

(2004) 06 BOM CK 0046
In the Bombay High Court
Case No : Criminal Appeal No. 58 of 1992

Mohan Sadhu Kawale

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-06-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2004) CriLJ 4167

Hon'ble Judges : R.S. Mohite, J; R.M.S. Khandeparkar, J

Bench : Division Bench

Advocate : Shekhar Ingawale and Ranjit R. Bhosale, for the Appellant; U.V. Kejariwal, Addl. PP, for the Respondent

Final Decision : Allowed

Judgement

R.S. Mohite, J.—By this appeal the appellant (hereinafter referred to as "the Accused") seeks to quash and set aside the judgment and order dated 22nd November, 1999 passed by the 2nd Additional Sessions Judge, Satara, in Sessions Case No. 88 of 1990, convicting the accused for an offence u/s 302 of Indian Penal Code and sentencing him to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default, to suffer further R.I. for a period of six months.

2. The brief facts of the prosecution case are as follows:

(a) The accused Mohan Sadhu Kawale is a resident of Marali, Taluka Karad. The deceased who was a lady by name Lalubai Shamrao Gaikwad, was also a resident of the said village.

(b) According to the prosecution, on 17th June, 1988, there was a transaction between the accused and the deceased. The accused had loaned an amount of Rs. 400/- to the deceased. Since then, the accused and the deceased were having an illicit relationship. The accused used to visit the house of the deceased often. The deceased Lalubai was residing along with her son Sanjay (P.W.11) and

her sister Balabai Narayan Kambale (P.W.8). It is an admitted position that when the accused used to come to visit the deceased Lalubai, Balabai and Sanjay used to go to spend the night at the house of another sister by name Talubai.

(c) The incident of the burning of the deceased Lalubai is said to have occurred on 12th February, 1990 between 8.00 to 8.30 in the night. It is the prosecution case that on the night of the incident, P.W.8 Balabai and P.W.11 Sanjay were present in the house of the deceased Lalubai. That at about 8.00 p.m., these three persons were sitting in the house after taking their meal, the accused came to the said house. It is alleged that the accused asked P.W.8 Balabai and P.W.11 Sanjay to go out of the house. He was carrying an axe and he displayed the said axe to Balabai and Sanjay, and therefore, these two persons went out of the house. The accused then closed the door of the said house. He then asked the deceased Lalubai that she should give him a receipt of Rs. 2,000/- for the loan amount of Rs. 400/- which had been obtained from him. The deceased Lalubai refused to give such receipt. The accused pushed Lalubai on the ground, took a kerosene can and sprinkled the kerosene over the person of Lalubai. He then asked Lalubai whether he should light the match stick and set her on fire to which she said that he should do what he likes. It is contended that thereupon the accused lit the match stick and set Lalubai on fire. Lalubai then opened the door of the house and emerged engulfed in flames. As the incident had occurred in a crowded locality, the persons from the village gathered at the spot. Lalubai fell on the ground in front of the house. That thereafter, the accused came out of the house and tried to press the throat of Lalubai. He was pulled away from the body of Lalubai and thereafter, he went away. The police patil of the village by name Eknath Shivaram Kambale (P.W.12) had come there. He recorded the statement of Lalubai and got the said statement signed by the eight villagers who had arrived at the spot in the meanwhile. That thereafter Lalubai was taken to the hospital at village Indoli, and from there, she was brought to the Civil Hospital, Satara.

(d) It is the case of the prosecution that this entire incident of the accused demanding a receipt from the deceased Lalubai, pouring kerosene on her person and setting her on fire, was personally witnessed by P.W.8 Balabai and P.W.11 Sanjay, who had been earlier sent out of the house under threat. It is the prosecution case that there was a gap in between the two planks of the door of the house. From one such vertical gap, P.W.8 Balabai and P.W.1 Sanjay are said to have witnessed the things going on within the house.

