearly appears that the dying declarations are not result of tutoring. On both the dying declarations there are endorsements made by the Doctor about consciousness of Rinabai at the time of recording her dying declarations. On both the dying declarations, Medical Officer has given endorsements that the patient was conscious to give statement. Though the counsel appearing for the appellant vehemently submitted that there is no time mentioned on one of the dying declaration, in our opinion, said technical defect would not be a circumstance to nullify the effect of the dying declarations. On reading dying declaration, which was recorded by A.S.I. Dhule Taluka Police Station, it clearly appears that Rinabai in her dying declaration refers the day on which the incident in question took place. Therefore, it clearly appears that the dying declaration by A.S.I. is recorded on the very same day. The another dying declaration, which is recorded by Special Executive Magistrate, is also recorded on the same day. It is an admitted position that the mother of Rinabai met Rinabai for the first time on 7.2.2007 i.e. on the next day of the incident and before that both the dying declarations were recorded and therefore, the dying declarations were not result of tutoring. So far as the consciousness of Rinabai at the time of giving dying declarations is concerned, the A.S.I. Dhule and Special Executive Magistrate have described in detail as to what deceased has stated to each one of them. There was no even any suggestion to either of the witnesses that deceased was not in a fit condition to give any statement. Therefore, there is no substance in the plea of the appellant that deceased was not in a fit condition to give the statements.

12. On reading both the dying declarations, it is abundantly clear that the role and overt act attributed to the appellant husband is consistent. It has come in both the dying declarations that the appellant was not allowing her to talk to any other persons. It has also come in both the dying declarations that husband used to consume liquor and under the influence of liquor, he used to beat her. On the day of the incident also, the husband under the influence of liquor beat Rinabai and then threw an ignited traditional kerosene lamp/chimney on her person, due to which her sari caught fire, in which she suffered burn injuries.

13. The prosecution has examined the Medical Officer Dr. Ajit Raghunath Patil, P.W.1, who at the relevant time, was working as Lecturer in Government Medical College, Dhule, This witness had performed the post mortem on the dead body of Rinabai. The said witness has stated in his examination in chief that he himself and Dr. Ghadri performed post mortem on the dead body of deceased Rinabai, between 10.15 to 11.15 a.m. He has mentioned in his examination in chief that external injuries found on the dead body were second degree and third degree infected burns covering;

This witness has further stated that all injuries were ante mortem Age of the injuries mentioned as 48 to 72 hours. This witness has also stated that on internal examination, all visceral organs were congested. The cause of death, as mentioned, is septicemia following thermal burns. In his cross examination he

has stated that except both the palms and both the soles, upper and lower limbs had burnt.

14. The prosecution has also examined Dr. Sandeep Borse, P.W.6 at Exh.42 who has endorsed both the dying declarations. P.W.6 in his examination in chief has stated that at the relevant time he was attached to civil hospital, Dhule. On 6.2.2007, at about 8.20 p.m. Rinabai Gautam Ahire was admitted in the civil hospital in burnt condition. He gave necessary treatment to her. On 6.2.2007, one police official visited the civil hospital, Dhule. He took him to Rinabai. He examined Rinabai and found her conscious and able to give statement. Thereafter, police official recorded the statement of Rinabai. After completion of recording the statement he again examined Rinabai and found that she was conscious and able to give statement. Then he put his endorsement on her statement. The statement of Rinabai dated 6.2.2007 was shown to him and he stated that it bears his endorsement and signature. He, in his examination in chief, further stated that on 6.2.2007 at about 8.50 p.m. the Executive Magistrate came to him for recoding statement of Rinabai. He showed Rinabai to Executive Magistrate. He examined Rinabai and found that she was conscious and able to give statement. Accordingly, he put his endorsement and signature and then Executive Magistrate recorded statement of Rinabai. After completion of recording of statement, he again examined her and found that she was conscious and able to give statement. He put his endorsement and signature on the said statement. The said statement at Exh.27 was shown to him he stated that it bears his endorsement and signature. His statement in examination in chief has not shattered in any manner in cross examination. Though it is vehemently argued by the counsel for the appellant that on the dying declaration recorded by A.S.I., the time is not mentioned, on perusal of the chief examination of this witness, it is clear that at around 8.20 p.m. Rinabai Gautam Ahire was admitted in the hospital and thereafter the police official recorded the statement of Rinabai. So far as the endorsement on the said dying declaration is concerned, the evidence of this witness has not shattered in any manner in the cross examination. Even in his cross examination, he has stated that the police visited the hospital at about 8.30 p.m. Therefore, merely because time is not mentioned on the dying declaration, that itself would not nullify the effect of the dying declaration in the light of contents of the dying declaration, the deposition of author of said dying declaration and the evidence of Doctor who put endorsement on the said dying declarations. As already stated, no hyper technical view can be taken while construing the dying declarations and same are required to be construed reasonably.

