
(2016) 09 BOM CK 0129
In the Bombay High Court
Case No : Criminal Appeal No. 176 of 2013

Nilesh S/o Nivrutti Jadhav	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 01-09-2016

Acts Referred:

Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302, Section 498A

Citation : (2017) 1 AIRBomRCri 293

Hon'ble Judges : A.V. Nirgude and V.L. Achliya, JJ.

Bench : Division Bench

Advocate : Shri K.B. Autade, Advocate, for the Respondent Nos. 1 and 2 in Criminal Appeal No.243 Of 2015; Shri M.M. Nerlikar, APP, for the Appellant-State in Criminal Appeal No.243 Of 2015; Shri M.M. Nerlikar, APP, for the Respondent State in Criminal Appeal No. 176

Final Decision : Disposed Off

Judgement

V.L. Achliya, J. - Both these Appeals are filed against the judgment and order dated 13/2/2013 in Sessions Case No.36/2012 passed by Adhoc District Judge-1. and Additional Sessions Judge, Shrirampur, District Ahmednagar, whereby the appellant in Criminal Appeal No.176/2013 is convicted under Section 302 and 498-A of IPC and acquitted respondents no.1 and 2 in Criminal Appeal No.243/2015.

2. Criminal Appeal No.176/2013 is preferred by accused no.1 Nilesh Jadhav against conviction. Criminal Appeal No.243/2015 is preferred by the State against order of acquittal of accused no.2 and

3. For the sake of convenience, the accused are referred as they are described in the judgment.

4. Prosecution has approached with a case that marriage between accused no.1 Nilesh and Jyoti (hereinafter referred as "deceased") was solemnised on

17/4/2008. For few months, the deceased was treated properly. Subsequently the deceased was subjected to physical and mental harassment by the accused. Due to continuous physical and mental harassment, the deceased had left the house of accused no.1 and came to reside with her parents. Subsequently, at the intervention of one Nanasaheb Gade (PW9) social worker, the settlement was arrived. Accused no.1 executed a bond wherein he had given undertaking that in future he would not cause harassment and illtreat his wife and she will be treated properly. On this assurance, Jyoti returned to her matrimonial house.

5. On 18/7/2011, Jyoti was admitted in Sakhar Kamgar hospital at Shrirampur with 78% burn injuries over the body. On her admission the intimation was given to police by the Medical Officer on duty. A.S.I. Arun Asaram Aghade (P.W.6) who was on duty with police station Shrirampur rushed to hospital . He recorded statement of Jyoti after seeking an opinion of the Medical Officer on duty. She disclosed in her statement that at about 4.30 p.m. her husband i.e. accused no.1 came to house under the influence of liquor and asked about her extra marital relationship. On that count the quarrel took place in between them. Her husband i.e. accused no.1 poured kerosene on her person and set her ablaze. The accused no. 2 and 3 helped accused no.1 in setting her ablaze. She further disclosed that she tried to run away from the house but she was pushed inside the house by accused no.1. Neighbours extinguished the flames on her body by covering blanket and brought her to Sakhar Kamgar hospital. The statement of the deceased was treated as complaint and on that basis, offence under Section 498-A, 307 r.w. 34 of IPC came to be registered vide Crime No.219/2011 with police station, Shrirampur. Subsequently the statement of deceased was recorded by Devidas Gulab Shere, Awal Karkoon attached to Tahsil office, Shrirampur. Thereafter, statement of deceased was again recorded on 20/7/2011 by Subhash Baburao Kadam, Naib Tahsildar, Rahata. After the registration of offence, police visited the spot of incident and in presence of the panchas, drew the spot panchanama and seized articles like burnt pieces of saree, petticoat, blouse, match box, burnt match stick, plastic bottle etc. On receipt of the information that Jyoti has been admitted in burnt condition, Usha Sonawane (PW.2) mother of the deceased, Anita Sonawane (PW3) sister of the deceased, Eknath Sonawane (PW5) father of the deceased, Rakesh Sonawane (PW11) brother of the deceased rushed to hospital. They enquired from Jyoti as to how she sustained the burn injuries. She disclosed to them that accused no.1 has poured kerosene on her person and set her ablaze and in that act, the accused no.2 and 3 helped accused no.1. On 23/7/2011, Jyoti succumbed to burn injuries. After her death, the inquest panchanama was drawn, her dead body was referred for post mortem. Offence under Section 302 of IPC was added. P.I. Shriram Moharkar (PW13) recorded the statements of father, mother, sister and brother of deceased.

6. The accused no.1 who was also lying admitted in the hospital and sustained burn injuries in same incident was arrested on 4/11/2011. Accused no.2 and 3 were arrested on 10/8/2011. Muddemal property seized during the investigation

was forwarded to Chemical Analyser.

7. P.I. Jagdish Patil (PW..) conducted the further investigation and filed charge sheet. After filing of the charge sheet case was committed to Sessions Court. Charge under Section 302, 498-A read with Section 34 of IPC was framed against the accused. All of them pleaded not guilty to charge and claimed to be tried. Hence the case proceeded against the accused.