(e) It is not in dispute that P.W.8 Balabai, P.W.11 Sanjay, One Shalan Kamble, Sharad Lade and 2 to 3 other persons went with the deceased Lalubai to the hospital and also went to the Burns Ward where Lalubai was admitted. According to the medical case papers produced by the Medical Officer, it appears that when the deceased Lalubai was admitted in the hospital, she was given treatment for her burns and this included an injection of drug Fortwin. It is contended that at about 3 a.m. on 13th February, 1990, the deceased Lalubai made a dying

declaration before the Special Judicial Magistrate (P.W.9) by name Shivaji Laxman Nalawade. According to the prosecution case, the dying declaration was recorded by the Special Judicial Magistrate after obtaining an endorsement from the Medical Officer, Dr. Vilas Mahadev Kawachale (P.W.10) to the effect that the deceased was conscious. That in the said dying declaration (Exhibit - 26), the deceased specifically implicated the accused and narrated not only the incident itself but also the motive for the same. The record indicates that, subsequently, on 13th February, 1990, at about 12.40 noon, the deceased expired.

(f) On the basis of the copy of the dying declaration which was forwarded by the Satara Police Station, an offence was registered by Umbraj Police Station as C.R.No. 32 of 1990 u/s 307 of Indian Penal Code. P.W.14 P.S.I. Chandrakant Baburao Shinde then commenced investigation of the offence. He went to the village and prepared a spot panchanama (Exhibit-11). This panchanama was made immediately on 13th February, 1990 itself and from the scene of the offence, the Investigating Officer seized one plastic cane having smell of kerosene, one match box of tiger print, one burnt match-stick, burnt pieces of nylon blouse, burnt pieces of green sari and sample of earth. He recorded the statements of several witnesses on that date, arrested the accused and seized the clothes on his person. At the time of his arrest, the accused was found to have burn injuries on his left hand, and therefore, the Investigating Officer sent the accused to the hospital.

(g) On 14th February, 1990, the Investigating Officer received the inquest panchanama and other papers relating to the dead body of Lalubai. On the same day, he recorded the statement of other witnesses. On 15th February, 1990, the Investigating Officer recorded the statement of one Datta Dange, on 16th February, 1990, P.W.8 Balabai produced an axe which was seized by the Investigating Officer under a panchanama (Exhibit-13). On the same day, i.e. on 16th February, 1990, in the presence of panchas, once again, a search of the house of the accused was taken and in the said search, a receipt dated 17th June, 1986 was found which was seized by the Investigating Officer.

(h) In due course, the Investigating Officer sent the materials like earth and clothes to the Chemical Analyser for analysis and after the receipt of the report of the Chemical Analyser, he filed the chargesheet.

3. On committal of the case, a charge u/s 302 of Indian Penal Code came to the framed. In all 14 witnesses have been examined by the prosecution in order to prove its case. Amongst these witnesses, were the two eye witnesses, i.e. Balabai Narayan Kambale (P.W.8) and Sanjay Shamrao Gaikwad (P.W.11). In order to prove the circumstance of the deceased Lalubai having made an oral dying declaration, P.W.12 Eknath Kamble, who was the Police Patil, was examined and he produced the statement in writing which is said to be the record of the dying declaration, at Exhibit 32/1 and was said to have been signed by eight villagers who had gathered there immediately after the incident. Some other witnesses like Ananda Ramchandra Kambale (P.W.5) and Kamal Yedu Lade

