

(1997) 01 BOM CK 0040

In the Bombay High Court

Case No : Criminal Appeal No. 181 of 1984

Janabai Ranu Patole and another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-01-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 215, 313, 464, 464(1)

Evidence Act, 1872 — Section 114, 32

Penal Code, 1860 (IPC) — Section 300, 302, 34

Citation : (1997) BomCR(Cri) 397 : (1997) CriLJ 2062

Hon'ble Judges : Vishnu Sahai, J;Ranjana Desai, J

Bench : Division Bench

Advocate : Ms. Sherly Mazrello, for R.S. Mohite and Shrikant Shivade, for the Appellant; V.T. Tulpule, Public Prosecutor, for the Respondent

Judgement

Sahai, J.—The Appellants aggrieved by the Judgment and Order dated 16-2-1984 passed by the Additional Sessions Judge, Pune, in Sessions Case No. 252 of 1983 convicting and sentencing them to undergo imprisonment for life u/s 302 read with 34 IPC have come up in appeal before us.

2. Briefly stated, the prosecution case runs as follows :

The deceased Ranu Mahadu Patole was married to Godhabai who died about 20 years prior to the incident. He had three children from her; 2 sons-Manju and Baban and one daughter-Suman. About 10 to 12 years prior to the incident Ranu Patole married appellant Janabai. Janabai at the time of marriage was having two sons viz : Appellant-Ramdas and Kailash from her former husband. She also had three daughters Sushila, Leela and Shalan from him. The evidence shows that Manju and others used to stay separately from Ranu Patole in a contiguous hut.

Ranu Patole was alleged to be driving a bullock-cart on hire. The Appellants and Sushila were living with him. It appears that Sushila, about two years prior to the incident, had been married to one Dilip Nitko from Bombay. But from the evidence it emerges that like in all marriages, there was the initial teething

problem in hers also. Consequently, from about 4 to 5 months prior to the incident she was staying with the Appellants and Ranu Patole. It is said that about 15 days prior to the incident Dilip Nitke had come to take Sushila. The deceased was prepared to send her, but appellant Janabai was against her being sent back. This appears to have created fissure in the relationship of the deceased and Janabai. The evidence shows that Janabai had the last word and Sushila ultimately did not accompany her husband. It is also said that on account of his quarrel with Janabai, the deceased Ranu Patole 2 to 4 days thereafter started residing separately from the Appellants in a room which was situated at a distance of about 500 to 600 feet from his house. But the evidence shows that 5 to 6 days before the incident he again came back and started living with the Appellants. On 4th August 1983, at about 1.30 a.m. Ranu Patole was sleeping in his house situated at plot no. 340, Kasewadi Zopadpatti, Bhavani Peth, Poona. At that time, Appellant Janabai sprinkled kerosene oil on him and her son Ramdas set him on fire with a burning chimney. About that time, Kamal Bhonde (not examined) came to the house of Manju, the son of Ranu Patole and the step son of Janabai and told him that, Janabai had sprinkled kerosene on Ranu Patole and had set him to fire with a burning chimney. Accordingly, Manju went to Ranu Patole's house, which was in the immediate proximity, along with his brother-in-law Gulab and some others. When he went near Ranu Patole, he found him sitting on the foot-steps of the hutment area. He was burnt. The fire had already been extinguished. He was shouting and told him that, Appellant Janabai had sprinkled kerosene oil and Appellant Ramdas had set him on fire with a burning chimney. The same thing has been deposed to by Gulab (P.W.2), who was accompanying Manju. Consequently, Manju and others put him in a rickshaw and carried him to Sasoon Hospital where he was admitted in Ward No. 27-Burns Ward.

3. The evidence shows that at about 2.00 a.m. on 4-8-1983 Ranu Patole was brought into Burns Ward of Sasoon Hospital, Poona. At 2.20 a.m. he was medically examined by Dr. Sudhakar Lawand P.W.7. On enquiry it was revealed that Ranu Patole had a history of burns. To put it in the words of Dr. Lawand :

"He stated that while he was sleeping his subsequent wife Janabai started sprinkling kerosene on him he was awakened he tried to escape but her son from her former husband and by name Ramu caught him and then the son Ramu set him on fire with a burning chimney."