8. In order to prove its case, the prosecution has examined 15 witnesses. The defence of the accused appears to be of total denial and false implication at the instance of relatives of the deceased. Accused no.1 has taken a stand that on the day of the incident deceased poured kerosene on her person and set herself ablaze as he had expressed his inability to purchase the ear-rings. After hearing the shouts of Aditya, he came outside the room and saw Jyoti engulfed in the fire. He tried to extinguish the fire. In that process, he sustained burn injuries. His neighbours came there and they extinguished the fire. He further stated that he was addicted to liquor and because of that Jyoti was annoyed. Accused no. 2 and 3 have taken defence that they were not present in the house at the time of incident.

9. On conclusion of trial, learned Additional Sessions Judge has reached to conclusion that prosecution has failed to prove its case against accused no.2 and 3 and ordered them to be acquitted. However, the learned additional Sessions Judge has found the appellant accused no.1 guilty of committing offence under Section 302, 498-A of IPC. For committing offence under Section 302 of IPC, the accused no. 1 has been sentenced to life imprisonment and to pay fine of Rs.1000/-, in default to suffer simple imprisonment for 3 months and for offence under Section 498-A of IPC sentenced him to suffer rigorous imprisonment for one year. Being aggrieved by the judgment and order of conviction, the accused no.1 has preferred the appeal which is numbered as Criminal Appeal No.176/2013. As against the acquittal of accused no.2 and 3 the State Government has preferred appeal which is registered as Criminal Appeal No.243/2015. Since both the appeals are arising out of same judgment and order, the appeals are heard together and taken up for disposal by common judgment.

10. We have heard the submissions advanced at length by Advocate Shri V.R. Autade, learned counsel representing the appellant in Criminal Appeal No.176/2013 and respondents no.1 and 2 in Criminal Appeal No.243/2015 and learned APP for the State.

11. On due consideration of the evidence on record, we have no hesitation to observe that there is no cogent, convincing evidence on record to prove the guilt against the accused no.2 and 3. The reasons and findings recorded by the trial Court to acquit the accused no.2 and 3 are consistent with the evidence on record and there appears to be no perversity in the reasons and findings recorded by the trial Court. We therefore, found no merit in the Criminal Appeal

No.243/2015 preferred by the State Government against the judgment and order of acquittal of accused no.2 and 3.

12. Now the next question falls for our consideration, whether the prosecution has proved guilt against accused no.1 beyond reasonable doubt. If we consider the overall evidence and reasons and findings recorded by trial Court then the conviction is mainly based upon the three dying declarations recorded by P.W.4, P.W.6 and P.W.7 vide Exh. Nos.122, 141, 152 respectively and oral dying declarations made by deceased to members of her family i.e. mother (PW2) and sister (PW3), father (PW5) and brother (PW11). Although the statement of Aditya, the child witness was recorded during the investigation as witness to the incident, the prosecution has not examined him. Therefore, the question before us whether the dying declarations as relied by the prosecution are of the nature to form the sole basis to convict the accused no.1.

13. The learned counsel for the appellant has invited our attention to all the three dying declarations and tried to convince us that there is no consistency amongst those three dying declarations and same suffers from inherent contradictions and inconsistencies which raises serious doubt as to truthfulness of dying declarations. He has argued that there are number of suspicious circumstances which itself makes out a case to discard all the dying declarations. He has further submitted that the oral dying declarations are not worth to be relied. He has submitted that there are reasons to believe that before recording the alleged dying declaration the deceased was tutored by her family members to make such statement to falsely implicate accused no.1 to 3. Accused no.1 had sustained 38% burn injuries and admitted in hospital along with deceased. The burn injuries sustained by the accused establishes that accused has tried to extinguish the flames over the body of the deceased and in that process, he sustained severe burn injuries. He has further submitted that though the prosecution has recorded the statement of Aditya the sole witness to the incident, prosecution has deliberately not examined him to suppress the truth.

14. On the other hand, learned APP for the State has supported the conviction of the accused no.1, and assailed the reasons and findings recorded by the trial Court to acquit the accused no.2 and 3. He has submitted that all the dying declarations made by deceased are consistent and same can be accepted as truthful.

15. So far as the deceased died unnatural death, the fact is not in dispute. Apart from this, there is sufficient evidence on record to establish that deceased died on account of burn injuries. Dr. Ulhas Gonnade (PW8) who conducted post mortem on the dead body of the deceased has categorically stated that the deceased had sustained 78% burn injuries and the death was result of complications caused due to burn injuries.

16. Now the question before us is death of the deceased was homicidal or suicidal and if the death was homicidal, the prosecution has proved beyond

reasonable doubt that accused No.1 has caused the homicidal death of the deceased. As discussed the entire case of the prosecution is based upon three dying declarations made by the deceased to P.W.4, 6 and 7 and the oral dying declarations made to her mother and other close relatives. Section 32 of the Indian Evidence Act is an exception to hearsay evidence and it deals with the statements of declarations by a person, relating to cause of his or her death or the circumstances leading to such death. Dying declaration made by person on the verge of his/her death has a special sanctity as it is presumed that at such solemn moment person is most unlikely to make any untrue statement and the shadow of death is by itself guarantee of truth of the statement of the deceased regarding circumstance leading to his/her death. But the dying declaration like any other evidence has to be tested by the touch stone of credibility to be acceptable as the accused does not get an opportunity of questioning veracity of such statement by cross examination. Dying declaration if found to be voluntary, truthful and free from any doubt then only it can be made sole basis to convict the accused. The best test to be applied to guarantee the truthfulness of the dying declaration is to seek corroboration from other material or circumstantial evidence.