(P.W.6) were examined to support the case of prosecution relating to the making of an oral dying declaration. In order to prove the dying declaration made to the Special Judicial Magistrate, the prosecution examined Shivaji Laxman Nalawade, Special Judicial Magistrate (P.W.9). It also examined Dr. Vilas Kawachale (P.W.10), who had given the endorsement on the dying declaration about the deceased being conscious. The post mortem notes were also proved through the same doctor and are at Exhibit 17. The same indicated that the deceased Lalubai had suffered 100% burns. The defence of the accused, as can be read from the suggestion put to the witnesses in the 313 statement and written statement of the defence filed on behalf of the accused at Exhibit 39, was to the effect that the deceased had mortgaged her land to the accused five years ago for an amount of Rs. 400/-. That this transaction has been oral. The land of the deceased admeasuring 11 gunthas had been handed over and was being cultivated by the accused. The deceased was not being maintained by her husband and she was constantly fighting with her sister. That the first wife of the accused had deserted him and in such circumstances, the accused and the deceased developed an illicit relationship. The accused was maintaining the deceased and her son. That the accused was of Mang community whereas the deceased and most of the witnesses belonged to Mahar caste. The persons from Mahar caste did not like the illicit relationship between the accused and the deceased. The deceased felt that the accused should get married to her but the accused was not in a position to marry, and for this reason, the deceased was upset with the accused. When the accused contracted a second marriage shortly before the incident with another woman, the deceased was upset. The police patil of the village had an evil eye on Lalubai. As Lalubai was upset, on two occasions, she had attempted to commit suicide by consuming poison. That the accused used to regularly go for residing with Lalubai and used to stay over night at her place. When he used to go for such overnight stay, her sister and son used to go to reside at the house of another sister Tanubai. That on 12th February, 1990, as usual, he had gone for stay with the deceased, and, therefore, the son and the sister of the deceased i.e. Sanjay and Balabai, had gone away to the house of Tanubai. The accused was alone with the deceased at about 8 p.m., at that time, the deceased asked him as to why he married a second time and threatened to set herself on fire. The accused tried to push the deceased but he deceased poured kerosene on her body and set herself on fire. The accused brought her outside the house and tried to extinguish the fire by putting gunni bags from the house on her person. While doing so, he himself suffered burns. His cloths were also burnt. At that time, the police patil came there along with some others and attempted to beat him and due to fear, the accused ran away. That he was conducting a liquor business but was not paying a bribe to the police patil. For this reason also, the police patil used to tell him that he will take revenge. It was suggested by him that it was the police patil who was instrumental in recording of the false dying declaration and instigating all the witnesses to depose in favour of the prosecution. The other witnesses examined were the panchas and the police patil and on appreciation of the aforesaid

documents and evidence, the trial court passed the impugned judgment and order.

4. On taking into consideration the records as aforesaid, the trial Court passed the impugned judgment and order convicting the accused u/s 302 of Indian Penal Code and sentencing him as aforesaid.

5. At this stage, it may be stated that the main grounds on which the conviction is based can be summarized as follows:

(a) The eye witnesses account of two person i.e. P.W.8 Balabai and P.W.11 Sanjay;

(b) The oral dying declaration said to have been given by the deceased Lalubai to P.W.12-Police Patil Eknath Kambale immediately after the occurrence of the incident;

(c) The dying declaration given by the deceased to the Special Judicial Magistrate on 13th February, 1999 at 3.00 a.m.;

(d) Other corroborating evidence like post-mortem notes, Chemical Analyser's Report, seizure of an axe and seizure of receipt relating to the loan transaction of 1986.

6. Before dealing with the aforesaid grounds, it would be necessary to mention that certain facts which find place in the statement of the accused have been admitted by the prosecution witnesses. The two eye witnesses, i.e. P.W.8 Balabai and P.W.11 Sanjay, who were admittedly staying with the deceased, have admitted that the accused was having an illicit relationship with the deceased. They have further admitted that whenever the accused used to come to stay for the night in the house of Lalubai, both Balabai and Sanjay used to go sleep in the house of Tanubai which was situated elsewhere. It is also admitted by the prosecution that about six months prior to the date of the incident, the deceased had attempted to commit suicide by consuming poison. It was further admitted that, again on a second occasion about two months prior to the incident, the deceased had attempted to commit suicide by consuming poison. The witnesses also admitted that the deceased was keen on marrying the accused and was upset because the accused had married another lady about two months prior to the incident. We have appreciated the evidence in the light of the aforesaid admitted facts about which there is no serious dispute.