This dying declaration made by Ranu Patole was recorded by Dr. Lawand in the medical case papers Exh. 18. Dr. Lawand also stated that on examining Ranu Patole, he found him fully conscious and oriented. He further stated that he was able to understand the questions put by him and that he had suffered 88% burns on face, neck, chest, abdomen, back, both the superior extremities and the inferior extremities. In Dr. Lawand's opinion 60% of the burns were third degree and 28% of the burns were second degree.

4. It appears that after Ranu Patole had been medically examined by Dr. Lawand,

information was sent from the Sasoon Hospital to Ramoshi Gate Police Chowky within the limits of which fell Sasoon Hospital. P.S.I. Balasaheb Bapurao Kadam, P.W.8 of Khadak Police Station stated that on 4-8-1983 at about 3.45 a.m., while he was on patrol duty, he visited Ramoshi Gate Police Chowky and learnt that a phone message was received that one Ranu was set on fire by his wife by pouring kerosene and by his son by setting him on fire with a burning chimney. As the offence pertained to his police station, he immediately rushed to Sasoon Hospital. He reached there at about 4 a.m. He went to the Burns Ward and found that Ranu was in a condition to speak. He made enquiries on this aspect with the Medical Officer on duty, who told him that he was fully conscious and in a position to make the statement. After initially examining Ranu, he felt satisfied that an offence had been committed and consequently, recorded his statement as a regular F.I.R. He also sent a message to the Magistrate for recording his dying declaration. In his cross-examination, he stated that he started recording the F.I.R. at 4.15 a.m. and finished the same at 5 a.m. After recording the F.I.R. (Exh. 20), he obtained Ranu Patole's left hand thumb impression on the same. He had also obtained an endorsement of the Medical Officer about the condition of the informant. On the basis of the F.I.R. an offence was registered.

5. The evidence shows that Bashir Nijamsaheb Mujawar, P.W. 6, a Sub- Divisional Magistrate posted at Pune, on 4-8-1983 at about 4.15 a.m. was approached by the police for recording the dying declaration of Ranu Patole. A written memo to this effect was given to him. Accordingly, he immediately went to Sasoon Hospital. He entered the burns Ward, made enquiries with Ranu Patole and found that he was in a position to understand questions and answers. He also made enquiries from Dr. Sudhakar Lawand (P.W.7), who was Medical Officer on duty and the said doctor gave a certificate that Ranu Patole was in fit mental condition to give a dying declaration. The said endorsement is found in the dying declaration - Exh. 16. Thereafter, Bashir Nijamsaheb Mujawar proceeded to record the dying declaration in the own words of Ranu Patole. The said dying declaration is in a question and answer form and since it constitutes the sheet-anchor of the prosecution evidence against the Appellants, we are reproducing it in entirety :

----- "DYING
DECLARATION Name : Ranu Mahndu Patole Age : 50 years Occ : Bullockarture
R/o 340, Bhavani Peth, Pune Question : Whether you are in conscious ? Ans :
Yes. Ques : I am Sub-Divisional Magistrate, Sub-Division Pune. Whether you
are understand what I narrated ? Ans : Yes. Ques : What has happened with
you ? How it has happened ? Ans : I was sleeping at night. Approximately 1.00
O'clock my wife viz. Janabai has poured Kerosene on my person. I woke up due
to the cold sensation. Just then her son (of her first husband) viz. Ramdas set
fire to me with kerosene lamp. I came running out of the hut while burning.
Fisherman thrown water on me. Frequent quarrels used to take place between
me and wife. Read over and admitted to be correct. Date : 4-8-1983. Time :
5.00 A.M.

Signature : L.H.T.I. of Sd/- xxx Ranu Mahadu Patole. Date : 4-8-1983. Sub-Divisional Magistrate Sub-Division, Pune . Patient Ranu Mahadu Patole. Date 4-8-1983.