17. It is quite settled position in law when there are multiple dying declarations and there are inconsistencies and discrepancies in such dying declarations, it is unsafe to rely upon such dying declarations to convict the person. It is therefore, incumbent upon the prosecution to prove that the dying declaration as relied is untainted and truthful. So also the Court has to be on guard that the statement of deceased was not a result of tutoring prompting or stretch of imagination. The Court is also expected to see that the deceased was in fit state of mind. Only in the case wherein the Court is satisfied that the declaration was true and voluntary, it can base its conviction without seeking further corroboration. However, the Court has to take such decision based upon facts of the case before it. When it is found that contradictory and inconsistent stand was taken by the deceased himself or herself in different dying declarations, then as a rule of prudence, Court should not accept such dying declaration and if situation demands, insist for corroboration from other evidence brought on record.

18. Keeping in mind the settled position in law as discussed above, we proceed to appreciate the submissions advanced by both the sides. Learned counsel for the petitioner has assailed the conviction of accused mainly on the ground that there is no consistency amongst the various dying declarations made by the deceased and there are number of suspicious circumstances which raises serious doubt as to truthfulness of dying declarations of deceased recorded by P.W.4, 6 and 7. He has pointed out that the close relatives of the deceased were present in the hospital and met her immediately after her admission and before recording her dying declarations. Therefore, the probability of the deceased being tutored to make such declaration and to falsely implicate the accused cannot be ruled out. Whereas, it is the contention of the learned Additional Public Prosecutor that there is no inconsistency in the dying declarations made by the deceased.

19. Prosecution has heavily placed reliance upon the testimony of A.S.I. Arun Aghade (PW6) who has recorded the first dying declaration which is at Exh.37. Admittedly, the incident was occurred on 18/7/2011 at about 4.30 p.m. and thereafter brought to hospital in a burnt condition. P.W.6 has deposed that after receiving the message from Sakhar Kamgar hospital about admission of Jyoti in burnt condition, he visited hospital at about 5 p.m. and met Medical Officer. The Medical Officer told him that Jyoti was in a position to make statement. He therefore, recorded her statement wherein she has stated that at about 4.30 p.m. her husband had come to house under the influence of liquor and asked her about her extra marital relations and on this count, quarrel had taken place between them. At that time, her husband poured kerosene on her person from bottle and set her on fire. She further told him that sister and mother of accused no.1 helped him and her neighbours tried to extinguish fire by covering her with blanket and brought her to Sakhar Kamgar hospital.

20. In the cross examination, he deposed that the information about admission of Jyoti was received from hospital at about 5 p.m. when he reached there, the treatment had already started. He admitted that in the dying declaration Exh.37 he has not mentioned the time of recording statement. He further admitted that the thumb impression which appears on Exh.37 he has not attested the same as that of deceased. He has admitted that in dying declaration Exh.37 it is not mentioned that for the purpose to set Jyoti on fire, the accused 2 and 3 helped accused no.1. He denied the suggestion that the portion marked "A" in the dying declaration to the effect that "the accused 2 and 3 helped accused no.1" was subsequently entered in the dying declaration on the instructions of the father of the deceased. He admitted that while recording statement deceased has disclosed to him that accused no.1 also sustained burn injury in that incident and admitted in the adjacent room. However, this fact though stated by the deceased still he has not recorded the same in Exh.37. He admitted that accused no.1 was lying admitted in the adjacent room and undergoing treatment on account of burn injuries and recorded his statement. He further deposed that he remained in hospital upto 6 p.m. and during that period the relatives of the deceased were not present in the hospital. He admitted that he had not taken any station diary entry about recording of statement of deceased.

21. Thus, if we consider the testimony of P.W.6 who recorded the dying declaration within few hours after the incident then it is highly unsafe to base conviction on such dying declaration. If the intimation was received at 5 p.m. from hospital then it was not possible for P.W.6 to be present in hospital at 5 p.m. It has come on record that he has omitted to record some of the facts disclosed to him by deceased. He has categorically admitted that deceased told him that her husband accused no.1 also sustained burn injuries and lying admitted in adjacent room, however, he has not recorded the same in the dying declaration Exh.37. He has admitted that he has not made the endorsement below thumb impression that the thumb impression of deceased. The form in which the dying declaration (Exh.37) recorded clearly reflects that the dying

declaration was not recorded in exact words of the deceased. It has been recorded in the manner in which the police records the statement under Section 161 of Cr.P.C. It is apparent from the face of the dying declaration Exh. 37 that role attributed to accused 2 and 3 in the incident has been subsequently introduced and interpolated. It is clearly visible from face of dying declaration Exh.37 that the entire sentence "tyani madat keli" i.e. the accused no.2 and 3 helped the accused no.1 in setting her ablaze was subsequently introduced and incorporated. If we read the dying declaration Exh.37 by excluding the said words then what was disclosed to P.W.6 was that accused poured kerosene on her person from the bottle and set her ablaze and her neighbours brought her to hospital. It is apparent from the face of record that the words that "her mother in law and sister in law has helped the accused" has been subsequently introduced/ added in the dying declaration.