7. On going through the evidence of the first eye witness (P.W.8- Balabai), it is revealed that her version is that on the date of the incident, at about 8 p.m., the deceased herself and Sanjay were sitting in the house after taking their meals and at that time, the accused came there. On arriving, he asked Balabai and Sanjay to go out of the house and showed an axe which he was carrying. Balabai and Sanjay then went out of the house and the accused closed the door of the house. Balabai then claims to have seen what had happened thereafter through the vertical gap in the door planks. According to her, the accused then asked the

deceased that she should give a receipt for Rs. 2,000/- for the loan amount of Rs. 400/- which the deceased had obtained from the accused. The deceased refused to do so, and, therefore, the accused pushed Lalubai on the ground. He took a kerosene can and sprinkled the kerosene over the person of Lalubai. He then asked Lalubai whether he should light the match-stick to which she said, he should do what he likes. Thereafter, the accused lit the match-stick and set Lalubai on fire. Lalubai came out of the house in a burning condition. At that time, some persons from the village gathered at the place of the incident. Lalubai fell to the ground in front of the house. Thereafter, the accused came out of the house and tried to press the throat of the deceased but was pulled on the say of Balabai and then the accused went away. It is the version that thereafter the police patil came on the scene and he recorded the statement of Lalubai after which Lalubai was taken to the hospital at village Indoli and from there, she was brought to the Civil Hospital, Satara. In her cross-examination, P.W.8 Balabai admitted that the accused was having an illicit relationship with Lalubai and he used to visit her house frequently. She has admitted that she was not liking the illicit relationship between the deceased Lalubai and the accused and has further admitted that the accused used to stay at the house of the deceased on some occasions and whenever he did so, she and Sanjay used to go to the house of Tanubai for sleeping. She admitted that the deceased had tried to commit suicide on two earlier occasions, the first occasion of attempt to commit suicide was about six months prior to the date of the incident and the second attempt was about two months prior to the incident. She admitted that she had not executed any receipt in favour of the accused Mohan for the transaction of Rs. 400/- and that the said transaction between the deceased and the accused was oral. She admitted that the deceased used to ask the accused to marry her and that the accused was not ready to do the same. She claimed that on the date after the incident i.e. on 13th February, 1990, the police patil came to the village and she had shown an axe to the police on that day and then the axe was seized by the police at that time. She denied the defence suggestion that there was no space in between the planks to the door of the house. She claimed to have shown such space in between the planks of the door to the police. She admitted that she did not disclose anything about the incident witnessed by her to the persons gathered at the spot. She admitted that there was no light connection inside the house. She admitted that even though the accused had showed her the axe in order to threaten her to leave the house, she did not raise any hue and cry. Her version that after Lalubai came out of the house, the accused came out and tried to press the throat of the deceased was proved to be an omission in her police statement. Similarly, her version that the accused after pouring the kerosene over the person of Lalubai asked her whether he should light the match stick to which she said, "Yes", was also proved to be an omission in the police statement. She admitted that the deceased Lalubai was very much angry with the accused as he had entered into a second marriage some months before the incident.

8. P.W.11 Sanjay, the son of the deceased who is a child witness 11 years of age,

deposed that about 8.00 or 8.30 in the night of 12th February, 1999, he along with his mother and Balabai were sitting in the house after taking their meals. At that time, the accused Mohan came to the house and showed him and Balabai an axe and asked them to go out of the house. Therefore, Sanjay and Balabai left the house and on their leaving the house, the accused closed the door of the house. He also deposed that both, he and Balabai, remained near the door of the house and were seeing what was happening inside the house from the space in between the two planks of the door. He claimed that the accused pushed down his mother on the ground and asked her that she should execute a stamp paper for Rs. 2,000/- for the earlier loan transaction in between them. That the deceased Lalubai told him that he had given only Rs. 400/- and there was no reason why she should execute a writing on a stamp paper of Rs. 2,000/-. Then the accused told her that if she did not execute document of Rs. 2,000/-, he would set her on fire to which Lalubai replied that she would not execute the document and he may set fire to her if he so desired. Upon hearing this, the accused took a black can of kerosene, poured the kerosene over Lalubai, took out the match stick from his pocket and after lighting the match stick set fire to the sari of the deceased. On seeing the same, P.W.8 Balabai and P.W.11 Sanjay started crying and therefore, the persons from the locality gathered. That his mother Lalubai came out of the house in a burning condition. She fell down on the ground in front of the house. Thereafter, the accused came to the house with gunny bags and the accused put the gunny bags over the body of his mother and was trying to press her mouth. Therefore, P.W.4 Baburao, who was one of the villagers who had come there pulled the accused to the side. That thereafter, the police patil came there and started taking the statement of his mother Lalubai. Then his mother was taken to the hospital at Indoli and thereafter she was brought to Civil Hospital, Satara. In his cross-examination, the witness admitted that before the date of the incident, the accused had come to their house on many occasions and when the accused used to come there, he and Balabai used to go to sleep in the house of Tanubai. He admitted that when the accused showed them an axe, Balabai did not quarrel with the accused and also did not cry. That after going out of the house, they did not call anybody to their house. He stated that the accused was having a stamp paper in his hand when he was asking him mother to execute the document and by giving a stamp paper in her hand, he pushed the deceased Lalubai to the ground. He admitted that he and Balabai did not raise any cry before his mother was set on fire. He admitted that he did not tell anything about the incident seen by him to the persons gathered near the spot and he also did not tell anything about the incident in the hospital or to anybody in Satara. He stated that he was narrating the incident for the first time before the Court.