M.L.C. 15593 Reg No.457. Patient in position to give police statement. Sd/- xxx (4-8-83)" -----

6. The investigation of the case was conducted by P.S.I. Balasaheb Bapurao Kadam (P.W.8) and P.I. Bhalchandra Khandekar (P.W.9). After the dying declaration of Ranu Patole had been recorded, P.S.I. Balasaheb Kadam took Manju to the place of the incident. It was a hut. A carpet and a chaddar had been spread on the floor. They were smelling of kerosene. One bottle of kerosene was lying nearby. The same was containing little kerosene. A kerosene chimney was also lying nearby. There were some burnt pieces of cloth. All the articles were attached under a panchanama Exh.19. The Appellants were also present, nearby. Their hands were smelling of kerosene. They were arrested under a panchanama Exh. 11 and taken to Ramoshi Gate Police Chowky. Thereafter, P.S.I. Kadam went to Sasoon Hospital. Gulab (P.W.2) produced pyjama and under-pant of Ranu Patole which he attached under a panchanama Exh. 22. At 9.00 a.m. he handed over the investigation to P.I. Bhalchandra Khandekar.

The evidence of P.I. Khandekar shows that at 9 a.m. on 4-8-83 he took up the investigation. He visited the Sasoon Hospital and made enquiries with Ranu. He recorded his supplementary statement. Thereafter, he visited the place of incident and verified the panchanama of the scene of offence. He recorded the statements of Manju (P.W.1), Gulab (P.W.2) and 11 others. He obtained the police custody of the Appellants. At about 8 p.m. he received news that, Ranu Patole had died in hospital. Accordingly, he directed P.S.I. Balasaheb Kadam to make a panchanama. He made the same (Exh. 23) and sent the dead body for autopsy.

On 5-8-1983, P.I. Bhalchandra Khandekar recorded the statements of Mohan and 9 others and on the next day recorded statements of 5 others. That day he sent the case property to the Chemical Analyst. On 19-9-1983 he received the post-mortem report. After completing the investigation, he submitted the charge-sheet on 24-10-83.

7. Going backwards, the post-mortem examination of the dead body of Ranu Patole was conducted on 5th August 1983 between 10 a.m. and 11 a.m. by Dr. Laxman Pherwani (P.W.5). Dr. Pherwani found 95% ante mortem burns on the corpse which were distributed between the head, face, neck, chest, abdomen, both upper extremities, both lower extremities and parts of back. The skin was burnt up and was getting peeled off. On internal examination, he found the brain, larynx, trachea, lungs and bronchi to be congested. There were soot particles in the trachea. In the opinion of Dr. Pherwani, the deceased died due to shock and toxemia due to extensive burns, which was sufficient in the ordinary course of nature to cause death.

8. The case was committed to the Court of Session in the usual manner. In the trial Court, the Appellants were charged u/s 302, IPC or u/s 302 read with 34, IPC. They pleaded not guilty to the said charges and claimed to be tried. In the trial Court, apart from tendering and proving some documentary evidence, prosecution in all examined 9 witnesses. The sheet-anchor of the prosecution evidence were the following four dying declarations :- (a) the oral dying declaration made to Manju (P.W.1) and heard by Gulab (P.W.2); (b) the dying declaration recorded by P.W.7, Dr. Sudhakar Lawand which is contained in the medical case papers of the victim (Exh. 18) prepared by him; (c) the F.I.R. of the victim recorded by P.S.I. Balasaheb Kadam (P.W.8); and (d) statement of the victim recorded by P.W.6, Bashir Nijamsaheb Mujawar, Sub-Divisional Magistrate.

In the defence no witness was examined.

After recording the evidence adduced by the prosecution, the statement of the Appellants u/s 313 Cr.P.C.; and hearing the learned Counsel for the parties, the learned Trial Judge convicted the appellants for the offence punishable u/s 302 read with 34 IPC, vide the impugned judgment. The said judgment has been assailed by the Appellants through the present appeal.

9. We have heard Ms. Sherly Mazrello for the Appellants and Mr. V. T. Tulpule for the Respondent at a considerable length. We have also perused the depositions of the prosecution witnesses; the four dying declarations relied upon by the prosecution; the statements of the Appellants recorded u/s 313, Cr.P.C.; and the impugned judgment. After giving our thoughtful consideration to the matter, we are implicitly satisfied that the prosecution has established the guilt of the Appellants beyond reasonable doubt. As a logical imperative, this appeal has to fail.

10. The short and the crucial question is, whether the evidence of the four dying declarations relied upon by the prosecution inspires confidence ? This is the bone of contention between the learned Counsel for the parties. Whereas, with her customary tenacity Ms. Sherly Mazrello urged that the said dying declarations did not inspire any confidence, Mr. V. T. Tulpule with an equally tenacious advocacy has contended to the contrary.

