
(2014) 02 BOM CK 0120
In the Bombay High Court
Case No : Criminal Appeal No. 445 of 2011

Maruti and Sheelabai

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-02-2014

Acts Referred:

Evidence Act, 1872 — Section 113A

Penal Code, 1860 (IPC) — Section 302 307 34 449 452

Citation : (2014) ALLMR(Cri) 3831 : (2014) 2 BomCR(Cri) 632

Hon'ble Judges : V.M. Deshpande, J;S.S. Shinde, J

Bench : Division Bench

Advocate : Satej S. Jadhav holding for or Mr. Sachin Salgare, for the Appellant;
S.G. Chincholkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.M. Deshpande, J.—The appellants, who are the husband and wife are questioning the correctness of the Judgment and Order of conviction passed by the learned Additional Sessions Judge, Kandhar, Dist. Nanded dated 12th July, 2011 in Sessions Case No. 2 Of 2010 whereby, the learned court below was pleased to record the guilt, for the offence punishable U/Section 302 read with 34 of the Indian Penal Code, 1860 (In short, the I.P. Code) and sentenced both of them to suffer imprisonment for life and both of them were directed to pay fine of Rs. 2000/- (Rs. Two Thousand only) and in default, to suffer rigorous imprisonment for six month. The court below however, was pleased to acquit both the accused for the offence punishable U/Section 449 read with 34 of the I.P. Code. As per the Charge, both the appellants on 2nd September, 2009 at about 8.00 a.m. at village Shelali, Tal. Kandhar, Dist. Nanded in furtherance of their common intention committed the murder of Sunita w/o Madhav Kendre by committing house trespass by entering into the house of Sunita and appellant No. 1 poured kerosene on the person of Sunita and appellant No. 2 set her on fire by throwing burning match stick. Thus, the appellants faced the Charge for the offence punishable U/Section 449 read with 34 of the I.P. Code.

2. The prosecution case can conveniently be stated as under :-

(i) The appellants, who are accused Nos. 1 and 2 are resident of village Shelali, Tal. Kandhar, Dist. Nanded. Sunita, the deceased was also residing at village Shelali alongwith her husband Madhav Kendre.

(ii) As per the case of prosecution, on 2nd September, 2009 when Sunita was in her house, both the appellants came there and raised a question, as to why she has back-bitted and picked up a quarrel with her. The prosecution further states that, Sunita's hair were caught and she was assaulted by giving slapping and blows and made her to fell down. Thereafter, accused No. 1 brought a bisleri bottle from her house containing kerosene, which he poured on her and at that time, accused No. 2/appellant No. 2 Sheelabai set her on fire by igniting a match stick.

(iii) The prosecution case further proceeds that, thereafter, Sunita rushed towards the house of one Nirmala Madhav Nagargoje (P.W. No. 3). She was shouting. One earthen pot was kept outside the house of PW No. 3 Nirmala containing the water. Sunita poured water on her person. PW No. 3 Nirmala also poured some water on her person. Fire then got extinguished.

(iv) The prosecution case further proceeds that, Sunita's sister-in-law Subhadrabai Babu Jaibhaye put sari on Sunita's person. Thereafter, both of them went towards the house of Police-Patil (PW No. 4) Vitthal Manikrao Kande. It is the case of the prosecution that, Sunita and Subhadra visited the house of Police-Patil. That time, his wife Kevalbai (PW No. 5) took Sunita into her house; as she had no clothes on her person. Thereafter, she gave water to her. According to the prosecution case, that time, on the interrogation of the Kevalbai, Sunita disclosed in presence of Police Patil that, both the appellants after quarreling with her put her on fire. Sunita's mother-in-law took her to Rural Hospital, Kandhar in rickshaw.

(v) The prosecution case further proceeds that, when Sunita was brought to the Rural Hospital, Kandhar by her mother-in-law at 9.40 a.m. Dr. Haribhau Gadekar (PW No. 7) examined her and he started medical treatment to her. The police were informed about her admission. He enquired with the patient as to how she got burn injuries upon which, she replied that, she was burnt by the neighbourers by pouring kerosene on her person and set her on fire. PW No. 7 Dr. Haribhau s/o Ganpatrao Gadekar sent the report Exh. No. 24 to police.