9. It may be stated here that the police have examining three witnesses P.W.4 Baburao Sakharam Kamble, P.W.5 Ananda Ramchandra Kamble and P.W.6 Kamal Yedu Lade, who, according to the prosecution, were the persons who came to the scene of the offence on hearing the cry of P.W.8 Balabai.

10. On perusal of the evidence as aforesaid, we find that it will be dangerous to accept the eye witnesses account for the following reasons.

(a) That there is serious doubt about these two persons, i.e. Balabai and Sanjay, being in the house of the deceased. Both witnesses admitted that when the accused used to come at night on previous occasions, they used to go to the house of on Tanubai for residing.

(b) That the presence of these two witnesses at the spot of the offence immediately after the occurrence of the incident has not been deposed to by any of the three witnesses i.e. P.W.4 Baburao, P.W.5 Ananda Kamble and P.W.6 Kamal Lade, who according to the prosecution arrived at the spot immediately after the occurrence of the offence.

(c) That admittedly, the said three witnesses were not immediately told as to what happened inside the house by these two alleged eye witnesses. In fact, neither P.W.8 Balabai nor P.W.11 Sanjay have made any disclosure about what they saw or heard inside the house from the space in between the door planks to any of the several persons who admittedly gathered at the spot immediately after the occurrence of the incident.

(d) That the conduct of these two eye witnesses in not raising any hue and cry after being driven out of the house under a threat of injury of an axe seems to us to be unnatural. The evidence indicates that there were several houses situated in an around the houses of Lalubai. It would have been their natural conduct to raise hue and cry if they had been driven out of the house under a threat of being caused an axe injury.

(e) That these two persons claimed to have seen the incident inside the house through a space in the door planks. Perusal of the panchanama Exhibit-11 and the evidence of the Pancha P.W.2 Uttam Mane who has proved that the panchanama does not indicate that the door of the house had any space between the door planks. The evidence of P.W.1 Bhimrao Khot, who was Circle Inspector and who visited the spot of the incident and drew the map, also does not indicate the existence of any such space between the door planks from which a person could have seen what was going on inside the house.

(f) That there is inherent discrepancy between the versions given by these two eye witnesses, i.e. Balabai and Sanjay. Sanjay has given a version that the accused was carrying a stamp paper in his hand and by giving stamp paper in her hand, he pushed the deceased Lalubai to the ground. No such stamp paper has been seized by the police in the case. There is no reference to such stamp paper in the evidence of Balabai.

(g) The version of these witnesses about the driven out of the house under threat of an axe, is not supported or corroborated either by discovery of an axe at the spot or at the behest of the accused. Though the Investigating Officer, admittedly, searched the house on the next date after the incident i.e. 14th

February, 1990, no axe was found. In fact, the axe is said to have been seized only when produced by P.W.8 Balabai, three days after the incident i.e. on 16th February, 1990. There is no independent evidence indicating that this axe belonged to the accused.