11. We would separately like to examine each of the four dying declarations.

We begin first with the first dying declaration viz. the oral dying declaration of the deceased made to his son Manju immediately after the incident. This dying declaration was also heard and deposed to by Manju's brother-in-law Gulab (P.W.2). The evidence of Manju (P.W.1) is that, at about 1.30 a.m. Kamal Bhonde (not examined) told him that his father had been burnt. Pursuant to that information, he along with Gulab and others went to the immediate proximity wherein in a hut Ranu Patole resided. The evidence of Manju shows that his father was sitting on the foot-steps of the hut and when he enquired from him as to, what had happened, he disclosed that Appellant-Janabai had sprinkled kerosene oil on his person and Appellant Ramdas had set him on fire, with a

burning chimney. On the first blush we were inclined to accept this oral dying declaration as a gospel truth, because apart from the fact that Manju and Gulab were close relations of Ranu Patole, we could fathom no ostensible infirmity in the said dying declaration. It was here that Ms. Sherly Mazrello turned the tables on the prosecution by inviting our attention to the evidence of Mohan Kamle (PW 3), also a neighbour of Ranu Patole. She invited our attention to paragraph 2 of Mohan's statement wherein he has stated that he also immediately went to the place of the incident and saw that Ranu was burnt. She high-lighted that in Mohan's evidence there is an ominous silence with respect to Ranu Patole making an oral dying declaration to his son Manju which is said to have been over- heard by Gulab (P.W.2).

Ms. Mazrello urged that since Mohan did not depose about this oral dying declaration prudence warrants that we should not accept the same. We find ample merit in the contention of Ms. Mazrello.

11A. Apart from the reason urged by Ms. Mazrello for not placing credence on the oral dying declaration, there is another reason which is to be found in the form of the observations of the Apex Court in paragraph 12 of the oft-quoted case of Bhagwandas Vs. The State of Rajasthan, . In the context of oral dying declarations in the said paragraph, their Lordships of the Supreme Court observed that ordinarily it is not safe to place reliance on them. To put it in their own words :-

"The other piece of evidence which the prosecution relied upon was the two dying declarations made by Shivilal to Gyaniram P.W.4 and Jora P.W.7. Besides the infirmities which the testimony of these two witnesses (Gyaniram P.W.4 and Jora P.W.1) suffered from due to material contradictions in their respective statements made at various stages of the case and which have been pointed out by the learned Sessions Judge who said about Gyaniram :

"In such a state of affairs I refuse to put any weight and value to the statement of Gyaniram"

their evidence cannot be a sure foundation for maintaining the conviction if the statement of Hazari the sole eye witness is disregarded, as it must be disregarded in this case; because ordinarily a dying declaration of the kind which the prosecution has relied upon is by itself insufficient for sustaining a conviction on a charge of murder."

12. We next take up the dying declaration recorded by Dr. Sudhakar Lawand (P.W.7) in the medical case papers (Exh. 18). While setting out the prosecution case in paragraph 3, we have mentioned that at 2.20 a.m. on 4-8-1983 Dr. Lawand enquired from Ranu Patole about the history of his burns and to use the words of Dr. Lawand.

"He stated that while he was sleeping his subsequent wife Janabai started sprinkling kerosene on him he was awakened he tried to escape but her son from

her former husband and by name Ranu caught him and then the son Ramu set him on fire with a burning chimney."

This dying declaration is incorporated in the medical case papers. We have gone through the same and in our opinion, it inspires implicit confidence. Dr. Lawand has categorically stated that Ranu was fully conscious and oriented when he gave the said dying declaration. We also find that Dr. Lawand is a witness who is wholly independent and had no animus or axe to grind against the Appellants. The time honoured rule and one of great wisdom, is to accept the evidence of an independent witness. We certainly find no infirmity in Dr. Lawand's evidence and accept the same. Although Dr. Lawand was subjected an extensive cross-examination, we find that nothing could be extracted from him which would impeach, the credibility and the truthfulness of the dying declaration recorded by him in the medical case papers.

12A. We would like to emphasize that the statement made by a victim forming a part of the transaction of circumstances leading to his death, recorded in the medical case papers, would be admissible as a dying declaration u/s 32 of the Indian Evidence Act. In all fairness, we hasten to add, that neither of the learned counsel for the parties dispute the correctness of this legal proposition.