(vi) As per the case of the prosecution, intimation/report Exh. No. 24 was received by Police Station, Kandhar, at about 10.15 a.m. That time, Shri. Shaikh was the Police Station Officer. He handed over the said intimation to Police-Head-Constable, B. No. 252 Syed Khalil Syed Ismail for further action. Thereafter, P.H.C. Syed Khalil Syed Ismail visited the Rural Hospital Kandhar, met the Medical Officer and disclosed his intention that he intends to record the statement of the patient. Doctor took him to the concerned Ward. Patient was shown to him. Doctor was asked by PW P.H.C. Syed Khalil as to whether patient

was in a condition to give her statement. Doctor examined her and replied in the positive. Thereafter, PW No. 6 P.H.C. Syed Khalil recorded her dying declaration, which is at Exh. No. 22.

(vii) The said statement recorded by PW No. 6 P.H.C. Syed Khalil was placed before A.P.I. Shaikh. On the basis of said statement, A.P.I. Shaikh registered CR No. I 33/2009 against the accused/appellants for the offences punishable U/ Section 307, 452 read with 34 of the I.P. Code and investigation was taken over by A.P.I. Shaikh himself.

(viii) According to the prosecution, Sunita was required to be shifted at Nanded for further medical treatment after her statement was recorded by PW No. 6 P.H.C. Syed Khalil, obviously because her health was deteriorating. She was taken on 2nd September, 2009 itself at the Government Hospital, Nanded.

(ix) In the meantime, A.P.I. Shaikh visited the spot of occurrence, panchnama of spot was drawn in presence of the panchas. Said panchnama is at Exh. No. 41. He also seized plastic bottle containing kerosene, match stick, burnt pieces of sari and clothes and sample of earth smelling kerosene under the same panchnama. Since the patient was taken to the Government Hospital, Nanded, he sent wireless message (Exh. No. 23) to Vajirabad Police Station for recording the dying declaration.

(x) The prosecution case further proceeds that, on receipt of wireless message, police personnel of Vajirabad Police Station requested the Judicial Magistrate, First Class, Nanded to record the dying declaration of the patient. The said requisition is at Exh. No. 30. Said requisition was received by the learned J.M.F.C., Nanded at his house at 7.00 p.m. on 2nd September, 2009. Said was received by him from Police-Head-Constable B. No. 245 - Mr. Sayyad.

(xi) Thereafter, PW No. 8 Bhagwan Dhondiram Pandit. (JMFC) visited the Government Hospital, Nanded. He called the Medical Officer on duty. He was taken to Ward No. 14, where-in Sunita was taking treatment. PW No. 8 Bhagwan Pandit requested the Medical Officer to identify the patient by name Sunita. Patient was identified by the Medical Officer. He asked the Medical Officer to examine the patient and give his opinion in respect, as to whether she was in a position to give her statement, upon which, PW No. 9 Dr. Madhav Bhaurao Phole examined the patient and found her conscious and oriented, therefore, he opined that, her statement can be recorded. Accordingly, statement of Sunita was recorded by PW No. 8 Bhagwan Pandit. Said statement is at Exh. No. 31 on record.

(xii) In the meantime, on 3rd September, 2009 A.P.I. Shaikh arrested both the accused. He also recorded the statements of the concerned witnesses. Record shows that,

during the treatment, Sunita succumbed to the burn injuries at about 6.10 p.m. on 7th September, 2009.

(xiii) Inquest panchnama was drawn by Vajirabad Police Station. Her body was sent for post mortem. Dr. Durge performed post mortem. Provisional post mortem-cum-death certification is at Exh. No. 33. While final report of post mortem is at Exh. No. 34. Probable cause of death is due to 92% superficial deep burn. A.P.I. Shaikh then collected the post mortem report. Seized articles were sent to the Regional Forensic Science Laboratory, Aurangabad for chemical analysis. After completion of the investigation, Charge-Sheet was presented.