22. P.W.6 has not mentioned in Exh. 37 as to time at which he started recording of dying declaration and concluded the work of recording. The endorsement made in the margin in the dying declaration Exh.37 reflects that the Medical Officer has mentioned below his signature the time as 5.30 p.m. at which he made endorsement/certificate. There is no endorsement recorded at the end of the dying declaration by the Medical Officer to the effect that the deceased was found in a fit state of mind throughout recording of dying declaration. P.W.6 has deposed that he visited the hospital at 5 p.m. and after Doctor told him that patient was fit to make statement, immediately thereafter he recorded the statement. If we consider the testimony of P.W.6 in the light of the endorsement of Doctor then by no stretch of imagination it can be stated that work of recording of dying declaration started before 5.30 p.m.

23. Thus taking into consideration the overall evidence on record the dying declaration Exh.37 cannot be treated as truthful and form the basis to convict the appellant.

24. The second written dying declaration claims to be recorded by Devidas Shere (PW7) on 18/7/2011. At relevant time he was working as Awal Karkun with Supply Department of the State Government. He has deposed that on 18/7/2011, the Tahsildar gave letter to him and asked to record statement of patient lying admitted in hospital. He therefore, visited Sakhar Kamgar hospital. He reached there at about 7.40 p.m. Doctor gave endorsement to the effect that deceased was in fit condition to make statement. Thereafter he recorded statement of Jyoti in question answer form. He deposed that Jyoti told him that her husband used to come to house after consuming liquor and therefore, there used to be quarrel between them. He further told him that her husband was suspecting her character and abusing her. She further told him that incident had taken place on 18/7/2011 at 3.30 p.m. Her mother in law and sister in law i.e. accused 2 and 3 caught her hands and her husband set her on fire by pouring kerosene. He recorded the fact as stated by Jyoti and thereafter read over the contents of her statement and then obtained thumb impression of her left hand

on that statement. After recording of the statement, Doctor made endorsement. He deposed that Exh.43 is the same dying declaration which he recorded.

25. In his cross examination, P.W.7 admitted that the letter Exh.41 was received after recording dying declaration. The time of receipt of letter has not been mentioned. The receipt of letter Exh.41 has not been recorded in inward register. He further deposed that carbon copy of the statement of Jyoti was not taken out at the time of recording of her statement. He admitted that in the dying declaration Exh. 43 the figure "9" has been over written. He admitted that in the dying declaration Exh.43 he has not mentioned that Jyoti told him that her husband set her on fire. He denied the suggestion that he has made overwriting in dying declaration Exh.43. He denied the suggestion that the over-writing was made after applying whitener. However, when his attention was invited to some portion of dying declaration Exh.43, then he put forth the explanation that the portion of his signature and date appears to be dark due to folding of paper. He deposed that only one thumb impression of the deceased was obtained on Exh.43. He denied the suggestion that three thumb impressions of deceased were obtained at three places on Exh.43. He admitted that below the thumb impression he has not mentioned that the thumb impression as that of deceased. He further deposed that he met Medical Officer at about 7.40 p.m. He further deposed that he was not aware that accused no.1 was also lying admitted in the hospital and family members of Jyoti had met her before he reached there and recorded her statement.

26. We have thoroughly scrutinized the dying declaration Exh.43 in the light of testimony of P.W.7 It is apparent from the face of the dying declaration Exh.43 that some overwriting has been made in respect of time at which P.W.7 started recording of dying declaration. There is overwriting as to figure "9". On the reverse side of the dying declaration Exh.43, there appears to be three thumb impressions. It appears that P.W.7 has made his signature at the end of dying declaration over the portion of thumb impression. Application of whitener is visible from the naked eye over the portion where P.W.7 has recorded the date below his signature. No endorsement find place on Exh. 43 to the effect that Jyoti was examined by Medical Officer and certified to be fit to make statement and thereafter, the work of recording of statement was started.

27. If we look into the contents of the dying declaration Exh.43, then deceased has disclosed the time of incident as 3 to 3.30 p.m. on 18/7/2011. So far as narration of incident of setting on fire, she has deposed that her husband poured kerosene and her mother in law and sister in law i.e. accused 2 and 3 caught her hands. There is inconsistency about the time at which incident has occurred. As per the prosecution case, the incident was occurred at about 4.30 p.m. in the house of the deceased. As per P.W.5 the deceased disclosed that incident was occurred at about 4.30 p.m. whereas in the second dying declaration the deceased has mentioned the time of incident as between 3 to 3.30 p.m. In dying declaration Exh.37 deceased has not attributed any active role played by accused

2 and 3 in setting her on fire. However, in dying declaration Exh.43, she attributed active role played by accused no.2 and 3 and stated that they had caught hold her hands and accused no.1 poured kerosene. As discussed, the word "accused 2 and 3 helped the accused" found to be interpolated in the dying declaration Exh.37. In the dying declaration Exh.43, it is not disclosed as to how she was actually set on fire. She has only deposed that accused no.1 poured kerosene and accused no.2 and 3 caught hold her hands. There are 3 thumb impressions find place at the bottom of the dying declaration Exh.43. The application of whitener is also visible. The certificate of the doctor find place at the end of the dying declaration. There is no evidence to show that the Medical Officer examined the deceased before the work of recording of dying declaration by P.W.7. In this view of the matter, the second dying declaration also not beyond suspicion and can be safely relied as truthful dying declaration to form basis to convict the appellant.