15. Apart from the two dying declarations, there is oral dying declaration made before the mother of Rinabai. There is corroboration to two written dying declarations in the nature of oral dying declaration made before mother. The recovery from the spot unequivocally indicates that the lamp was recovered and that also supports the prosecution story and corroborates the dying declarations. In addition to this, there is report by the C.A. that the kerosene residues are

found on the clothes of the appellant-accused. In the instant case, not only that two consistent dying declarations are there but there is one oral dying declaration by deceased Rinabai made before her mother, which corroborates with two written dying declarations. There is recovery of lamp from the spot that also corroborates the statement made in the dying declarations. There is C.A. report, therefore, in the present case, two dying declarations are corroborated by the sufficient evidence brought on record by the prosecution.

16. Learned Counsel appearing for the appellant in support of his contention that both the dying declarations are inconsistent and there was no proper endorsement made by the Doctor on the said dying declarations and the Rinabai was not in a fit state of mind to give the said dying declarations, has placed reliance on the reported judgment of this Court in the case of *Dadu Genu More v. State of Maharashtra* reported in 2007 ALL MR (Cri.) 1078, *Vasanta Shrawan Gajbhiye v. State of Maharashtra* reported in 2007 ALL MR (Cri.) 3474 and in the case of *Mahendra Digambar Deshmukh v. State of Maharashtra* reported in 2007 ALL MR (Cri) 414. On careful reading of all these three judgments it clearly appears that the facts of those cases were different from the case in hand. In the case of *Dadu Genu More* (supra), in para 4, this Court has observed that on both the dying declarations allegedly recorded by SEM as well as Police Officer, there are endorsements of the said doctor but those endorsements are not at all proved. In the present case the Medical Officer who gave endorsement on both the dying declarations, is examined by the prosecution and the endorsements on the said dying declarations are duly proved. Therefore, reliance placed by the counsel for the appellant on the said judgment is misplaced in the facts of this case.

Coming to the next judgment of this Court in the case of *Vasanta Shrawan Gajbhiye* (supra), it appears that before recording dying declarations fitness of declarant was not obtained from doctor. Therefore, the facts of that case are different from the case in hand. So far as the reliance placed by the appellant on the reported judgment in the case of *Mahendra Digamber Deshkukh* (supra), the principle laid down in para 14 of the said judgment are not disputed. In fact the prosecution has convincingly established that both the dying declarations are recorded free from any tutoring and after endorsement by the Medical Officer that Rinabai was conscious to give such dying declarations. Therefore, reliance placed by the counsel appearing for the appellant on the aforesaid judgments is not useful to the appellant in the facts of the present case.

17. In the light of the above discussion, we do not find any reason to disbelieve the dying declarations. The trial Court has rightly concluded that both the dying declarations were consistent in material particulars and no any ground brought on record on behalf of the defence that in order to take any revenge, Rinabai falsely implicated the accused in her dying declarations. The trial court has rightly concluded in para 15 that on the next day morning of the date of incident, daughter Rinabai disclosed before her mother that the accused threw traditional