(xiv) The learned Judicial Magistrate, (F.C.), in whose court the Charge-Sheet was filed found that, offence is exclusively triable by the Court of Sessions hence, he passed an order of committal. The learned Additional Sessions Judge, thereafter, framed the Charge against both the accused/appellants. They pleaded not guilty and claimed for trial.

(xv) In order to prove the guilt of the accused/appellants, in all thirteen [13] witnesses were examined by the prosecution, besides the documentary evidence. The learned Additional Sessions Judge after full dressed trial, passed an order of conviction and sentenced both the appellants to suffer imprisonment for life and both of them were directed to pay fine of Rs. 2000/- (Rs. Two Thousand only) and in default, to suffer rigorous imprisonment for six month.

3. We have heard Mr. Satej S. Jadhav Advocate for the appellants and Mrs. S.G. Chincholkar, learned A.P.P. for the State, in extensio. With the assistance of both the learned counsel, we have very minutely perused the entire Record & Proceedings in order to re-appreciate the entire evidence, as brought on the record by the prosecution.

4. It is the submission of learned defence counsel that, in the present case, there are no eye witness. In fact, the witnesses who were examined either to prove the occurrence or to prove the oral dying declarations, have failed to support the prosecution and, therefore, they were declared hostile, by the prosecution. According to the learned counsel for the appellants, both the dying declarations Exh. No. 22 and Exh. No. 31 recorded by PW No. 6 Syed Khalil Syed Ismail (Police-Head-Constable, B. No. 252 of Kandhar Police Station.) and PW No. 8 Bhagwan Dhondiram Pandit (J.M.F.C.) respectively, fail to inspire confidence. It is the submission of learned defence counsel that, two different versions in respect of the prelude is disclosed in these two dying declarations. Further, according to the learned counsel, from the evidence of PW No. 6 Syed Khalil Syed Ismail, scribe of dying declaration Exh. No. 22, it is very clear that, that cannot be pressed into service for recording the guilt of the present appellants. In so far as dying declaration Exh. No. 31 is concerned, it is submission of the learned defence counsel that, since there is material variance in respect of the prelude of the incident, as appearing in both the dying declarations, the same may not be used for holding the appellants as guilty. He placed reliance on following reported authoritative pronouncements :-

(i) Suresh Dodorkar (Sonar) Vs. State of Maharashtra, .

(ii) P. Mani Vs. State of Tamil Nadu, .

5. Per contra, the learned A.P.P. for the state heavily relied upon two dying declarations and submits that prior to recording the dying declarations all necessary care was taken by both the Scribe. Both the dying declarations, according to the learned A.P.P. inspire the confidence and, therefore, it was submitted that, Criminal Appeal be dismissed.

6. After perusal and scanning entire evidence brought on the record, it is clearly established that, the prosecution case ultimately rests on two dying declarations only.

7. PW No. 1 Maroti Yeshwanta Nagargoje, who was examined by the prosecution as eye witness has turned hostile. He has specifically asserted that, he has not seen the incident. The learned A.P.P. thoroughly cross-examined this witness, however nothing can be brought on record. The portion marks appearing in his statement, recorded by the police, during the course of investigation, remained to be proved.

8. However, the situation of the house of deceased Sunita is brought on record. It appears that, Sunita's house is on a hill and it is at one end of the village; where-as the house of the appellants is at other end of the village. This position about the situation of the respective houses of deceased Sunita and the appellants has great bearing while deciding this particular case. Nevertheless, said fact is also reiterated by the prosecution witness PW No. 10 Balaji s/o Ramji Gitte, who has supported the prosecution, who was the panch to the spot panchnama. From his evidence, there cannot be any doubt in mind that, Sunita's house is at one end of the village; where-as house of the accused/appellants is situated to the other end of the village.

9. PW No. 2 is Janabai Bhujang Kendre. Her house is situated just beyond one house of the deceased Sunita. She also turned hostile. There is nothing on record in the cross-examination of the learned A.P.P. except suggestions. Needless to say, even the portion mark "A" in her statement was not proved.

10. Then we have PW No. 3 Nirmalabai Madhav Nagargoje. It appears, through this witness, prosecution has tried to establish that after the incident, both the accused followed the deceased till the house of this witness. However, she has not supported prosecution at all.