28. The prosecution has relied upon third written dying declaration which was recorded on 20/7/2011 by Shri S.B. Kadam, Circle Officer, Rahata. The dying declaration recorded by P.W.4 is at Exh.32. He deposed that on 20/7/2011, he was posted as Circle Officer Rahata. On that day, he received message from Tahsil office that one Jyoti Nilesh Jadhav has been admitted in PMT hospital and instructed to record her dying declaration. He therefore, went to Pravara hospital at about 11.30 a.m. Medical Officer on duty told him that Jyoti was in a position to give statement. He therefore, recorded her statement by using printed form which he carried with him. He further deposed that he recorded the statement in question and answer form. She told him that she sustained burn injuries due to pouring of kerosene on her person. She further told him that her husband had come under influence of liquor and poured kerosene on her person. In response to his query as to who were present at the time of incident, the deceased replied that her mother in law and sister in law both were present in the house. She further told him that she could not conceive child therefore, her husband set her on fire. In response to another question, she told him that her relations with her in laws were not cordial and she was frequently beaten. She further told him that after 1? hour after the incident, she was admitted in hospital, as the vehicle was not available. In response to query as to whether she had any grievance about the incident, the deceased told him that she had complaint against her husband, mother in law and sister in law.

29. In the cross examination, P.W.4 has deposed that he kept one photo copy of the dying declaration as office record. It appears from record that during the course of examination at the request of the Defence Counsel, the photo copy of Dying declaration kept as office record by P.W.4 has been taken on record and marked as Article "B". He admitted that in original statement i.e. dying declaration Exh.32 the time at which he started recording of dying declaration has not been mentioned, however, same find place in the photo copy Article "B". He admitted that there is overwriting as to word "Ghetale" in front of word "Takale" in answer given in response to question no.10. In the further cross

examination, he denied the suggestion that word "Patine" i.e. by "husband" has been subsequently recorded in dying declaration Exh.32 as answer given in response to question no.10. He admitted that the answer recorded in response to question no.8 one word was scored out but unable to recollect as to what was written there. He admitted that there is no endorsement made to effect that he had explained the contents of her statement to Jyoti (deceased) after recording her statement and she found the same to be recorded as per her statement. He further admitted that the contents of certificate recorded above his signature are in printed form and he has signed below the printed certificate. He admitted that Doctor has not recorded in his hand writing that patient was in fit state of mind to make statement. He admitted that time of recording statement has been mentioned below his signature on Exh.32 but same is not find place in the photo copy of same dying declaration i.e. Article "B". He admitted that the thumb impression of maker of the statement is not attested by him. He deposed that he has not received any written instruction to record the dying declaration and instructions to record dying declaration was received to him through phone call made by the Peon from Tahsil office.

30. We have carefully perused the dying declaration recorded by P.W.4 which is at Exh.32. It is recorded in question and answer form. There is no endorsement on the dying declaration Exh.32 to reflect that before recording of dying declaration the deceased was examined by Medical Officer and certified to be in a fit state of mind to make statement. It is apparent from the dying declaration Exh.32 that the answer given in response to question 1 and 2 i.e. personal information about the deceased the contents were recorded by using different pen. The ink or the pen used for recording the entire dying declaration Exh.32 was same except the ink or pen used for recording the contents as to answer given in response to question no. 1 and 2. In response to question as regards the actual incident, I.e. as to how the incident occurred, the deceased has disclosed that her husband i.e. accused no.1 came in drunken condition and poured kerosene on her person. In response to answer to question no.9 as to who were present at the time of incident, the deceased has stated that her mother in law and sister in law i.e. accused 2 and 3 were present. In response to question as to why such incident was occurred, the deceased has stated that as she could not conceive child therefore, her husband poured kerosene. It is very significant to note that in answer to question no.10 and 11 it is visible from the naked eye that the word "Patine" i.e. by (husband) has been subsequently written. It is also pertinent to note that there was one word written as "Ghetale" preceding the word "Patine" and succeeded by the word "Takale" which was scored out If we ignore the word interpolated as by "Patine" i.e. "husband" and the word scored out exist as "ghetale" then sentence will have to be read as "Mulbal Hot Nahi Mhanun Rokel Otun Ghetale" i.e. the deceased had made statement that as she could not conceive therefore she herself poured kerosene on her body. There is a great significance attached to introduction of the word "Patine" i.e. by husband and scoring the word "ghetale" i.e. poured by herself and adding the word

"Takale" i.e. poured herself in Exh.32.