13. In our view the dying declaration recorded by Dr. Lawand (P.W.7) in the medical case papers is alone sufficient to confirm the convictions and sentences of the Appellants. The golden rule after all is that evidence has to be weighed and not counted.

14. We now next come to the third dying declaration namely, the F.I.R. recorded by P.S.I. Balasaheb Kadam. The evidence shows that at about 3.45 a.m. on 4-8-1983, while on patrol duty P.S.I. Kadam had reached Ramoshi Gate Police Chowky, he was informed that a telephone message had been received from Sasoon Hospital to the effect that Ranu Patole had been burnt after his wife had poured kerosene oil on him and his son had set him on fire with a burning chimney. Since the offence pertained to his jurisdiction, he rushed to Sasoon Hospital. At about 4 a.m. he contacted the Medical Officer Dr. Lawand, who opined that he was in a condition to make the statement. (This has also been stated by Dr. Lawand in paragraph 1 of his statement). Thereafter, the evidence of P.S.I. Kadam is that at 4.15 a.m. he started recording Ranu's statement and finished recording the same at 5 a.m. It is this statement of Ranu Patole (Exh. 20), the F.I.R., which was also relied upon by the prosecution as a dying declaration.

It is very elaborate statement. Therein, Ranu Patole has mentioned that about 20 years ago his wife Godabai had died leaving behind two children - Manju and Baban, who used to live separately, though in his immediate proximity. He has also stated that about 10 years prior to the incident, he married Appellant Janabai, who started living with him as his wife. He has also mentioned therein that, Janabai from her first husband had daughter Sushila, whose marriage

presumably failed and she started living with them. In the said statement he also stated that about 15 days prior to the incident, Sushila's husband Dilip Nitke had come to take her. He wanted to send her, but Janabai was not willing to send her.

Coming to the main incident, we find that he has stated that at 10 O' clock they had meals. Thereafter there was an altercation between him and appellant Janabai over the issue of Sushila being sent her husband. The issue could not be sorted out between the parties. Thereafter, he went and tried to sleep. When he was about to sleep, he felt something cold on his person. He saw that his wife Janabai was standing near him with a bottle of kerosene in her hand. Just at that time her son Ramdas came running into the house with a burning kerosene lamp and set him to fire. Neighbours gathered and extinguished the fire.

15. Ms. Sherly, learned Counsel for the Appellants vehemently castigated this F.I.R. as being a tutored and manufactured document at the instance of P.S.I. Kadam on the ground that, Ranu Patole, after sustaining 95% burns, practically all over his body, including vital parts, could not have made such an elaborate statement. In her contention prudence warranted that we should not place reliance on it. We admit that we are impressed with her submission. The F.I.R. is a remarkably coherent, spontaneous and well reasoned document. It runs into two full scape typed pages. We are certainly not prepared to accept that in the physical condition in which Ranu Patole was at the time when the F.I.R. was recorded (it was recorded barely within 3 hours of his being burnt), he could have dictated such a long and perfect F.I.R.

15A. Mr. Tulpule, the learned Public Prosecutor vehemently urged that it would be uncharitable on our part to raise such an inference against P.S.I. Kadam because in his cross-examination no suggestion of the F.I.R. being tutored and manufactured by him was put to him. He also urged that no suggestion was made to either Dr. Lawand (P.W.7), who medically examined Ranu Patole in his lifetime or to the Autopsy Surgeon Dr. Laxman Pherwani (P.W.5) that bearing in mind that Ranu Patole had sustained 95% burns, whether he was capable of making such an elaborate F.I.R.

15B. Technically, Mr. Tulpure may be right. But there are certain situations where common sense should not be the victim of technicalities. After all technicalities cannot be permitted to frustrate justice for if that happens they would become a unruly customer. Rejecting Ms. Mazorello's contention would tantamount to our being guilty of adopting a purely wooden approach. There is no rule of law which says that common sense should be put in cold storage. After all in our judgment by no stretch of imagination can it be believed that the deceased could have independently dictated the F.I.R. In situations such as this the Court should presume the best answer in favour of prosecution had the question been put to the witness and then examine whether the said answer is capable of acceptance or not. Applying such a approach we find that at the beat the medical witnesses may have stated that the deceased was capable of dictating the F.I.R. and P.S.I. Kadam may have stated that the F.I.R. was not authored by him but was

independently dictated by the deceased. However, even had they so stated we would not have accepted their evidence.