lamp on her person, due to which burn injuries were caused to her. Therefore, dying declaration at Exh.27 and Exh.40 of deceased Rinabai came to be recorded before arrival of mother Pramilabai in civil Hospital at Dhule. So far the admission of Rinabai in the hospital is concerned, indisputably the accused-appellant admitted Rinabai in the hospital. There was nobody for tutoring or prompting Rinabai while recording her dying declaration at Exh.27 and 40. The spot panchnama Exh.28 is admitted by the defence counsel before the trial Court. The spot panchnama Exh.28 was drawn on 7.2.2007 at about 10.05 a.m. The spot panchnama shows that burn pieces of clothes, traditional kerosene lamp/chimney and kerosene mixed earth were found at the spot of incident that were laying on the ground in the room of the accused. Rinabai in her dying declarations, has disclosed that accused was suspecting about her character, and that under the influence of liquor he used to beat her. Pramilabai, P.W.9 mother of deceased Rinabai, has also stated in her evidence that deceased Rinabai disclosed her that the accused under the influence of liquor use to ill treat and beat her. Nothing is brought on record during the cross examination of P.W.9 Pramilabai by the defence counsel that what she has stated in the examination in chief is not true. Therefore, the trial court is right in concluding that the dying declarations at Exh. 27 and 40 of Rinabai are unblemished, not influenced by tutoring and prompting or vengeance, therefore they are reliable. Rinabai in her dying declarations has stated that accused was suspecting about her character. Thus, as the accused was suspecting about the character of Rinabai, this is the motive behind death of Rinabai caused by the appellant. The trial court has also rightly concluded that death of Rinabai took place due to 91% burn injuries caused to her.

18. We have no hesitation to accept the submission of the learned A.P.P. appearing for the State that both the dying declarations were consistent in nature and corroborated by oral dying declaration made before P.W.9, mother of Rinabai and also the spot panchnama and C.A. report. We are also in agreement with learned A.P.P. that in both the dying declarations Rinabai has stated that husband was not allowing her to talk with other persons. If the said version appears in both the dying declarations, it necessarily means that the appellant husband was suspecting about the character of deceased Rinabai. Therefore, the argument advanced by the counsel appearing for the appellant that the prosecution has not established motive behind the incident is required to be rejected.

19. As stated earlier, if both the dying declarations are perused carefully, it seems that the appellant was suspicious about the character of deceased Rinabai and as a result he was not allowing Rinabai to talk with any other person. At the cost of repetition and as held by the Hon"ble Supreme Court, in our opinion, the dying declarations are to be construed reasonably and no hyper technical view can be taken while construing the dying declarations. Therefore, we are of the opinion that the prosecution has convincingly proved two dying declarations by bringing cogent evidence on record. There is also corroboration to the said

written dying declarations. The prosecution has brought on record the corroborative piece of evidence of two dying declarations in the form of oral dying declaration made before P.W.9 Pramilabai, mother of Rinabai, recovery from spot of the incident and C.A. report. Exh.16 i.e report sent by the Regional Forensic Science Laboratory, State of Maharashtra, Panchwati Nashik to the police Inspector, Dhule Taluka Police station, Dhule. Under the head of description of articles contained in parcels at Exh.5, 6 and 7, it is mentioned that the a shirt with full sleeves wrapped in paper marked "B", Sandow baniyan wrapped in paper marked "B-1" and Full pant marked "B-2". These clothes belong to accused-appellant were seized by the Investigating Officer. In the said report, the result of the analysis are as under:

Results of the tests for the detection of kerosene residues on exhibit No. 1 - are negative and on exhibit Nos. 2, 3, 5, 6 and 7 are positive.

20. Now we would proceed to deal with the another contention raised on behalf of the appellant that he was not present at his house at the time of incident and that villagers have called him after the incident. The appellant in his statement u/s 313 of Cr.P.C. stated that the police Patil of village had called him from the place of his work. Learned Counsel appearing for the appellant, relying on the evidence of P.W.5 and 7 would strenuously contend that since P.W.5 Police Patil has stated in his cross examination that he called the appellant accused from the place of his work and in substance the appellant accused was not present at the spot of the incident, therefore he is entitled for acquittal. Learned Counsel further placed reliance on the evidence of P.W.7 to contend that at the relevant time, the appellant accused was not present at the place of incident and therefore, there is no question of any role played by the appellant in the whole incident. According to the counsel for the appellant, the prosecution is duty bound to discharge the burden to prove the prosecution case. It is further submitted that P.W.5 and P.W.7 were examined as prosecution witnesses and when they stated that the appellant accused was not present at the place of incident, it is not necessary for the appellant accused to bring anything on record in his defence to prove that he was not present at the place of incident.

21. On careful reading of the statement of the appellant accused recorded u/s 313 of Cr.P.C. and more particularly the answers given to question No. 25 by him, it clearly appears that the appellant accused has taken defence of alibi. When the accused takes defence of alibi the provisions of Section 103 of the Evidence Act will come into picture. The provisions of Section 103 reads thus;-

103. Burden of proof as to particular facts.- The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the

theft to C. A must prove the admission.