11. Then we have PW No. 4 Vitthal Manikrao Kande, who at the relevant time was the Police Patil of the village. He has also not supported the prosecution.

12. PW No. 5 Kevalbai w/o Vitthalrao Kande is the wife of PW No. 4 Vitthal. She is not hostile witness. According to this witness in between 8.00 a.m. to 9.00 a.m. she heard Sunita's call. She found that, she had no clothes on her person. She was taken into the house. She was kept in one room. Sunita demanded water to her. Accordingly, water was given to her. Thereafter, this witness with the help of one Dropadabai put another sari on her person. According to this

witness, Sunita did not state anything to her in respect of the incident.

13. Then we have PW No. 6 Syed Khalil Syed Ismail, Police-Head-Constable, B. No. 252 of Kandhar Police Station, who recorded dying declaration Exh. No. 22, PW No. 7 Dr. Haribhau s/o Ganpatrao Gadekar, PW No. 8 Bhagwan Dhondiram Pandit, J.M.F.C., who recorded dying declaration Exh. No. 31 and PW No. 9 Dr. Madhav Bhaurao Phole, Medical Officer of S.G.G.S.M., Hospital, Nanded. Evidence of all these witnesses will be discussed in later part of the Judgment.

14. Then on record, PW No. 10 Balaji s/o Ramji Gitte has proved panchnama Exh. No. 41. PW No. 11 Govind Malkaji Kaletwad is Police-Head-Constable. He has taken the muddemal property to the Office of Regional Forensic Science Laboratory, Aurangabad.

15. PW No. 12 Vitthal Govindrao Nagargoje, father of deceased has not supported the prosecution. Obviously, this witness was examined on the point of the oral dying declaration made to him.

16. PW No. 13 Bhagwan Baba Kendre is also related to deceased Sunita. This witness has also not supported prosecution on the point of alleged oral dying declaration made to this witness as alleged by the prosecution.

17. In the spectrum of the facts, it is very clear that the prosecution was obliged to prove the guilt of the appellants beyond reasonable doubt with the help of aforesaid two dying declarations.

18. On close scrutiny of the entire record, it appears that, Sunita was brought to the hospital by Sonyabai Kendre, mother-in-law of the deceased-Sunita. She was admitted in Rural Hospital, Kandhar on 2nd September, 2009 at 9.40 a.m. Her medical case record at Rural Hospital, Kandhar is available on record and it is at Exh. No. 28.

19. On admission to the Rural Hospital, Kandhar, PW No. 7 Dr. Haribhau Ganpatrao Gadekar examined her and started medical treatment. From his evidence, it is very clear that, he has inquired with the patient (Sunita) as to how she got burn injuries. Upon which, she disclosed that, she was burnt by the neighbours by pouring kerosene on her person and by setting her on fire. Relevant portion appearing in the examination of PW No. 7 Dr. Haribhau Gadekar is reproduced herein under :

I inquired with the patient as to how she got burnt. She stated that, she was burnt by neighbours by pouring kerosene by setting her on fire.

This is also supported by contemporary document available on record. Firstly, it is at Exh. No. 24 which is an intimation given by PW No. 7 Dr. Haribhau Gadekar himself on 2nd September, 2009 at 10.00 a.m. to Police-Sub-Inspector of Kandhar Police Station. The same is at Exh. No. 24. Relevant portion of the said document can be conveniently reproduced here-under :-

As observed, the medical case record of Sunita at Rural Hospital, Kandhar is

available on record at Exh. No. 28. In Exh. No. 28, it is mentioned as under :

Thrown kerosene and lightening by the neighbourers at morning.

20. What is important is that, there appears the thumb impression of both-Sunita and Sonyabai. We cannot forget that, PW No. 7 Dr. Haribhau Ganpatrao Gadekar being a Doctor has made this noting in the official record duly maintained by the hospital authority during the ordinary course of discharging his official duty. Therefore, we will have to attach much importance to this noting. From this, it is very clear that, at the first opportunity, neither Sunita nor her mother-in-law, who accompanied her, have disclosed anything against the present appellants. Not only that, Sunita has stated before the hospital authority that, the "neighbourers have poured kerosene on her person and set her ablaze".