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

15C. But we hasten to add that we should not be understood as laying down that as a general rule it is not necessary to question a witness in cross-examination and the Court can draw an inference against the prosecution. The general rule in our judgment is to the contrary. It is only where circumstances per se lend to only one inference as is the case here, would the Court be justified in drawing it in the absence of cross-examination. Such cases would of course be extremely rare.

16. For the reasons stated above, we accept Ms. Mazerollo's contention that it would not be safe to place reliance on the F.I.R. Consequently, we are excluding this F.I.R. which is the third dying declaration in the instant case, from consideration.

17. We now come to the fourth dying declaration namely, the one recorded by Sub-Divisional Magistrate, Bashir Nijamsaheb Mujawar (P.W. 6). The evidence of Bashir Mujawar is that on 4-8-1983 at about 4.15 a.m. a constable with a written memo requiring him to record a dying declaration approached him and accordingly, he went to Sasoon Hospital and there in the Burns Ward, he found Ranu Patole admitted. He made enquiries from him and found that he was in a position to talk. He met Dr. Lawand (P.W.7), the Medical Officer on duty, who also stated that he was in a fit condition to make a statement. Thereafter, he proceeded to record the dying declaration of Ranu Patole in question and answer form. Since in paragraph 5 we have extracted the said dying declaration in its entirety, we do not propose reproducing the account mentioned therein. We would however, like to point out that in the said dying declaration there is a certificate by Dr. Lawand that Ranu Patole was in a fit mental condition to make the declaration.

18. A perusal of the dying declaration recorded by Bashir Mujawar shows that Ranu Patole had stated that at about 1.30 a.m. on 4-8-1983, Appellant Janabai poured kerosene oil on his person and Appellant Ramdas set him on fire with a burning chimney. It has also been stated therein that frequent quarrels between him and Janabai used to take place.

19. We have borne in mind the words of wisdom stated in the oft-quoted case of Khushal Rao Vs. The State of Bombay, wherein in paragraph 16, B. P. Sinha, J. speaking for the Court has laid down certain precaution to be borne in mind by the Court before accepting a dying declaration. In paragraph 16, his Lordship has observed thus :

"..... 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 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 his 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."

Judged in the light of the said observations this dying declaration inspires confidence. Since Janabai and Ramdas were living with Ranu Patole for over ten years as wife and step-son respectively there was no question of his having any difficulty in recognising them.

We also find that there is nothing to indicate that the faculties of Ranu Patole had been impaired at the time when he gave the declaration. Dr. Lawand (P.W.7) has candidly stated that Ranu Patole was in a fit mental condition when he made the statement.

20. It is also worth pointing out that, the evidence of Bashir Mujawar is to the effect that when the dying declaration was being recorded only he and Ranu Patole were in the room. In other words, there were no chances of the dying declaration being a tutored document.

We would do well to bear in mind that, neither Bashir Mujawar, who was a respectable person having the status of a Sib-Divisional Magistrate, when he recorded the dying declaration, nor Mr. Lawand, who was an equally respectable person, had any animus or axe to grind against the appellants. In the absence of the same, we are not prepared to believe that they would have manufactured the evidence of this dying declaration.

We wish to emphasize that, although Bashir Mujawar has been subjected to a searching cross-examination, but to our regret nothing could be elicited therefrom, which could impair the weightage to be given to the dying declaration.

21. It is a time honoured view that Courts of Law give utmost weightage to a dying declaration recorded by a magistrate, especially, one which is in the form of question and answer. (See Khushal Rao Vs. The State of Bombay, .

22. In our view, the dying declaration recorded by the Sub-Divisional Magistrate, Bashir Mujawar inspires implicit confidence and by itself is sufficient to sustain the conviction of the Appellants. Its brevity is an in-built guarantee of its truthfulness.

23. An analysis of the above discussion would show that the dying declaration contained in the medical case papers (Exh. 18) prepared by Dr. Lawand and the dying declaration recorded by Sub-Divisional Magistrate, Bashir Mujawar are implicitly reliable. We feel that they are both individually and collectively sufficient to confirm the guilt and the sentences of the Appellants.