31. As per disclosure made in Dying declaration Exh.32, the deceased was brought to hospital after 1? hour after the incident and that too by autorickshaw. As per the fact disclosed in the earlier Dying declaration Exh. 37, the incident was occurred at 4.30 p.m. and she was brought to hospital in ambulance. As per P.W.7 he reached to hospital at 5 p.m. and started the work of recording the dying declaration Exh. 37, while the treatment was already started. As discussed in the foregoing para in the original copy of dying declaration Exh.32 there is no nothing made in margin of the dying declaration Exh.32 about time at which work of dying declaration started and time at which work of dying declaration was over. Whereas on the photo copy of same dying declaration which has been produced before the Court and marked as Article "B" the time has been mentioned. Similarly, on the original copy of the dying declaration Exh.32 below signature of P.W.4 the date and time at which P.W.4 concluded the work of recording of dying declaration recorded as 11.55 a.m. However, no such date and time mentioned on photo copy of same dying declaration produced at Exh.B. No satisfactory explanation has been put forth as to why photo copy of the original dying declaration produced by him as Article "B" not tallies with original Dying declaration Exh.32.

32. If we consider the fact regarding the actual incident and the manner in which incident occurred, there appears to be inconsistencies in the three dying declarations relied by prosecution. There is material variance as to how the incident was actually occurred. In the dying declaration at Exh.32, which is first in time recorded on 18/7/2011 at about 5 p.m. the deceased has stated the time of incident as 4.30 p.m. on 18/7/2011. It is disclosed that at about 4.30 p.m. her husband came to house in drunken condition and told her that she had an affair with someone and asked her to disclose the names of those persons otherwise he will kill her and therefore, he poured kerosene from the bottle, ignited the match stick and set her on fire. She therefore, came out of the house and her neighbours extinguished the flames by putting blanket around her and brought her to hospital. As discussed in first dying declaration, she has not attributed any active role played by accused no.2 and 3 in incident of setting her on fire. The word that accused no.2 and 3 have helped him found to have lateron introduced in the dying declaration Exh.37.

33. If we consider the second dying declaration recorded on same day, at about 7.40 p.m. which is at Exh.43, then she has given the time of incident as in between 3 to 3.30 p.m. So far as narration of actual incident is concerned, she has disclosed that accused no.1 poured kerosene on her and accused no.2 and 3 caught hold her hands. Therefore, there is material discrepancy as regards the time of incident and the manner in which incident was occurred. The role of active participation in commission of offence by accused no.2 and 3 has been introduced in the second dying declaration. Therefore, there is not only the material discrepancy and inconsistencies in two dying declarations recorded at

short interval but it also exposes the tendency on the part of the deceased to exaggerate and implicate the family members other than her husband. The role attributed to accused no.2 and 3 of participation in actual incident is by way of improved version in the second dying declaration. In order to get both the dying declarations as consistent, to each other the attempt has been made lateron by introducing the word "Madat Keli" i.e. helped by accused no. 2 and 3 in the first dying declaration.

34. If we consider the third dying declaration which is at Exh.32 then the third dying declaration is in complete variance with the earlier two dying declarations. In dying declaration Exh.32 which is recorded on 20/7/2011, entirely different cause has been assigned for setting her on fire. In the third dying declaration Exh.32, reason for setting her on fire has been attributed due to the reason that she could not conceive child and therefore, she was set on fire. In third dying declaration, entire role of pouring kerosene and setting on fire has been attributed to her husband. The accused 2 and 3 are disclosed to be present in the house. It is also important to note that the presence of accused no.2 and 3 has been recorded in response to the question as to who else were present in the house. It is not in response as to who else was involved in the incident.

35. As discussed, the third dying declaration is also not beyond suspicion. It is pertinent to note that in the third dying declaration, the deceased has disclosed that she was brought to hospital after 1? hour, of incident and that too in autorickshaw. As per earlier dying declaration the deceased has disclosed that she was brought to hospital in ambulance and that too immediately after the incident. If we accept the third version to be correct version about time of incident then if the incident was occurred at 4.30 p.m. and brought to hospital after one and half hour after the incident then she was admitted in hospital on and after 6 p.m. If that is so, there was no question of recording her dying declaration by P.W.6 at 5 p.m. on 18/7/2011 and her examination by Doctor at 5.30 p.m. All the three dying declarations are found to be in material variance and full of inconsistent statements of deceased, therefore, no reliance can be placed on such dying declarations to form basis to convict the accused. Apart from this, the dying declarations Exh.43 and 32 bears no endorsement to the effect that before obtaining thumb impression of deceased, same were read over to deceased and admitted by her to be recorded as per her narration. Moreover, the first dying declaration is not recorded in verbatim as to what the deceased has disclosed. It has been recorded in narrative form as if the Officer was recording her statement under Section 161 of Cr.P.C It has come on record that P.W.6 has omitted to record certain facts which were disclosed by the deceased.