21. Even perusal of Exh. No. 22, the dying declaration recorded by PW No. 6 PHC-Syed Khalil Syed Ismail, it is mentioned that, From this, firstly, it was obligatory on the part of the prosecution to establish the fact that, the appellants are the neighbourers of Sunita and secondly, they are the relatives of Sunita. In that behalf PW No. 1 Maruti, though he was declared hostile stated the position of the houses of the both the appellants and deceased Sunita, which clearly shows that the house of the appellants is at other end of the village; where-as house of Sunita is at another end of the village. Not only that, PW No. 10 Balaji s/o Ramji Gitte, who has proved spot panchnama Exh. No. 41 and who is one of the prosecution witness (who is not hostile witness) also supported the version of PW 1 Maruti in respect of topography, which can be seen from the following statement appearing in his evidence.

Sunita's house is at one end of the village; where-as house of the appellants is at the other end of the village.

Not only this, the spot panchnama Exh. No. 41 gives the four boundaries of the house of deceased Sunita as under :-

22. There is no mention in the entire spot panchnama about the existence of the house of the appellants either adjacent to the house of the Sunita or in the same vicinity. Therefore, what is established on record is that the house of the appellants is situated at one end of the village; while house of deceased Sunita was situated at another end of the village. By no stretch of imagination, therefore, it cannot be said that the appellants were neighbourers of deceased Sunita. Further PW No. 3 Nirmalabai Madhav Nagargoje in her cross-examination has stated that, the appellants are not relatives of Sunita. Now when this fact was brought on the record by defence, what is expected from the prosecution to establish by any cogent material on record to prove that the appellants were the relatives of deceased Sunita, through remaining witnesses.

23. PW No. 5 Kevalbai w/o Vitthalrao Kande (not a hostile witness) is the first person who took Sunita to her house, offered water to her, put sari on her person. She has asserted in her evidence that, Sunita did not state anything to

her about the incident. House of this witness must be near to the house of Sunita. If really, the appellants were the neighbourers and they were the culprits, it would have been very natural on the part of the Sunita to disclose the names of the appellants to this lady. Non disclosure of names of the appellants at very first instance to this lady and subsequently, not disclosing the names of the appellants to the hospital authority, by only making reference that the neighbourers set her ablaze, creates serious doubt as to really the appellants were the authors of the burn injuries appearing on the person of Sunita.

24. In this backdrop, now let's examine the dying declarations. First in time, is Exh. No. 22 recorded by PW No. 6 Syed Khalil Syed Ismail, who is Police-Head-Constable, B. No. 252 of Kandhar Police Station. Astt. Police Inspector Mr. Shaikh, who was the P.S.O. gave intimation to this witness about the admission of burnt lady in the Rural Hospital, Kandhar. He then visited the hospital, met the Medical Officer and expressed his desire to record her statement. Doctor showed patient to him. He asked the Doctor, whether patient is in condition to give her statement. Doctor examined the patient and expressed his opinion that, her statement can be recorded. According to this witness thereafter, Doctor made endorsement on paper, on which he was intending to record her statement. Then this witness proceeded to record her statement. According to said dying declaration which was recorded by PW No. 6 PHC Syed Khalil Syed Ismail, the appellants are residing as neighbourers and appellant No. 1 is her relative. On account of previous quarrel, the appellants assaulted her and thereafter, appellant No. 1 poured kerosene on her person and appellant No. 2 ignited a match stick and set her ablaze.

25. PW No. 8 Bhagwan Dhondiram Pandit, who has recorded the dying declaration Exh. No. 31 gives altogether different version in respect of the prelude. As per the said dying declaration, Sunita went for weeding to her cousin sister-in-law. There was dispute between two cousin sisters-in-law. Appellant No. 2 asked her as to why she has gone there for weeding. Thereafter, both the appellants gave beating to her. Thereafter, she sat for cleaning the utensils. That time, appellant No. 1 poured kerosene on her person and appellant No. 2 threw burning match stick. No doubt true, in both the dying declarations, the role ascribed to these appellants is consistent.