Since the Appellants have been convicted u/s 302 read with 34, I.P.C. and have been awarded the lesser sentence of imprisonment for life, there can be no question of reducing the same.

That their conviction u/s 302 r/w 34, I.P.C. is legally proper is born out by the fact that the deceased sustained 95% burn injuries which, in the opinion of the medical witnesses, were sufficient in the ordinary course of nature to cause his death. The evidence is that Appellant Janabai had intentionally poured kerosene oil on his person and appellant Ramdas had intentionally set him on fire.

That being so, the act of the Appellants would fall squarely within the mischief of clause thirdly of Section 300, I.P.C.; the breach of which is punishable u/s 302, I.P.C. The said clause provides that culpable homicide is murder if an act is done with the intention of causing a bodily injury which is sufficient to cause death in the ordinary course of nature. But we hasten to add in all fairness that Ms. Sherly Mazorello has not assailed the Section on which the Appellants should have been convicted.

24. Ms. Sherly Mazorello, the learned Counsel for the Appellants made a number of submissions before us. We propose dealing with them. We have already accepted her submissions pertaining to the oral dying declaration and the F.I.R.

She contended that Sushila, daughter of Janabai was a witness whose evidence was essential to the unfolding of the narrative and an adverse inference be drawn against the prosecution, in terms of Section 114(g) of the Indian Evidence Act, for its failure to produce her. We admit that it would have been better had the prosecution examined her. But her non-examination certainly is not lethal enough to wash off the weightage to be given to the two dying declarations which we have accepted. Her non-examination does not impair the credibility of those two dying declarations. At the most, she would have stated any about the motive for the incident. Consequently, this submission of Ms. Mazorello fails.

25. Ms. Mazorello also urged that evidence of Dr. Lawand shows that the deceased stated that the Appellant tried to save him. In our judgment, this statement appears to have been made under some misconception for had this been truth there would have been burn injuries on the person of the Appellants. The same are not there. Even assuming that the Appellants tried to save Ranu Patole, it appears that it was a ploy on their part to save their own skins. It is common experience that by conforming to a non-incriminating conduct criminals often try to save themselves. In our view, this is one such case. This submission of Ms. Mazorello also fails.

26. Ms. Mazerello also urged that the motive was not strong enough to kill the deceased. She urged that after all the only motive alleged by the prosecution was whereas, Ranu Patole wanted that Sushila be sent back to her husband, the appellant Janabai did not want this. We would like to point out that no hard and fast rule can be laid down about the gravity of a motive influencing a criminal act. It basically depends on the concerned individual. It may be that since Sushila was the step-daughter of the deceased, Janabai may be feeling that he wanted her to go and would always create obstacles in the way of her living with them. Since her husband was not treating her well like a typical mother, she might be wanting that she should permanently stay with her. That on this issue there were acute differences between her and the deceased is apparent from a perusal of the dying declarations. At any rate, we would like to emphasize that, motive pales into insignificance where there is impeachable evidence in the form of dying declaration. Consequently, the said submission of Ms. Mazerello also fails.

27. Ms. Mazerello also urged that the prosecution case that, Ramdas rushed to burn the deceased after Janabai had poured kerosene oil on him appears to be extremely improbable. In her contention the exercise by the appellants, on probabilities, should have been simultaneous. When criminal courts judge the conduct of accused persons, the test which they adopt is not whether the conduct attributed to them is the most sane and sensible. What they have to examine is whether the conduct is such which can be classified as a possible one and cannot be stigmatized as an unnatural conduct. The conduct of the appellant Ramdas in not simultaneously setting fire to Ranu Patole when his mother poured kerosene oil on him is not an unnatural conduct. It may have been occasioned by the fact that the appellants may have thought that if Ramdas was standing along with Janabai with a burning chimney, the deceased, who was trying to sleep would recognise them in the light of chimney. In the overall circumstances in our judgment, it was a perfectly legitimate conduct. It cannot be faulted.

28. Lastly, Ms. Mazerello urged that the charge in the instant case was defective and this vitiates the conviction and sentence of the appellants. Ms. Mazerello invited our attention to the charge which has been framed viz - u/S. 302, I.P.C. or u/s 302 r/w 34, I.P.C. We regret that the manner in which the charge has been framed reflects much on inexperience of the Judge, who has framed it.