(b) B wishes the court to believe that at the time in question, he was elsewhere. He must prove it.

The plain reading of language of Section 103 and illustration (b) would cast burden on the appellant accused to prove that at the time of incident he was elsewhere. At this juncture, it would be relevant to refer to some of the judgments of the Hon''ble Supreme Court on this aspect. The Hon''ble Supreme Court in the case of Gurcharan Singh and Another Vs. State of Punjab, , held that the burden of proving alibi undoubtedly lies on the accused setting up the defence. But even so, the burden of proving the case against the accused is on the prosecution irrespective of whether or not the accused have made out a plausible defence. Yet in another reported judgment in the case of Chandrika Prasad Singh and Others Vs. The State of Bihar, , the apex Court held that the onus to establish the alibi is on the accused. In another judgment, the Apex Court in the case of State of Haryana Vs. Sher Singh and Others, , the supreme court held that when the accused pleads alibi the burden is on him to prove it u/s 103 of the Evidence Act. In the case of Rajendra Singh v. State of U.P. and Anr. reported in (2007) 7 SCC 378, the Supreme Court held that the burden to prove the plea of alibi is on the accused and the accused could prove such plea by leading evidence during trial.

22. In the instant case, admittedly, the appellant accused has not concluded in para 17 of the judgment that the defence has not brought on record as to at which place the accused was doing his work. Moreover, Jagannath Ahire, P.W.5, the Police Patil of village in his cross examination stated that they tried to extinguish the fire of Rinabai. At that time, Gautam Bhila was not present there. He sent message to Gautam Bhila and called him. However, the statement of Jagannath Ahire, P.W.5 is totally vague and nothing has been brought on record by the counsel for the appellant to show that through whom the message was sent by Jagannath Ahire and from which place they had called the accused. P.W.7 Rajaram Anna Patil, stated that his grocery shop is situated opposite to the house of accused. He stated that they called Gautam. This version of Rajaram Patil P.W.7 is also silent that who had called Gautam and from which place they called him. Therefore, the burden lies on appellant/accused to establish that at the material time he was present at the particular place. However, there is no cogent and reliable evidence brought by the defence to show that the accused was present at different place at the time of incident. Therefore, learned trial Court has discarded the contention of the accused that he was not present at the time of incident at the spot of incident. We are of the opinion that the trial Court has correctly recorded the findings on this aspect.

23. We are of the opinion that while appreciating the evidence appreciated in its entirety. Merely because one witness has stated some stray sentence that too in his cross examination, it cannot be considered de-hors entire prosecution evidence brought on record by the prosecution. In the instant case,

overwhelming evidence has been brought on record by the prosecution to establish its case. As stated earlier, the prosecution has established its case by proving two written dying declarations corroborated by one oral dying declaration, recovery from spot and C.A. report. Therefore, we do not find substance in the contention of the counsel appearing for the appellant that at the time of incident appellant/accused was not present in his house i.e. at the spot of incident. In our opinion, if the appellant has taken plea of alibi, he was bound to prove it by leading evidence. However, in the instant case, admittedly, the defence has not led any evidence in support of the appellant's contention that at the time of incident, he was not present at the spot.

24. Learned Counsel appearing for the appellant in the alternative submitted that without admitting but assuming that the appellant was involved in the alleged incident and under the influence of liquor, he beat his wife and threw an ignited traditional kerosene lamp/chimney on her person, due to which her Saree caught fire the said act of the appellant was without any intention or knowledge and therefore, he is entitled for benefit of provisions of Section 86 of the I.P.C. In support of his contention, learned Counsel placed reliance on the reported judgment of this Court in the case of *Sadashiv Dhondiram Pandit v. State of Maharashtra* reported in 2001 ALL MR (Cri.) 69, in *Dayaram Dhonduji Thakre v. State of Maharashtra* reported in 2002 ALL MR (Cri) 2430. By placing reliance on these judicial pronouncements, counsel for the appellant submitted that the case of the appellant will be governed by Section 304 Part-I of I.P.C.