26. What should be the approach of the court when the court is called upon to appreciate the evidence of written dying declaration, is found in a reported case in the case of Tukaram Dashrath Padhen and Others Vs. State of Maharashtra, . This court has observed in paragraph No. 24 as under :-

When the court is called upon to appreciate the evidence of written dying declaration, the Court has to be extremely cautious and examine with meticulous care the evidence regarding recording of the dying declaration. Merely because witnesses came forward and depose about the recording of the dying declarations, it should not impel the Court to immediately accept the dying declaration. It has to be remembered that the declarant is not available for cross-

examination and, therefore, the prosecution must prove, apart from the truthfulness of the contents, the factum of the recording of the dying declaration as well as the fact that the declarant was in a fit mental condition to give the statement. Once suspicious circumstances are found in the evidence, the Court should be extremely slow in placing implicit reliance on the dying declaration. It is to be remembered that the conviction can be recorded on the dying declaration alone if the court finds the dying declaration to be wholly reliable. It is therefore, necessary for the Court to scrutinize the evidence and place reliance on the dying declaration only if the evidence in respect of the recording of the dying declaration is of "sterling" quality. If there are suspicious circumstances the Court should reject the dying declaration and look for other evidence if it is available. Mechanical acceptance of the dying declaration dehors a meticulous scrutiny of the evidence relating to the recording of the dying declaration must be deprecated in the present case as we have pointed out in the light of circumstances stated by us, we do not find the dying declaration to be pieces of evidence which would inspire the confidence of the Court for implicit acceptance. The aforesaid dying declaration, therefore, will have to be left out of consideration.

27. It will be very useful to point out the following passage of the reported case of this court in Suresh Dodorkar (Sonar) Vs. State of Maharashtra, .

A perusal of both the dying declarations reveal that there are inter se variance. In the dying declaration at Exh. 24 Vimal had stated that the appellant, under the influence of liquor, used to beat her as he was of suspicious nature. She states that when she had asked him to take his dinner, the appellant had quarrelled with her and, therefore, in anger she had gone to sleep. While she was asleep, the appellant had poured kerosene on her-and had set her ablaze. In the dying declaration at Exh. 27 Vimal had stated that in the evening she had sent the daughter of her neighbour for purchasing wheat, but as the said girl had not gone, she had herself gone and purchased wheat. According to her, the appellant, on his return, asked her as to why she had gone for purchasing wheat and what was the relationship between Vimal and the shopkeeper. The appellant then went out of the house and returned back at about 7.00 p.m. or 7.30 p.m. carrying a small plastic Can of kerosene. Vimal had asked her husband to take his dinner but her husband had said that he would not eat anything prepared by her as she was of lose character. On so saying her husband poured kerosene on her and set her ablaze. It would thus be seen that in respect of the incident there is a major variance though there is a common thread in both the dying declarations that it was the appellant who had set her ablaze. In cases resting on multiple written dying declarations, the Courts cannot pick and choose any one dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect of the names and the number of accused, the prelude to the incident and the incident itself. In these two dying declarations, there is consistency in respect of the name and the number of

accused. However, in respect of the prelude to the incident, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declarations and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs. 24 and 27, as acceptance of any one dying declaration necessarily renders the other as false. If in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. Merely because the overt act attributed to the accused is consistent in both the dying declarations would not make the dying declarations a reliable piece of evidence. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. In our opinion, therefore, no reliance can be placed on the dying declarations at Exhs. 24 and 27.

28. In the light of the observations made in two reported cases, cited *supra*, it is very clear that, there is variance in respect of prelude to the incident and incident itself. In these two dying declarations there is consistency in respect of names and role ascribed to the appellants. This is common thread in both the dying declarations. However, on minute scrutiny of Exh. No. 22, dying declaration recorded by PW No. 6 P.H.C. Syed Khalil Syed Ismail, it is really difficult to put reliance on it, to the effect, as to really it was her statement, looking to the tenor of the language.