(h) That the evidence of P.W.8 Balabai suffers from material omissions which pertain to the actual incident. She had omitted to mention in her statement that the accused was trying to press the throat of the deceased. Normally, it would not have been a material omission, but the circumstance in question attains importance because it was the case of the accused that he was trying to extinguish the fire and douse the flames on Lalubai by smothering them with gunny bags from the house. There is also an omission in the police statement of this witness pertaining to the accused asking the deceased as to whether he should light the match stick to which she agreed. This witness has made material improvement in her evidence before the Court by narrating a story about the accused trying to press throat of the deceased and also about asking the deceased as to whether he should light the match stick and set the deceased on fire.

11. We now come to the two dying declarations, one made to P.W.12 Police Patil Eknath Shivaram Kambale and reduced to writing, and another made to the Special Judicial Magistrate, Shivaji Laxman Nalawade (P.W.9). Before dealing with the aforesaid two dying declarations, we proceed on the footing that a dying declaration, if found to be voluntary and reliable, can by itself form a basis of the conviction. In the present case, however, we find several circumstances which cast a doubt on the reliability of the two dying declarations and these circumstances, we now hereinafter refer to.

12. As regards the oral dying declaration said to have been given by the deceased to P.W.12, police patil Eknath Kambale, the version given by this witness in his examination-in-chief is that his house was about 50 ft. away from the house of the deceased Lalubai. He heard cries from the side of the house of Lalubai, and therefore, he went towards the house. He saw Lalubai was lying on the ground in a burning condition. Many persons from the locality had gathered there. After seeing the condition of Lalubai, he asked Lalubai as to what had happened to which she told him that the accused Mohan set her on fire after pouring kerosene on her person. He then asked her as to why the accused had committed this act to which she replied that the accused Mohan was asking her to execute a document of Rs. 2,000/- for the loan amount of Rs. 400/- which she had taken from him and the accused had set her on fire because she had refused the same. He claimed that he had recorded the statement of Lalubai as per her say and obtained signature of 4 to 5 persons who had gathered near the spot. He proved the statement which, according to him, was recorded as per the say of Lalubai. He also proved his signature thereon. In this cross- examination, this witness admitted that the accused was carrying on business of liquor. He further admitted that he never informed the police about the liquor business of the

accused. He admitted that the accused was having an illicit relationship with the deceased Lalubai. He denied the suggestion that he was falsely implicating the accused because the accused was not paying him the installments of bribe. The defence story was put to this witness but he denied the said story. He admitted that he had not made any report to the police about the incident of Lalubai. He admitted that in the burn ward, he was present along with P.W.8 Balabai and other persons where Lalubai was kept. He admitted that when he came to the spot, there were no flames over the body of Lalubai. The version relating to the oral dying declaration given by Lalubai had been reduced by him to writing. There are several suspicious elements which render it unsafe to rely upon this document for the purpose of conviction and these are enumerated hereinbelow.

13. On perusing the statement recorded in writing by the said police patil P.W.12, it is clear that it is the case of the prosecution that the said statement was signed by eight other persons apart from P.W.12. Of these eight persons, only one has been examined by the prosecution, and he is P.W.5 Ananda Kambale. Perusal of the evidence of Ananda Kambale makes it clear that he himself does not claim to have signed any such statement. Even a question in this regard was not put to him by the prosecution.

14. Another person who came there immediately after the incident was P.W.6 Kamal Lade. This witness has also not stated anything about the statement of Lalubai being reduced to writing by P.W.12 Eknath Kambale or being signed by Eknath Kambale and eight other persons who had gathered there. P.W.4 Baburao Kambale is yet another person who claims to have come at the spot on hearing the cries of the lady. He states that when he came there, there was darkness and he saw two persons in the court-yard of the house. He raised a query as to who was there and what he was doing and at that time, the accused Mohan came towards him. The other person was the deceased Lalubai and he saw that Lalubai had been burnt. He claimed that he had not seen any flame of the fire over the body of Lalubai. He could not see as to what the accused Mohan was doing there because of the darkness and the persons neighbouring from the house were also gathered there. This witness does not speak anything about the deceased Lalubai making a dying declaration to P.W.12 Eknath Kambale and the fact that any such dying declaration was made was not even suggested to this witness.