36. It is pertinent to note that accused was addicted to liquor. As per the defence taken by the accused and circumstances appearing against him and explained in his statement recorded under Section 313 of Cr.P.C. no such incident as narrated by the deceased in her dying declaration was occurred. According to him, on the date of incident he was out of home and could not come to home for lunch due

to his work. Jyoti i.e. the deceased made phone call to him and asked to come to home for lunch. However, as he was busy in his work, he could not come to home. At about 3.30 p.m. Jyoti again called him on phone. Therefore, he went to his house. After lunch, Jyoti asked him as to whether he had purchased ear-rings for her. He told her that he had no money to purchase the same. After some time, he heard shouts of Aditya. He therefore, came out of room and saw Jyoti engulfed in the fire. He tried to extinguish the fire and in that process, he sustained burn injuries. He further stated that the neighbours came there and extinguished the fire and both of them were brought to hospital. He further stated that his wife Jyoti herself set on fire as he was addicted to liquor and due to his addiction, Jyoti was annoyed. He further stated that at the time of incident, his mother and sister were not present in the house and all of them were implicated in the false case.

37. The defence of accused appears to be probable. The fact is not in dispute that the accused no.1 sustained the burn injuries in same incident and simultaneously admitted in the hospital. He was found to have sustained 38% burn injuries. The incident was occurred on 18/7/2011. As per the arrest panchanama accused was arrested on 4/11/2011 after he was discharged from hospital. Accused no.2 and 3 have taken specific defence that at the time of incident they were not present in the house. Accused no.2 and 3 were arrested on 10/8/2011. P.I. Jagdish Patil (PW 12) the investigating officer who arrested the accused has deposed in his cross examination that before arrest, the accused no.1 was admitted in hospital. He further admitted that accused no.1 sustained the injuries in same incident and addicted to liquor. Dr. Satpute (PW15) the Medical Officer attached to Sakhar Kamgar hospital Shrirampur, also admitted in cross examination that accused no.1 was admitted at 5.15 p.m. in the hospital and he had sustained burn injuries to the extent of 38%. The M.L.C. papers regarding admission of Jyoti i.e. the deceased produced at Exh.54 reflects that time of giving history of the incident, was disclosed as 4.30 p.m. and she was brought to hospital by her father Eknath Sonawane i.e. P.W.5. Therefore, the defence story that deceased herself set her ablaze by pouring kerosene on her person due to her husband addicted to liquor cannot be ruled out. Under the facts and circumstances of the case and evidence on record and more particularly, the tendency on the part of deceased to exaggerate and improve her version after her relatives such as father, mother met her, the possibility of deceased being tutored to implicate the accused cannot be ruled out.

38. Besides three written dying declaration, the prosecution has relied upon the testimony of Usha Sonawane (PW2) the mother of the deceased, Anita Sonawane (PW3) sister of the deceased and Eknath Sonawane (PW5) father of the deceased, Rakesh (PW11) is brother of deceased. Prosecution has claimed that the deceased had made oral dying declaration to said witnesses. Usha mother of deceased has been examined as P.W.2. So far as the incident dated 18/7/2011 is concerned, she has deposed that at about 4.30 p.m. one woman called her on telephone from Shrirampur and informed that her daughter was set on fire.

Therefore, she along with her family members came to Sakhar Kamgar hospital at Shrirampur. When she enquired from her daughter as to how incident had occurred, she told her that her mother in law and sister in law caught her hands and her husband poured kerosene on her person and set her on fire by match stick and when she tried to run away she was pulled back in the house by her husband. She further disclosed that accused have set her on fire as he had suspicion about her character and she could not conceive the child. In the cross examination, she deposed that she along with her family members reached hospital at about 5.15 p.m. She admitted that no complaint was given in respect of harassment against accused persons before the incident dated 18/7/2011. She admitted that Aditya is son of sister in law of Jyoti and he was residing in same house. She further admitted that two months prior to the incident, Jyoti had come to her house and at that time, her mother in law accompanied her. Both of them stayed in their house for one day. Prior to incident, no complaint was lodged against accused about harassment. She deposed that her statement was recorded two days after the death of Jyoti. Thus from the testimony of P.W.2 it reveals that family members of deceased were present in the hospital at about 5.15 p.m. i.e. before recording of her dying declaration by P.W.6 and 7. Therefore, the possibility of deceased being tutored to make statement to implicate the accused no.1 to 3 cannot be ruled out in the facts and circumstances of the case. Further from the testimony of P.W.3 it is evident that there was no serious dispute or strained relationship with deceased as that of her husband and mother-in-law.

39. The testimony of Anita (PW3) refers to the incident prior to the date of incident. She admitted in cross examination that she visited the house of deceased 8 days prior to the incident as her husband i.e. accused no.1 got seriously injured in motor cycle accident. She deposed in cross examination that she came to know about the incident at 4.30 p.m. and within ? hour, she went to hospital and met Jyoti. However, later-on she changed her version and stated that she remained at home and other family members visited the hospital. Thus, if she had not visited the hospital there is no question of any disclosure being made to her by Jyoti. In this view the testimony of this witness is of no use to prove the case of the prosecution.