29. However, PW No. 6 Syed Khalil Syed Ismail has admitted in his cross-examination as under :-

It is our practice to state below any statement that the statement is read over to the person and he stated the same to be correct.

Now it is really difficult in the light of the above admission if really the statement was read over to the declarant and she admitted the contents of the said.

30. Not only that, the following portion appearing in the evidence of PW No. 6 Syed Khalil Syed Ismail has created a very serious doubt in the mind of the court about the genuineness and truthfulness of the statement Exh. No. 22.

I have not recorded patient's statement in verbatim.

31. What is duty of the scribe while recording the statement of declarant. ? Obvious answer to this is, it is the duty, rather it is an obligation on the part of the scribe to reproduce the version of the declarant as it is. In other words, the scribe must record the statement of the declarant in verbatim. This is because the dying declaration alone, if inspires the confidence in the mind of the court, can be the sole basis for recording the conviction. The declarant is not available for the cross-examination. The said document is solemn one. Therefore, it is expected from the scribe, not to tamper with the said declaration. The scribe

should record the declaration as it is. Thus not recording her statement in verbatim is the most glaring infirmity, which can be stated while appreciating Exh. No. 22.

32. Once it is established that the scribe PW No. 6 Syed Khalil Syed Ismail has not recorded the dying declaration in verbatim then the court is at a loss to visualize as to really what was stated by Sunita to this scribe. In that view of the matter, the prosecution cannot press into service this dying declaration.

33. Now let's scrutinize whether another dying declaration Exh. No. 31 recorded by PW No. 8 Bhagwan Dhondiram Pandit is free from all doubts; and whether it can be a basis for recording the conviction against both the appellants.?

34. As it was found, at the hospital at Kandhar, health of Sunita was deteriorating, she was shifted to the Government Hospital, Nanded. In fact, right from the beginning, the hospital authority at Kandhar were intending to shift Sunita to the Government Hospital, Nanded. In fact, there is reference of the same in Exh. No. 24, the intimation given by the Hospital authority, Kandhar to the police authority, Kandhar. It appears that, after the statement of Sunita was recorded at Kandhar, she was taken to the Government Hospital, Nanded. On being brought at Government Hospital at Nanded, Dr. Mrs. Zene admitted her in casualty at 12.30 hrs. and then she was shifted to the burn ward. Ward No. 14 is reserved for burnt patients. PW No. 9 Dr. Madhav Bhaurao Phole was the Medical Officer and he was on duty in Ward No. 14.

35. PW No. 8 Bhagwan Dhondiram Pandit, at the relevant time was the Judicial Magistrate, F.C., at Nanded. He received intimation Exh. No. 30 on dated 2nd September, 2009 at 7.00 p.m. at his house from Police Chowki situated at Government Hospital, Nanded which falls within the jurisdiction of Vajirabad Police Station. Accordingly, PW No. 8 Bhagwan Pandit visited the Government Hospital, Nanded. He visited Ward No. 14 of the hospital. He called the Medical Officer on duty.

36. PW No. 9 Dr. Madhav Bhaurao Phole, who was the medical Officer identified Sunita as a patient. According to the evidence of PW No. 8 Bhagwan Pandit, PW 9 Dr. Madhav Phole examined the patient and found that, she was conscious and was in a fit mental state for giving the statement. Thereafter, he started recording the dying declaration at 8.24 p.m. He introduced himself to the patient and disclosed his intention to record her statement. From the evidence of PW No. 8 Bhagwan Dhondiram Pandit, which is also appearing in Exh. No. 31, PW No. 8 was satisfied that, patient was able to give her statement. Accordingly, he has recorded her statement Exh. No. 31.

37. Now reading of this dying declaration shows, (i) there is variance about the place of incidence, (ii) there is variance as regards the case for picking quarrel with the deceased by the appellant, vis-?-vis Exh. No. 22. Though there is common thread in both the dying declarations that, it was the appellants who set her ablaze, there was variance in both the dying declarations in respect of other

aspects.