25. In reply to the arguments advanced by counsel for the appellant in above para, learned A.P.P. invited our attention to the language of Section 86 of I.P.C. and submitted that the appellant herein consumed liquor on his own and benefit available u/s 86 cannot be given in the present case. According to the learned A.P.P. benefit u/s 86 of I.P.C. is applicable only in case the thing which intoxicated the person was administered to him without knowledge or against his will. Learned A.P.P. has also submitted that the facts of the present case are different from the cases cited by the learned Counsel appearing for the appellant. Therefore, he would submit that the contention of the appellant that his case falls u/s 304 part I of I.P.C. is required to be rejected.

26. We have appreciated rival contentions and alternative submission of the counsel appearing for the appellant. Section 86 of I.P.C. reads thus:

86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.- In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

On plain reading of the said section, it is clear that the person who does the act

in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. The person claiming benefit u/s 86 has to prove that thing which intoxicated him was administered to him without his knowledge or against his will. In the present case, it is not the case of the appellant-accused that somebody administered or forced him to consume the liquor and therefore, the alternative submissions advanced by the counsel for the appellant is required to be rejected.

27. The reliance placed by the counsel for the appellant in the case of Sadashiv Dhondiram Pandit (supra) is of no use, since in that case this Court has observed that admittedly there was no enmity between the appellant and the deceased. In the present case, it is stated in the dying declarations that the husband used to suspect the character of deceased Rinabai and he used to pick up quarrel and beat deceased Rinabai. It is also come in the dying declaration that husband was not allowing her to talk with any other persons. Therefore, the facts of the case in hand are different than the case of Sadashiv Dhondiram Pandit (supra). The another judgment in the case of Dayaram Dhonduji Thakre (supra) is different on facts. In that case P.W.1 Ravindra who is son of deceased has clearly stated that the lamp had hit the wooden wall and the glass was broken after it fell down and as a result Kerosene caught fire and along with it the clothes of the deceased also caught fire and she received burn injuries and deceased survived for almost 12 days. Thereafter, she succumbed to the injuries. In the present case, the appellant accused herein directly threw an ignited traditional kerosene lamp/chimney on the person of deceased Rinabai. Therefore, the facts of this case are different and thus the reliance placed by the counsel for the appellant on the said judgment is wholly misplaced.

28. Taking over all view of the matter and taking into consideration the entire evidence brought on record by the prosecution, we are of the opinion that this appeal does not merit. Admittedly, the incident in question took place on 6.2.2007 in the house of the appellant-accused and deceased Rinabai. As a result of deceased Rinabai sustained 91% burn injuries. Two written dying declarations were recorded by A.S.I. Dhule Taluka Police station and Special Executive Magistrate on the very same day i.e. on 6.2.2007. On appreciation of evidence, the trial court has concluded that the dying declarations were free from tutoring or from any other factor. Both the dying declarations are consistent in nature and there is corroboration to those two dying declarations by oral dying declaration made before P.W.9 mother of deceased Rinabai. The lamp is recovered from the spot. The spot panchnama is duly proved by the prosecution. There is C.A. report which unequivocally indicates kerosene residues on the clothes of the accused, which were sent for examination. Plea of alibi taken by the accused in his defence has not been proved by him by leading evidence on record. We find substance in the contention of the learned A.P.P. that plea of alibi if not proved and failure to prove the same, would be added circumstance. It is also relevant to mention that the victim wife of the appellant herein was in the custody of deceased and no explanation has come forward from the appellant accused

under which circumstances, deceased Rinabai died. The prosecution has proved the motive behind the incident and in both the dying declarations wife has stated that husband took her to the hospital and this indicates the truthfulness of the statements in dying declarations. The role and overt act attributed to the appellant accused in the dying declarations is consistent. Both the dying declarations are duly proved by the prosecution by examining the authors of the dying declarations and the Medical Officer, who has made endorsement on the said dying declarations that at the time of recording of dying declarations, the patient was conscious to give such dying declarations. The doctor who has examined to prove post mortem report has stated that deceased Rinabai sustained 91% burn injuries and as a result of which she died. Medical Officer, who had given endorsement on both the dying declarations has categorically stated in his evidence that patient was conscious to give dying declarations. It has been rightly concluded by the trial court that the dying declarations are not the result of tutoring.

29. In the facts and circumstances of this case, in our opinion, the trial court has properly appreciated the evidence brought on record. After appreciation of entire evidence on record and after giving full opportunity to the respective parties, the trial court has convicted and sentenced the appellant-accused. We do not see any infirmity and perversity in the findings recorded by the trial Court. Therefore, this appeal is devoid of any merits and same stands dismissed.