40. Prosecution has examined Eknath Sonawane (PW5) father of the deceased. So far as the fact relating to incident, he has deposed that on 18/7/2011, after he received the message that Jyoti was set on fire, he visited the hospital along with other family members and found Jyoti admitted in hospital. She told him that her husband had come to house under influence of liquor. He abused and beaten her. Her sister in law and mother in law who were present in the house, caught her and her husband poured kerosene on her person and ignited fire by match stick. She tried to run away from house but her husband pushed her inside the house. In the cross examination, he deposed that when they reached and met Jyoti, there was no Constable present in the hospital. He further deposed that his daughter Jyoti was shifted to hospital at Loni within a short

period from Kamgar hospital at Shrirampur. He further deposed that Jyoti had not disclosed to him anything about burn injuries sustained by her husband Nilesh and he has not disclosed any fact to this effect to police.

41. On the same line, prosecution has examined Rakesh Sonawane (PW11) the brother of the deceased. He deposed that on 18/7/2011, his maternal uncle Kailash Khairnar made phone call to Jyoti. At that time, accused Nilesh asked her from which paramour of her she received phone call.

42. In our view, the testimony of such close relatives of the deceased cannot be safely relied to base the conviction. Due to death of deceased, they were annoyed. Therefore, the possibility of accused being falsely implicated by them cannot be ruled out. Prior to the incident, there was no police complaint lodged against the accused. There is no evidence to show that there was any motive for accused to have committed the murder of the deceased. If we accept version of P.W.2 that deceased along with her mother in law visited their house eight days prior to the incident and they stayed together for one day at her house. If there was any ill treatment and harassment, to deceased at the hands of accused no.1 and her in laws, then certainly the accused no.2 would not have visited the house of P.W.2 with Jyoti and stayed there for one day. The defence of the accused appears to be probable. Since the accused no.1 was addicted to liquor, the possibility of deceased being frustrated and having committed suicide, appears to be more probable. Sustaining 38% injuries by accused no.1 in the incident is the another circumstance which favours the accused to dispel the allegation that he set his wife ablaze.

43. In this view, the testimony of the other witnesses such as the Medical Officer and the investigating officer are of no use to prove the guilt against the accused. The detection of kerosene on the burnt pieces of clothes of deceased is quite natural and no way operate as circumstance against accused. Existence of traces of kerosene on the clothes of deceased or accused no way establishes the case of the prosecution that accused 2 and 3 caught hold the hands of the deceased and accused no.1 poured kerosene and set her ablaze.

44. During the course of submissions, learned APP has referred and relied upon decision of Apex Court in the case of Mohanlal Gangaram Gehani v. State of Maharashtra reported in 1982 (1) S.C.C. 700 in support of his submission that if there are more than 1 statements of the deceased, then the statement made first in time be preferred. The ruling cited have no bearing upon the facts of the case. It is quite settled position of law that where there are more than one dying declarations and they are found to be inconsistent and in material variance with each other, the Court should discard all of them. In this context, learned counsel for the petitioner has rightly placed reliance on the decision of Apex Court in the case of Shaikh Bakshu and others v. State of Maharashtra reported in (2007) 11 SCC 269.

45. It has come on record that at the time of incident, Aditya the son of sister in

law of the deceased was present in the house and police have recorded his statement. He was witness to the incident. For the reasons best known to the prosecution, said witness though cited, was not examined. Therefore, inference can be drawn that prosecution has tried to suppress the truth. Prosecution is not expected to hide anything from the Court. The job of the prosecution is to unfold the truth. It is for the Court to assess the evidence and arrive at a proper decision by evaluating all such evidence.

46. Thus the conclusion to which we arrive that the dying declarations as relied by the prosecution and which have formed basis to convict the accused are not trustworthy and suffers from number of infirmities, the conviction of the accused no.1 is not sustainable. The learned Judge of the trial Court has though discarded the Dying declarations as not reliable against accused no.2 and 3 has however, relied the same as truthful against the accused no.1. In our view, such segregation of contents of dying declaration is not permissible in law. Either the dying declaration as a whole to be treated as fully truthful or to be not truthful. It cannot be treated as partly true and partly untrue. We have therefore, no hesitation to hold that prosecution has failed to prove guilt against accused no.1 to 3 beyond reasonable doubt. Failure to prove guilt against accused beyond reasonable doubt, the conviction of accused no.1 cannot be upheld. In this view of the matter, the appeal filed by the appellant accused no.1 deserves to be allowed and the appeal filed by the State against acquittal of accused no.2 and 3 deserves to be dismissed. Accordingly, we pass the following order :

ORDER

I] Criminal Appeal No.243/2015 filed by State against respondents i.e. original accused no.2 and 3 is dismissed. Bail bonds of accused no.2 and 3 stands discharged.

II] Criminal Appeal No.176/2013 filed by appellant Nilesh Nivrutti Jadhav i.e. original accused no.1 is hereby allowed. The judgment and order dated 13/2/2013 in Sessions Case No.36/2012 convicting appellant-accused no.1 for offence punishable under Section 302 and 498-A read with Section 34 of IPC is hereby set aside. Appellant-accused no.1 be set at liberty, if not required in any other case. Fine amount if any deposited by accused no.1, same be refunded to him.