38. Apart from the major discrepancies, in respect of the prelude and the contents of the both the dying declarations, which is at variance, it does not appear in the dying declaration Exh. No. 31 that before obtaining thumb impression of Sunita, PW No. 8 Bhagwan Dhondiram Pandit read over said dying declaration to her and after her acceptance that it is her version, has obtained the thumb impression.

39. Exh. No. 31 shows that, after obtaining the thumb impression of Sunita, below that in English language there is reference that, " dying declaration was recorded as per the say of the patient and it was read over to her and she admits the contents to be true and correct. "

40. Now bare perusal of Exh. No. 31 shows that, this endorsement in English is made by PW No. 8 Bhagwan Pandit after his exercise of obtaining the thumb impression of Sunita was over. Meaning thereby, as to really whether before obtaining her thumb impression, whether the scribe to this document had read over the same to Sunita. This according to us, is material inherent infirmity in the dying declaration, therefore, Exh. No. 31 cannot inspire confidence of the court.

41. Further appearance of thumb impression on Exh. No. 31 is also one of the suspicious circumstance. We are observing the same for following reasons :-

(i) PW No. 9 Dr. Madhav Bhaurao Phole has stated in his evidence that he has put bandage on the injuries of the patient - Sunita on her arrival in Ward No. 14.

(ii) Even the inquest panchnama Exh. No. 25 shows that, her both the hands were having bandage.

(iii) In the cross-examination, PW No. 8 Bhagwan Dhondiram Pandit, scribe of Exh. No. 31 has stated as under:- :

? I do not remember that the patient had bandage over major portion of her body including her hands and palms.

? It is not true that, patient's both the hands including palms were fully bandaged.

? I do not remember, whether both the arms excluding the palms had bandage.

(iv) Thus, it is very clear that, this witness was not sure about, whether there was bandage or not. Right from the beginning at Kandhar Hospital, Doctor has found that, Right Upper limbs were burnt to the extent of 9%. Even the post mortem report Exh. No. 34, column no. 17 shows both the Rt. and Lt. Upper limbs were burnt to the extent of 8%, suggesting thereto that those were completely burnt.

(v) From the evidence of PW No. 7 Dr. Haribhau s/o Ganpatrao Gadekar, the defence has brought the following on the record :

...superficial skin becomes ash after burning of the skin. The ridges on the skin do not appear after burning of the skin. Serum is formed below the skin due to the burns and portions thereof swells.

In the background of the above, bearing of the thumb impression of Rt. hand of Sunita on the said dying declaration, raises serious doubt in the mind of the court.

42. The Hon"ble Apex Court in case of P. Mani Vs. State of Tamil Nadu, has observed as under :-

Indisputably conviction can be recorded on the basis of dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regard the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on records suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on records clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the Appellant has been charged u/s 302 of the Indian Penal Code, the presumption in terms of Section 113A of the Evidence Act is not available. In absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused.

43. From the aforesaid passage of the Hon"ble Apex Court, it is clear that, suspicion is no substitute for proof. If the evidence brought on the record suggest that such dying declaration does not reveal entire truth, it may be considered only as a piece of evidence. In such event conviction can not be based on such document. Thus, in the totality of the aforesaid situation as appearing in the case of the prosecution, on the re-appreciation of the entire evidence, we are of the view that, the prosecution has not proved its case beyond reasonable doubt. According to us, it is a fit case where-in benefit of doubt will have to be extended in favour of the appellants. Accordingly, same is given in favour of the appellants. Consequently, we pass following order :-

ORDER

(i) Judgment and Order of conviction passed by the learned Additional Sessions Judge, Kandhar, Dist. Nanded dated 12th July, 2011 in Sessions Case No. 2 Of 2010 whereby the accused/appellants are convicted for the offence punishable U/

Section 302 read with 34 of the Indian Penal Code, 1860 and sentenced to suffer imprisonment for life and to pay fine of Rs. 2000/- (Rs. Two Thousand only) and in default, to suffer rigorous imprisonment for six month, is hereby quashed and set aside.

(ii) Both the appellants (original accused Nos. 1 & 2) be set at liberty forthwith, if not required in any other case.

(iii) Fine amount, if paid by the accused/appellants should be refunded to them.

(iv) Criminal Appeal allowed.