In our view, it would be perpetrating injustice, if on account of the charge, persons of the tribe of the appellants are allowed to go unpunished.

29. Coming to brass facts we find that the learned Judge should have framed a charge u/s 302, I.P.C. against Ramdas and one u/S. 302 r/w 34, I.P.C. against Janabai. All the same the learned trial Judge has framed a charge u/S. 302 r/w 34, I.P.C. against both of them. We find no error in this.

30. Section 34 of the Indian Penal Code mandates that :-

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as

if it were done by him alone."

An analysis of Section 34 of the Indian Penal Code would show that before the said action can be invoked, the following things have to be established :-

(a) a criminal act has to be done by several persons i.e. persons more than one; and

(b) the said criminal act has to be committed in furtherance of common intention of all.

If elements (a) and (b) exist, the necessary consequence would be that each of such persons would be liable for the act done in the same manner as if the act were done by him alone.

In the instant case in the two dying declarations, we have relied upon viz. (a) the dying declaration contained in the medical case papers prepared by Dr. Lawand (P.W. 7); and (b) the dying declaration recorded by the Sub-Divisional Magistrate Bashir Mujawar (P.W. 6), all the ingredients of Section 34 are borne out. Their perusal would show that the act of pouring kerosene oil by appellant Janabai on the person of Ranu Patole and that of appellant Ramdas of setting fire to him with a burning chimney was committed by these two appellants, in furtherance of their common intention. The evidence is that the two appellants lived together with the deceased. The irresistible inference from the two dying declarations is that the two appellants committed the murder of the deceased conjointly.

31. We would also like to point out that in view of the provisions contained in Ss. 215 and 464 of the Code of Criminal Procedure, an error or defect in the framing of a charge would only assume significance if it has occasioned in failure of justice. This would become explicit from the language of the two sections.

Section 215 of the Code of Criminal Procedure reads thus :

"Effect of errors :- No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

Section 464(1) of the Code of Criminal Procedure mandates thus :

"Effect of omission to frame, or absence of, or error in, charge - (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of Appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby."

32. In the instant case, we are satisfied that on account of the so called infirmity pointed out by Ms. Mazerello in the framing of charge, there has been no failure

of justice.

33. We find that the prosecution witnesses Dr. Lawand (P.W. 7) and the Executive Magistrate Mujawar Bashir (P.W. 6) have been cross-examined in respect of both the dying declarations relied upon by us.

34. We also find that the averments contained in the two dying declarations have been put to the appellants in their statements u/s 313, Cr.P.C. A perusal of the statement of Janabai u/s 313, Cr.P.C. shows that question No. 18, which was put to her was that, in the dying declaration recorded by Sub-Divisional Magistrate Exh. 18, Ranu clearly stated that she sprinkled kerosene oil on him and Ramdas lighted him with a burning chimney.

A perusal of question No. 16 put to Janabai would show that Ranu Patole had told the Medical Officer that she had poured kerosene oil on him and Ramdas had set him on fire with a burning chimney.

Similarly, we find that in questions Nos. 16 and 18 the same two dying declarations have been put to appellant Ramdas. It has been specifically put to him in them that Janabai poured kerosene oil on Ranu Patole and he set him on fire with a burning chimney.

35. In the above circumstances, in our view there is no question of any prejudice having been caused to any of the two appellants on account of the so called infirmity in the framing of the charge. Consequently, this submission of Ms. Mazerello also fails.

36. We would like to close this judgment on the refrain that in a dead matter tremendous life was infused by the persuasive advocacy of Ms. Sherly Mazerello. We dare say the brief could not have been argued better. But even her herculean efforts were not sufficient to save her clients, although they were sufficient to hold us at bay for practically the whole day. This indeed is no small tribute to her effort.

37. In the result, this appeal is dismissed. The impugned judgment dated 16-2-84 passed by the Addl. Sessions Judge, Pune in Sessions Case No. 252 of 1983 convicting and sentencing the appellants to undergo imprisonment for life under S. 302 r/w 34, I.P.C. is confirmed. The appellants are on bail. They shall be taken into custody forthwith to serve out their sentences.

In case an application for a certified copy of this judgment is made, the same shall be issued on an expedited basis.

38. Appeal dismissed.