15. As regards the dying declaration said to have been made by the deceased on 13th February, 1990 at 3.00 a.m. to the Special Judicial Magistrate, Shri Shivaji Nalawade, the same is not free from doubt for the following reasons.

(a) Firstly, we have back of our mind that the deceased was accompanied to the hospital by the police patil and P.W.8 Balabai, who, according to the defence, were chemical to the accused.

(b) P.w.8 Balabai had admitted in her evidence that she disliked the illicit relationship between the accused and the deceased.

(c) In his examination-in-chief, P.W.9 Shivaji Nalawade, the Special Judicial

Magistrate, stated that he recorded the statement of Lalubai as per her say, in the presence of the doctor. However, in his cross-examination, he gave a different version stating that there was nobody when he recorded the statement of the deceased. The doctor gave an endorsement to the effect that the patient was conscious at 3.00 a.m. when she was examined by the prosecution as P.W.10. In his statement, Dr. Kawachale nowhere stated that the dying declaration of the deceased recorded by the Executive Magistrate, was recorded in his presence. We find from the post mortem notes that the deceased Lalubai had suffered 100% burns. In his cross-examination, the Special Judicial Magistrate Shivaji Nalawade has categorically admitted that the fingers of the hands of Lalubai were burnt. The post mortem notes also indicate burning injuries on extremities and all these factors raise some doubt on the question of thumb impression being taken on the document said to be her dying declaration.

16. Apart from this, the medial case diary indicates that when the deceased was brought to the hospital, amongst various injections that were given to her, one was an injection of Fortwin. P.W.10 Dr. Kawachale stated that Fortwin was a sedative drug and the same was given to the patient to give relief from pain. The effect of the Fortwin injection took place within 5 minutes if it was given intravenous. He was unable to state to whether in the present case the said injection was given intravenous or intramuscular. He further admitted that it was usually given intravenous. He further admitted that the effect of Fortwin injection remained for 2 hours. We find from the case papers that there is some endorsement made at the space below the direction to give this injection to the effect that the injection was given after dying declaration. Prima facie, it appears to be in a different handwriting. The prosecution could have made some better efforts to bring on record as to when exactly this injection was given to the deceased. We also find on perusing the dying declaration that the same is not only relating to the incident but also relates to the motive. We find it dangerous to accept that such a detailed and long account could have been given by the person who had suffered 100% burns.

17. It is true that the post mortem notes indicate burn injuries and the chemical analyser's report indicates that the kerosene was found on the earth seized and clothes of the deceased but these aspects of the matter do not carry the prosecution case further in view of the defence which admits his presence. As stated hereinabove, the seizure of an axe three days after the incident at the behest of Balabai P.W.8 is also not helpful to the prosecution. In normal course, the axe could have been found at the spot or would have been discovered at the behest of the accused. The police had visited the spot immediately on the next day after the incident and at that stage, neither any axe was found nor any axe was produced by P.W.8 Balabai. The finding of the receipt relating to the loan transaction also is a suspicious circumstance because the same also produced on 16th February, 1990 i.e. three days after the incident and was not found at the time when the scene of the offence of panchanama was drawn. Apart from this, P.W.8 Balabai admitted that there was no document relating to the transaction

between Lalubai and the accused and the same was an oral transaction.

18. Taking an over all view of the evidence, we feel that this is a fit case where the accused must be given the benefit of doubt. We have appreciated the entire evidence afresh and find that the appreciation of evidence by the trial court is not correct to the extent discussed above.

19. In the result, the appeal is allowed. The judgment and order dated 22nd November, 1991 passed by the II Additional Sessions Judge, Satara, in Sessions Case No. 88 of 1990 is quashed and set aside and the accused is acquitted of all the charges. The fine, if paid, shall be refunded to the accused. The bail bond stands cancelled.